

Moving Beyond *Coughlan*: Adopting Proportionality Test into Substantive Legitimate Expectation

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Abstract

*Ever since Laws L.J. Nadarajah v. Secretary of State for the Home Department proposed that the proportionality test should be the standard test to assess the justification provided for resiling from a substantive legitimate expectation, it has attracted the acute attention of legal intelligentsia. Fifteen years since, it is still unclear whether, and to what extent, the judiciary has embraced this proposition. The focus of this study, hence, revolves around ascertaining the extent to which this notion has received curial sanctions, both in England and Sri Lanka. Utilising qualitative methodology, this study surveys judicial decisions spanning from 2005 to 2020 that discussed the issue and finds that whereas the English judiciary has shown an inclination to adopt, the question has only recently entered the Sri Lankan judicial discourse. The study concludes that the proportionality test, due to its standard, structure, and clarity, provides a finer tool than the orthodox test propounded in *Coughlan*.*

Key words: Proportionality, Balancing test, Fairness and Abuse of power

Introduction

Legitimate expectation and proportionality are two of the focal points of rapidly expanding Administrative Law.

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Both have come a long way since their very integration into administrative law was questioned. Legitimate expectation due to its development, enjoys a fascinating relationship between other grounds such as equality¹, relevancy², and proportionality.³ This paper aims to analyse the intricate relationship the substantive legitimate expectation has with proportionality, the judicial reception thereof and the viability of maintaining such a relationship.

The gist of the concept of legitimate expectation is that public decision-makers are bound to apply a promise, practice or policy to those to whom it is directed in the absence of a reasoned justification.⁴ Of course, the margin of deference given to the decision-maker varies depending on whether the promise is procedural or substantive, and the conditions capable of generating substantive enforcement of expectations are much more tightly defined than those which yield procedural protection,⁵ the fact that there must be a countervailing justification to

¹ See, *Dayarathna et al v Minister of Health and Indigenous Medicine et al* 1 Sri LR [1999] 393

² See, *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607

³ Mark Elliott, 'The Supreme Court's Judgment in *Finucane* - I: Legitimate expectations, Reliance, Procedure and Substance' (Public Law for Everyone, 5th March 2019) <<https://publiclawforeveryone.com/2019/03/05/the-supreme-courts-judgment-in-finucane-i-legitimate-expectations-reliance-procedure-and-substance/>> accessed 24th May 2021.; See also, *M.R.C.C. Ariyaratne et al v N.K. Illangakoon, Inspector General of Police et al*. SC FR Application No.444/2012 [2019], Prasanna Jayawardena, PC J. at 25

⁴ Mark Elliott, 'Legitimate Expectations: Procedure, Substance, Policy and Proportionality' [July, 2006] *The Cambridge Law Journal*, Jul., 2006, Vol. 65, No. 2, 254

⁵ *ibid* at 256; See also, *R. v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213

frustrate a promise or policy has generally been emphasised on.⁶ It is in this context that the courts have ruminated on the possibility of applying the proportionality test to assess the justification given; that the act of reneging is a proportionate response in light of the justification given.

This article mainly focuses on the substantive legitimate expectation, though reference, whenever appropriate, is made to procedural expectations. Adopting qualitative methodology, this study examines the jurisprudence of England and Sri Lanka to ascertain how far the judiciaries in both jurisdictions have shown willingness to adopt structured proportionality test to ascertain the validity of resiling from a substantive legitimate expectation. To that end, case laws from 2005 to 2020 wherein the question of substantive legitimate expectation arose are purposefully selected and examined. An inductive approach is used to examine the judicial pronouncements and arrive at a more general set of conclusions about the judicial trend in both jurisdictions. The primary sources consist of case laws and secondary sources include law reviews, journals, committee reports and books on the subject.

Orthodox Judicial Approach

It would be apt to discuss here, albeit briefly, standards the courts have traditionally applied to determine the validity of a frustration of a legitimate expectation on

⁶*M.R.C.C. Ariyaratne et al v N.K.Illangakoon, Inspector General of Police et al.* SC FR Application No.444/2012 [2019] 54, 55

countervailing considerations, such as public duty or public interest. In *Council of Civil Service v. Minister for the Civil Service*, Lord Diplock, commenting on procedural legitimate expectation, remarked that there must be a “rational ground” for withdrawing it on which the promisee has been given an opportunity to comment.⁷ This has a clear reference to fairness, which permeates the concept of procedural impropriety. Here the central question is will it be unfair to frustrate the promise in the given context.⁸

On the other hand, in *R v. Ministry of Agriculture, Fisheries and Food ex parte Hamble (Offshore) Fisheries Ltd*, Sedley J, commenting on substantive legitimate expectation, remarked that court must weigh the reasons and necessity for the change of policy on the one hand against the significance of the promise to the promisee and prejudice that might be caused to him if the promise were frustrated on the other.⁹ This approach was cited with approval in Sri Lanka by Amarasinghe J in *Dayarathna v. Minister of Health and Indigenous Medicine*¹⁰ and subsequent cases.¹¹

While it appears as if a balancing approach as in proportionality was adopted here, it is not nearly as

⁷ [1984] 3 AER 935, 949

⁸ See, *R v. Secretary of State for Home Department ex parte Ruddock* [1987] 2 AER 518, 531

⁹ [1995] 2 ALL ER 714, 735

¹⁰ *Dayarathna* (n 1) 405

¹¹ *Galle Festival Guarantee* (n 16); *Zamrath* (n 16); *Wickramaratne* (n 48); *Thirmavithana* (n 49)

structured and rigorous a standard as the one proportionality test entails. Indeed, in *R v North and East Devon Health Authority ex parte Coughlan*, the court, narrowing down the approach adopted in *Hamble Fisheries*,¹² held that it would intervene only when the frustration of substantive legitimate expectation is so ‘unfair that it amounts to an abuse of process.’¹³ The difference between the proportionality test and the balancing test in *Coughlan*, as discussed in detail later, is their standard, structure, and control. When it comes to assessing competing interests, the proportionality test will allow the judiciary to strike down if no fair balance was made between the competing interests, whereas the balancing tests invite the judiciary to strike down the decision only if the frustration is so unfair that it renders the action an abuse of power.¹⁴

Thus, it is apparent that the orthodox trend is to ground the test in ‘fairness’ for procedural legitimate expectation¹⁵ and ‘unfairness amounting to an abuse of power’ when it comes to substantive legitimate expectation.¹⁶ While these differences might render it likely to be more challenging for a public authority to

¹² It is often submitted that *Humble Fisheries* gives judges considerable control compared to *Coughlan*. See, M.R.C.C. *Ariyaratna* (n 6) 28; Endicott (n 54) 295. Regardless, the difference is mostly an academic debate. For practical purposes, the tests in both cases have often been treated as synonymous.

¹³ [1999] Q.B. 213 [51]

¹⁴ *ibid* at [57]

¹⁵ *Hamble (Offshore) Fisheries Ltd* (n 9) 531;

¹⁶ *Coughlan* (n 13) [57]; *Galle Festival Guarantee Ltd. v. Galle Municipal Council* CA PHC No. 155/2010, [2019] 9, 10; *Zamrath v. Sri Lanka Medical Council* SC FR 119/2019 [2019] 11

justify resiling from a procedural legitimate expectation than from a substantive legitimate expectation,¹⁷ it is undeniable that in both instances, the notion of fairness, in its different gradations, underlies the balancing tests.¹⁸ In *609 Manufacturers (Pvt) Ltd v Commissioner General of Excise*, Thurairaja J (as he was then) put the matter thusly: “Legitimate expectation ... is based on the principles of natural justice and fairness and seeks to prevent authorities from abusing power.”¹⁹

Proportionality Tests in Legitimate Expectation: Recent Judicial Trends

Judicial Trend in England

The radical step of applying a structured proportionality test to assess the validity of justification given to frustrate a legitimate expectation emerged firstly in *Nadarajah v Secretary of State for the Home Department*,²⁰ where Laws L.J. stated that the relevant question is “whether denial of the expectation is in the circumstances proportionate to a legitimate aim pursued by the public body in the public interest.”²¹ While his Lordship had reiterated this point in *Niazi*,²² it was only in *R (X) v.*

¹⁷ Jonathan Moffett, ‘Resiling from Legitimate Expectations’ [2008] *Judicial Review Volume 13, Issue 4* 219-231, 224

¹⁸ *Coughlan* (n 13) [57], [67]-[71]; *R v. Inland Revenue Commissioners, ex parte Unilever Plc* [1996] STC 681

¹⁹ CA Writ 242/2015 [2016] 4

²⁰ [2005] EWCA Civ 1363

²¹ *ibid* at [68]

²² [2008] EWCA Civ 755 [51]

*Head Teacher and Governors of Y School*²³ that the test was first applied to a factual scenario.

In *R (X)*, the school sought to ban the wearing of the *niqab* citing various educational standards, equality and security reasons. The claimant, who had been told not to attend the school wearing a *niqab* and had alternatively been offered a place in a nearby school where she might be able to attend wearing the *niqab*, challenged the decision on the ground, *inter alia*, that it violated her legitimate expectation. Here, the court applied the structured proportionality test to assess the prejudice that might be caused to the claimant if she were required to attend the nearby school against the justifications provided by the school²⁴ and concluded that each of the objectives in not permitting the claimant to wear the *niqab* was sufficiently important to justify the limitation, the rule of prohibition is rationally connected to each of these objectives and the means necessary to achieve this aim and were no more than necessary to achieve this objective.²⁵ The reliance on proportionality, in this case, allowed the court to consider all the different factors structurally and weigh them against a common backdrop in the proper context before coming to a decision.

In *Francis Paponette v The Attorney General of Trinidad and Tobago*, the Privy Council, in its *dictum*, accepted the

²³ [2008] 1 All ER 249

²⁴ *ibid* at [113]-[129] per Silber J.

²⁵ *ibid* at [127]

proportionality test as the standard test.²⁶ In *R (Patel) v General Medical Council*, although Lloyd Jones LJ did not mention proportionality expressly, his reasoning embodied many of the principles that would typically be involved in the proportionality analysis.²⁷ However, the vagueness of the application inhibits the precise identification of the test the judge intended to use.

In *The United Kingdom Association of Fish Producer Organisations (UKAFPO) v Secretary of State for Environment, Food and Rural Affairs*, the court again expressly adopted the proportionality test.²⁸ Since 1999, the Secretary of State had distributed the fishing quota by a system of fixed quota allocation units. In 2012, following extensive consultation, the Secretary of State announced changes to this method of allocation. Reductions in the allocated quotas and reductions in the number of fixed quota allocations were announced. These were to be transferred to the inshore fleet instead. The amount of reduction was based on the extent to which the fishermen had used their full allocation in 2007–2010.²⁹ The Fish Producer Organisations (UKAFPO) challenged the 2012 decision on the basis, *inter alia*, that it unlawfully frustrated substantive legitimate expectations.³⁰ The legitimate expectation claim was based on correspondence made between the Secretary of

²⁶ [2010] UKPC 32 [38]

²⁷ [2013] EWCA Civ 327 [62], [83], [84]

²⁸ [2013] EWHC 1959 (Admin) [92] *per* Cranston J.

²⁹ Yaaser Vanderman, 'Substantive Legitimate Expectations' [2016] *JR* 21:3, 174-187, at 184

³⁰ *ibid* at 184

State and the UKAFPO that the current practice of allocating quota would be permitted to continue and that the policy would not be affected by failing to capture the entire annual quota.³¹ Cranston J., applying the proportionality test, came to the conclusion that the decision pursued a legitimate aim (the aim was to maximise the utilisation of available quota), the means adopted was necessary (as it focused only on unused quota), and it was proportionate (as the ultimate decision had been arrived at after assessing and incorporating the comments received).³² It should be noted, however, that the court did not direct extensive attention to the application of the test itself.

*The United Policyholders Group v Attorney General of Trinidad and Tobago*³³ is the case where the doctrine was, for the first time, thoroughly discussed by the Privy Council. The case involved the failure of the subsequently elected government to uphold the promise given by the previous government. In resiling from the previous government's promise, the subsequent government had cited macro-political and macro-economic reasons.³⁴ Lord Neuberger, though did not apply the proportionality test himself, endorsed the Court of Appeal's assessment that found that the subsequent government had given due consideration to the promise made to the claimant and the

³¹ For a summary of the fact, see, Thomas Appleby and Dr Margherita Pieraccini, 'Fishing Quota: A Very Large Squatting Claim?' [2013] 25 *ELM* : *Case Commentary: Fishing Quota*, 140

³² [2013] EWHC 1959 (Admin) [106] *per* Cranston J.

³³ [2016] UKPC 17

³⁴ *ibid* at [1] – [29]

detrimental effects that might be suffered by the claimant,³⁵ weighed them against the wider economic and political consideration and reached a conclusion that the government's approach was "methodical, reasonable and proportionate in the circumstances."³⁶

Lord Carnwath, going further, expressly endorsed the proportionality test when he stated, "...the court will require it (the promise) to be honoured, unless the authority is able to show good reasons, judged by the court to be proportionate, to resile from it. [Emphasis added]"³⁷ What is remarkable is that his Lordship stated that broader policy issues, particularly those of a 'macro-economic' or 'macro-political' kind, can also be rightfully considered by the court.³⁸ His Lordship seems to suggest that although *Coughlan* was indeed a landmark judgment in legitimate expectation, it could not however be taken as the exhaustive statement of law in this area,³⁹ thereby inviting the judges to look beyond the scope envisaged therein.

While *The United Policyholders Group* appeared to have brought some clarity, it did not last long. The United Kingdom's Supreme Court's judgment in *In the matter of an application by Geraldine Finucane for Judicial Review*⁴⁰ seems to have created uncertainty about the

³⁵ *ibid* at [73]

³⁶ *ibid* at [63], [73]

³⁷ *ibid* at [121]

³⁸ *ibid* at [121]

³⁹ *ibid* at [110], [112],

⁴⁰ [2019] UKSC 7

nature of the test being applied.⁴¹ Though the occasion to apply a test did not arise in that case, the court did make certain remarks on what the proper test is. According to Lord Kerr, “where a clear and unambiguous undertaking has been made, the authority giving the undertaking will not be allowed to depart from it unless it is shown that it is fair to do so.”⁴² Unfortunately, it reverts the law back to the orthodox trend of ‘fairness’ as applied in *Coughlan*. What is baffling is that his Lordship had come to this conclusion shortly after discussing Laws L. J’s dictum in *Nadarajah*,⁴³ leaving everyone perplexed about what the reason is for his Lordship to conclude the way he did. Professor Elliot tries to salvage it by arguing that the remark should be confined to procedural expectations as the court, in that case, was dealing with one.⁴⁴ Such an approach, however, would be artificial as the proper reading of Lord Kerr’s judgment noticeably indicates that he was remarking on substantive, not procedural, expectation.⁴⁵ Lord Carnwath, for his part, appeared to have treated the proportionality test as the standard test when he reproduced the remarks he had made in *The United Policyholders Group*⁴⁶ and stated that the detrimental reliance was a relevant consideration in

⁴¹ Mark Elliott, ‘The Supreme Court’s Judgment in *Finucane - II*: Legitimate expectations, Reliance, Procedure and Substance’ (Public Law for Everyone, 8th March 2019) < <https://publiclawforeveryone.com/2019/03/08/the-supreme-courts-judgment-in-finucane-ii-three-unanswered-questions-concerning-the-doctrine-of-legitimate-expectation/>> accessed on 29th May 2021.

⁴² *Finucane* (n 40) [62]

⁴³ *ibid* at [59]

⁴⁴ Mark Elliott (n 41)

⁴⁵ *Finucane* (n 40) [55] – [64]

⁴⁶ *ibid* [156]

assessing proportionality.⁴⁷ Since both ‘fairness’ and ‘proportionality’ were used by Lord Kerr and Lord Cornweath, respectively, *Finucane* cannot be taken to have settled the issue.

It is evident from these cases that though the issue is far from settled, particularly in the wake of the incongruous remarks in *Finucane*, courts in England, nevertheless, have shown a proclivity towards the adoption of the proportionality test in assessing whether an authority is justified in resiling from substantive legitimate expectation.⁴⁸

Judicial Trend in Sri Lanka

There is a long line of cases, starting from *Dayarathna v Minister of Health and Indigenous Medicine*, that have received and applied the balancing test without much controversy.⁴⁹ However, no decision prior to *M.R.C.C. Ariyaratne et al. v N.K.Illangakoon, Inspector General of Police et al.* had deliberated the possibility of incorporating proportionality as a standard test to determine the validity of frustration. Following judgments

⁴⁷ *ibid* [160]

⁴⁸ See, Mark Elliot ‘Legitimate Expectation: Reliance, Process, Substance’ [2019] *Cambridge Law Journal* 260-264, 261

⁴⁹ *Dayarathna* (n 1) 405; *Wickramaratne v Jeyaratne et al* [2001] 3 Sri LR 161, 175; *Zamrath* (n 51) 11; *Galle Festival Guarantee Ltd v. Galle Municipal Council* [2019] CA PHC No. 155/2010; *Samarakoon v UGC* [2005] 1 SLR 119; *Siriwardena v Senaviratne et al* [2011] 2 Sri LR 1; *Nimalasiri v. Fernando* [2015] SC FR 256/2010; See also, Sivaji Felix, ‘The Protection of Substantive Legitimate Expectations in Administrative Law’ [2006] *18 Sri Lanka J. Int’l L.* 69, 75

are cited as examples.

Thirmavithana v. Urban Development Authority is a case where the Urban Development Authority frustrated the promise that the land in question would be kept as a playground for the residents belonging to a housing scheme by reallocating the land to the Department of Wild Life Conservation.⁵⁰ The Authority contended that to house the Department, it had to take this decision.⁵¹ Though the requirement of overriding public interest was emphasised, no note was taken as to the proportionality test chiefly because the facts of the case did not raise any controversy regarding assessing the competing interests.⁵²

In *Zamrath v Sri Lanka Medical Council*, Dehideniya J reiterated the need to apply the balancing test when he held that “[t]he main function of this court...is to strike a balance between ensuring an administrative authority’s ability to change its policies when required, and make sure that in doing so they do not defeat the legitimate expectations of individuals by acting unfairly and arbitrarily.”⁵³ Although the express reference to ‘unfairness’ and ‘arbitrariness’ is a clear throwback to the *Coughlan* standard, interestingly enough, his Lordship, instead of citing *Coughlan*, cited *Hamble Fisheries*, whose balancing test is slightly wide that it could possibly

⁵⁰ [2010] 2 Sri LR 262, 281-287

⁵¹ *ibid* at 293

⁵² *ibid* at 294, 297

⁵³ SC FR 119/2019 [2019] 11

be reconciled with proportionality,⁵⁴ as the standard authority.⁵⁵ That said, it might have been an unintended consequence of treating the standard envisaged in *Hamble Fisheries* and *Coughlan* interchangeably.⁵⁶

In *M.R.C.C. Ariyaratne*, Prasanna Jayawardena, PC, J, having undertaken a meticulous survey of the authorities, concluded that “...the doctrine of substantive legitimate expectation applies in our jurisdiction in much the same manner as it now applies in England.”⁵⁷ Further, his Lordship proposes the following as to the standard test:

“....the court should weigh the character and substance of the expectation and the prejudice caused to the petitioner by its frustration, on the one hand; against the importance of the public interest...on the other hand; and then decide whether that exercise...leads to the conclusion that the petitioner’s... expectation is of such weight and the consequences of its frustration are so prejudicial to him when compared to the public interest...that the public authority’s decision to change its policy and negate the expectation was *disproportionate or unfair or unjust and amounted to an abuse of power* which should be quashed; or whether the decision to change the policy should stand because the public authority has acted *proportionately, fairly and justly*...”⁵⁸

⁵⁴ Timothy Endicott, *Administrative Law* (2nd edn. Oxford University Press, 2011) 295

⁵⁵ SC FR 119/2019 [2019] 11

⁵⁶ See, *M.R.C.C. Ariyaratne* (n 6) 48

⁵⁷ *ibid* at 53

⁵⁸ *ibid* at 53

[Emphasis added]

It is worth noting that instead of confining the test to unfairness and abuse of power, his Lordship has included proportionality as well, making the proportionality test a viable option if the circumstances of the case warrant so. While there is a certain allure in this amalgamated proposition, it nevertheless does not firmly settle the issue of what the proper test is. Indeed, if this proposition were to be adopted, it would confer upon the judiciary considerable flexibility in choosing which test to apply, which inevitably would leave the public body in considerable uncertainty as to the standard they need to satisfy *vis* ‘fairness’ and ‘abuse of power’ or ‘proportionality’. If their decisions always need to be proportionate, then adding unfairness and abuse of power will be superfluous, as proportionality is often the minimum standard of the two. If the standard would depend on the circumstances, then, as already pointed out, it leaves uncertainty in its wake. Therefore, the better option would be to apply the proportionality test as the universal standard. In any event, the application of this amalgamated test is not authoritatively settled as the occasion to apply it did not arise in this case. Hence, the balancing test applied in *Dayaratna* remains the authoritative statement of the law.

A perusal of Sri Lankan judgments since 2005 shows that the question of adopting the proportionality test in the context of legitimate expectation has not gained much traction. Regardless, *M.R.C.C. Ariyaratne* has brought

that possibility into judicial and academic discourse.

Balancing Test v Proportionality Test

Apparently, there is a certain confusion as to the difference between both tests. Steel, for instance, argues that the test adopted in *Coughlan* is a low-intensity version of the proportionality test.⁵⁹ He argues that the *Coughlan* test is nothing but proportionality even though the judges refrained from evoking the term.⁶⁰ Granted, there is some merit in the argument, and both tests indeed involve the weighing of fairness to the promisee against the justification provided,⁶¹ the difference, nevertheless, lies in the standard, structure and rigour with which the balancing is done. Though a detailed discussion would be too lengthy, each of these differences warrants a brief overview.⁶²

First, the structure. The balancing test does not prescribe any pre-set structure with which to assess the competing interests.⁶³ Whereas proportionality test, in one form or another, follows a pre-defined four-stage process or a similar one, which involves the following four questions:

⁵⁹ Steele, 'Substantive Legitimate Expectations: Striking the Right Balance' [2005] *121 L.Q.R* 300

⁶⁰ *ibid* at 300

⁶¹ See also, M. Elliott 'The Human Rights Act 1998 and the Standard of Substantive Review' [2001] *60 Cambridge Law Journal* 301

⁶² See, M. Elliott, *From Heresy to Orthodoxy: Substantive Legitimate Expectations in English Public Law* (Cambridge Legal Research Paper No 5/2016)

⁶³ P. Craig and S. Schonberg, 'Legitimate Expectations after *Coughlan*' [2000] *Public Law* 684.

1. Did the action pursue a legitimate aim? 2. Were the means employed suitable/rationally connected to achieve that aim? 3. Could the aim have been achieved by a less restrictive alternative? 4. Whether, having regard to these measures and to the severity of consequence, a fair balance has been struck?⁶⁴ *R (X) and The United Policyholders* show that the application of a similarly structured test gives coherence, precision, and predictability in the assessment.

A fortiori, this structured approach renders the scrutiny more rigorous. For the test not only requires the decision should be made after balancing competing interests, but it also requires that the justification must be an objective or aim that is acceptable to the court; that the act of resiling must, in court's opinion, be suitable to achieve that aim, and that court must find that the action the least restrictive. Naturally, when the court probes these three questions, it will go further than it otherwise would in the ordinary balancing test where the court's role is limited to only one of the four stages *vis* weighing interests against the justification. This is the second difference.

Third, the standard. In the balancing test, the court will quash a decision only if the public authority's approach to the claimant's expectation was an abuse of power.⁶⁵ Merely showing that the decision is unfair is insufficient.

⁶⁴ See, *Bank Mellat v. Her Majesty's Treasury (No. 2)* [2013] UKSC 39; J. Jowell, 'Beyond the Rule of Law: Towards Constitutional Judicial Review' [2000] *Public Law* 671

⁶⁵ Timothy Endicott (n 54) 285

For the court to interfere, the court must be convinced that reneging the expectation is unfair in a way it amounts to an abuse of power.⁶⁶ Here the court will decide what the correct balance between the interests of a person and the interests that weigh against the fulfilment is⁶⁷ and when the frustration becomes so unfair and amounts to an abuse of power.⁶⁸ The arbiter of whether the unfairness has amounted to an abuse of power, therefore, is the court itself. Hence, the balancing test is heavily subjective.⁶⁹

The proportionality test, conversely, probes whether the public body's decision to resile from its promise, in the circumstances, is proportionate to the legitimate aim pursued and a fair balance between different interests are made. The judges must simply be convinced that the public interest outweighs the interests of and the prejudice caused to the promisee, though depending on the context, the balancing scale and deference might differ.⁷⁰ In other words, the standard that invites the court to intervene is stringent in the balancing test compared to the proportionality test. If these are to be put in a simple scale, proportionality only requires *simple* disproportion to tilt

⁶⁶ *ibid* 292

⁶⁷ *ibid* 292

⁶⁸ *R (on the application of Bhatt Murphy) v. Independent Assessor* [2008] EWCA Civ 755 [35] *per* Laws L.J.; *Couglan* (n 13) [76], [81] - [82]

⁶⁹ *Nadarajah* (n 20) [67]

⁷⁰ Peter Leyland and Gordan Anthony, *Textbook on Administrative Law* (7th edn. OUP, 2013) 332-334, 365; M. Elliot (n 62) 7, 9; *R (Miranda) v. Secretary of State for the Home Department* [2014] EWHC 255 (Admin) [40] *per* Laws L.J.; cf. M. Hunt, 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in N. Bamforth and P. Leyland (eds), *Public Law in a Multi-Layered Constitution* (Oxford: Hart Publishing, 2003) 337

the court's favour, whereas in the balancing test, to quote Endicott, "it is unlawful...if the impact on the claimant of disappointing the expectation would be *so* disproportionate to the value of pursuing the public authority's purpose as to amount to an abuse of power."⁷¹

The Assault and the Defence

This part will focus on the arguments levelled against adopting the proportionality test in legitimate expectations and counterarguments thereto and focus on the reasons justifying the universal application of the proportionality test.

The central argument against the adoption of proportionality, which is also true of substantive legitimate expectation in general, is that it grants the judiciary far greater control over administrative discretion.⁷² By a corollary, as the balancing test has a stringent standard for the curial intervention into the public body's decisions, it is the appropriate test to strike a balance between substantive fairness and the principle of deference, which is interwoven throughout the Administrative Law.⁷³ A closer look at the balancing test, however, will illuminate that it does not give as wide a margin of deference as it claims to do, and any advantage

⁷¹ Timothy Endicott (n 54) 295. It is worth noting that this is not an exact measurement and should be treated as a simplification.

⁷² Andrew S.Y. Li and Hester Wai-San Leung, 'The Doctrine of Substantive Legitimate Expectation: The Significance of *NG Siu Tung and Others v. Director of Immigration*' [2002] 32 *Hong Kong L.J.* 471, 491

⁷³ Timothy Endicott (n 54) 293-295

it confers comes at the cost of legal certainty.⁷⁴

The terms ‘fairness’ and ‘abuse of power’ that are indispensable for the balancing test have become trite legal jargon that they do not have a precise and single meaning that can be identified with certainty.⁷⁵ The concept of ‘fairness’ invoke some notion of equity that the decision-maker must act fairly in the circumstances of the case. The same problem that boundaries of equity cannot be ascertained with certainty *mutatis mutandis* apply to ‘fairness’ as well. In light of this uncertainty, the balancing test requires the decision-makers and judges to assess ‘unfairness’ and ‘abuse of power’ without any precise understanding of what they clearly denote. What might be unfair and abuse of power to one arbiter might not be so to another. This is exacerbated by the fact that the assessment of when ‘unfairness’ amounts to an ‘abuse of power’, which is purely a subjective appraisal, being elusive, does not provide firm and practical guidance. As a cherry on top, the task in substantive legitimate expectation is one of ensuring ‘substantive fairness’, a term which so elastic and contested that it is open to various reading depending on the man who takes

⁷⁴ M. Elliott (n 62) 7-14

⁷⁵ James Allsop, ‘The Foundations of Administrative Law’ *12th Annual Whitmore Lecture Council of Australasian Tribunals (NSW Chapter)* 16; M. Elliott (n 41); *R (on the application of Gallaher Group Ltd and others) v. The Competition and Markets Authority* [2018] UKSC 25 [31] – [41]; *M.R.C.C. Ariyaratna* (n 40) 51-52; *McFarlane v. McFarlane* [2006] UKHL 24; *Canterbury Pipe Lines Ltd v. Christchurch Drainage Board* [1975] Q.B. 94, 104 (C.A.) 357; Matthew Groves, ‘Substantive Legitimate Expectation in Australian Administrative Law’ [2008] *Melbourne University Law Review* Vol.32, 470-520, 485; *Nadarajah* (n 20) 67

cognisance of it and whose contours are not as palpably established as that of ‘procedural fairness.’

Take *R (X)* for example. A religious-sensitive judge, applying these concepts, might have come to the conclusion that it was unfair to demand a student not to wear a *niqab* as it might infringe their religious belief. He might have found the very demand that ‘do not wear it or leave the school’ abuse of power. Of course, to mitigate this uncertainty, terms such as ‘conspicuous unfairness’ and ‘manifest unfairness’⁷⁶ have been suggested. They still offer no certainty and clarity other than that the judicial review requires something obvious to a reviewing court.⁷⁷ Hence, all these proffers no clear guidance to the public body except that the judiciary will intervene if it, in its own term and in the circumstances provided, finds the decision ‘unfair’ and ‘abuse of power’. In other words, these judicial jargons do not provide a firm tool for public bodies to assess, with certainty, that they are acting within their contours of power and taking a decision that is fair in the circumstances. This is clearly an anathema to “the basic idea that the law should be capable of providing effective guidance”,⁷⁸ and that is exactly what impelled Laws L.J to propose proportionality as a solution.⁷⁹

Adopting proportionality, on the other hand, would tender

⁷⁶ *R (Rashid) v. Home Secretary* [2005] EWCA Civ 744, [19]; *Coughlan* (n 13) [80]; *R v. IRC, ex p Unilever Plc* [1996] STC 681; *R v. National Lottery Commission, Ex p Camelot Group Plc* [2001] EMLR 3 [72]

⁷⁷ Timothy Endicott (n 54) 298

⁷⁸ J. Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) 218

⁷⁹ *Nadarajah* (n 20) 67

objective clarity with regard to what amounts to an ‘abuse of power’ in substantive legitimate expectation than ‘unfairness’ would. That is, if the act of reneging is disproportionate to the legitimate aim pursued, then it would be an abuse of power. While recognising that proportionality also involves a certain degree of subjective assessment, particularly regarding the value to be given to factors that weigh in, its conceptual clarity and structure, nonetheless, confer upon the judges and public bodies a far better contraption to objectively assess or otherwise predict⁸⁰ whether resiling from the promise would be an abuse of power, thereby, allowing them to assess or predict whether their decision would warrant curial intervention. The utilisation of this would also enhance consistency and certainty in decision making, both of which have a close connection with the rule of law⁸¹ and provide the justification for substantive legitimate expectation.⁸²

Another criticism levelled against the universal adoption is that its rigorous standard renders it far too intrusive when macro-policy issues are involved. This criticism, unfortunately, results from the misconceived perception

⁸⁰ See, J. Jowell, ‘Proportionality: Neither Novel nor Dangerous’ in J Jowell and D Oliver (eds), *New Directions in Judicial Review* (London: Sweet & Maxwell, 1988) 61, 68.

⁸¹ Craig, Paul, ‘The Rule of Law’, Appendix 5 to House of Lords, [2007] *Select Committee on the Constitution, 6th Report of Session 2006–2007*, 101; F. A. Hayek, *The Road to Serfdom* (London: Routledge Classics, 2001), 75

⁸² See, S. Schonberg, *Legitimate Expectations in Administrative Law* (Oxford, Oxford University Press, 2000) Chapter 1; Forsyth, ‘The Provenance and Protection of Legitimate Expectation’ [1988] *47 Cambridge Law Journal*, 238

that proportionality is an inflexible and concrete test, whereas, in reality, it allows the judges flexibility to tune in its rigorousness if the circumstances demand so.⁸³ On the contrary, Professor Elliott attacks the balancing test as the one that gives little credence to the principle of deference⁸⁴, stating that “balancing test was applied [in *Coughlan*] in a way that was insufficiently sensitive to the polycentric and value-laden nature of the issues at stake and the limits of the Court’s capacity to assess such matters.”⁸⁵[Emphasis added]

Connected with this is also the general proposition that proportionality is ill-suited outside the scope of assessing limitation on fundamental rights. Much has been written on this, and the current trend is changing in favour of adopting proportionality to cases where no fundamental rights are involved.⁸⁶ In any event, this dilemma is not as important in the Sri Lankan context as it is in England, as Sri Lankan courts have often given a fundamental rights dimension to the legitimate expectation that unjustified frustration is an abuse of power, which is evidently prohibited by the rule of law embodied in Article 12 of the Constitution.

⁸³ See, Janina Boughey, ‘Proportionality and Legitimate Expectations’ in Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017) 121-146; Also, Peter Leyland and Gordon Anthony (n 70) 365

⁸⁴ M. Elliot (n 62) 9-11, 18

⁸⁵ *ibid* at 20

⁸⁶ See, *R (on the application of Alconbury Developments Ltd) v. Secretary of State for the Environment Transport and the Regions* [2003] 2 AC 295 [51]; *Pham v. Secretary of State for the Home Department* [2015] UKSC 19

Finally, the first step of the proportionality test requires the justification provided to be a legitimate one defensible in a democratic society. This means that public bodies have a limitation of what they can claim as ‘justifications’, thereby, ensures that expectations are not frustrated for whimsical reasons.

Conclusion

The need for a clear and standard test to assess the competing interests has always been a vexing issue in substantive legitimate expectation. Judges in *Coughlan* were indeed mindful that the law in this area would have to be developed over time, and ever since Laws L.J. proposed the application of proportionality test to assess legitimate expectation it has remained at the forefront of the academic debate. While the judiciary in England is not united in adopting it as the universal test, its recent trends demonstrate its willingness to do so. In Sri Lanka, the issue of the right test has not invited much academic debate. Nevertheless, the Supreme Court in *M.R.C.C. Ariyaratne* has rightfully brought this issue to the fore and what course the Sri Lankan judiciary will take remains to be seen. Having said that, the adoption of the proportionality test as the standard one will bridge the gap between these grounds of review and will bring structure, certainty, and predictability to substantive legitimate expectation, which is known for its lack of conceptual clarity and elusiveness.