Legal Studies (2018), 187–190
doi:10.1017/lst.2017.9

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BOOK REVIEW

Legitimate Expectations in the Common Law World

by Matthew Groves and Greg Weeks (eds). Oxford: Bloomsbury Hart Publishing, 2017, 368 pp (£79.99 hardback). ISBN: 978-1-50-990950-6.

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Debates about the scope and form of the legal protection of legitimate expectations are now part of the regular diet in administrative law circles. There are a range of possible explanations for why legitimate expectations have consumed so much academic energy. One significant driver has been the fact that the doctrine offers helpful fodder through which various broader themes within administrative law can be explored. The new collection of essays that is the subject of this review – *Legitimate Expectations in the Common Law World* – fits very much into a theme which is on the cusp of resurgence in administrative law: comparative study. As a field, comparative administrative law is not new but it has been neglected in recent decades. The lack of interest may be attributed to various difficulties, both conceptual and practical in nature (eg lack of researcher capacity to understand multiple complex and fast-moving jurisdictions, the apparent specificity of administrative law to particular constitutional and political contexts, and the difficulty inherent in translating concepts across legal traditions). Now, however, the malaise finally seems to be over, and comparative administrative law 'is emerging as a distinct field of inquiry after a period of neglect'.[1]

Within the context of a renewed interest in comparative administrative law, Matthew Groves and Greg Weeks' book is certainly timely. Added to this, the subject of the collection is particularly ripe for comparative study as, while the case-law across the common law world has taken different turns, the various doctrines of legitimate expectation remain connected by a series of relatable challenges.[2] Due to these factors, this book will almost certainly become a much relied upon text for both academics and practitioners alike (indeed, one contribution has already been cited in the Privy Council).[3] The editors open their text by suggesting the book ought to be seen as:

> an extended essay in family relations. After all, the countries within the common law world are united to a significant extent by their shared heritage of English legal principles. As with all families, the younger members grow up and change but do so in different ways. Some stay close to their parents. Some do not.[4]

As families are also prone to do, this book forgets about more remote, less talked about relatives. Jurisdictions such as Kenya can claim to possess a lively administrative law jurisprudence and are

[1] S Rose-Ackerman and P Lindseth 'Comparative administrative law: outlining a field of study' (2010) 28 Windsor Yearbook of Access to Justice 435 at 435.

[2] Justice Grant Huscroft's 'Introduction' to the collection also highlights these connected issues; see pp v–vi.

[3] *The United Policyholders Group & Ors v The Attorney General of Trinidad and Tobago (Trinidad and Tobago)* [2016] UKPC 17, [2016] WLR 3383 [81].

[4] M Groves and G Weeks *Legitimate Expectations in the Common Law World* (Oxford: Bloomsbury Hart Publishing, 2017) at 1.

wrestling with the protection of legitimate expectations just as much as any country included in this collection.[5] It would be to the advantage of 'common law world' scholarship if there was a concerted effort to move beyond thinking of that 'world' as more than a standard pack of jurisdictions (that pack usually involves the UK, Australia, New Zealand, Canada and, less frequently, South Africa, Hong Kong and Singapore). This grumble aside, each of the essays in this collection represents a superb addition to the literature on legitimate expectations.

After an interesting thematic introduction by the editors, the first two substantive chapters of the book serve up juxtaposed approaches and viewpoints, highlighting the contested nature of both substantive legitimate expectations and administrative law more generally. First is Jason Varuhas' attempt to 'map' the law of legitimate expectations. The general arguments in favour of the sort of 'conceptual' clarity Varuhas pushes for in respect of legitimate expectations have been set out with some force, by various scholars, on multiple occasions.[6] From the position of somebody already in that particular choir, the arguments in this chapter will strike a convincing note. But not everyone – including this reviewer – will be convinced by Varuhas' starting assumption that the law of legitimate expectations can be characterised as 'unruly' and in need of mapping.[7] Indeed, objections to Varuhas' thesis may come from scholars who take the approach of Robert Thomas, whose Chapter 2 stands in sharp contrast by adopting a 'realist' approach. Thomas' analysis adopts an approach of examining the degree and effect of judicial intervention in cases where substantive expectations have been successfully argued in the English and Welsh courts. He concludes:

> The cases … show that the courts recognise the need to consider the consequences of their intervention from the perspective of the individual claimant, the public body concerned, and the wider public interest. In other words, the courts acknowledge the need to attain a balance between ensuring fairness for individuals without at the same time unduly interfering with public administration.[8]

The striking difference between Thomas' analysis and that of Varuhas reflects not just a difference of philosophies, but also a difference in methodologies. Thomas' chapter – by showing the analytical fruits that moving beyond a doctrinal analysis can produce – offers a strong case for empirical research into the application and effects of legitimate expectations. The use and importance of such research has long been highlighted, but it is still yet to be undertaken[9] – a remarkable fact given the amount of work that has been produced on legitimate expectations in recent years.

Such multifaceted lines of divergence are on display throughout the rest of the text, too. Chapter 4, by Kristina Stern SC and Joanna Davidson, suggests that the difference between English and Australian case-law post-*Coughlan* may not be as profound in substance as it is in form. In Chapter 5, Paul Daly offers an important contribution to the developing debate concerning the normative foundations of the document, providing a compelling argument that the doctrine serves plural normative values instead of one overarching 'meta-value'. Janina Boughey, in Chapter 6, challenges the suitability of deploying proportionality, as presently applied in English public law, in all legitimate expectation cases. In Chapter 7, one of the editors, Greg Weeks, examines the question: What can we legitimately expect from the state? While acknowledging that answering this question presents a huge task, Weeks argues that the answer ought to involve considering what we can legitimately expect courts to do. Cora Hoexter, in Chapter 8, traces the development of legitimate expectations before and

[5]For example, *Royal Media Services Limited & others v Attorney General & 8 others* [2014] eKLR. Indeed, Kenya has a dynamic administrative justice system, see eg M Akech, *Administrative Law* (Nairobi: Strathmore University Press, 2017).

[6]For example, C Forsyth 'Showing the fly the way out of the fly bottle: the value of formalism and conceptual reasoning in administrative law' (2007) 66 CLJ 325.

[7]J Tomlinson 'The narrow approach to substantive legitimate expectations and the trend of modern authority' (2017) OUCLJ (online pre-publication).

[8]Groves and Weeks, above n 4, p 77.

[9]For example, S Schønberg *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press, 2000) ch 1.

https://doi.org/10.1017/lst.2017.9 Published online by Cambridge University Press

in the wake of South Africa's new constitutional order, suggesting that substantive enforcement of expectations now appears to be on the cusp of recognition. In Chapter 9, Philip Joseph reflects on how the doctrine emerged and on some of the difficulties that the New Zealand courts have faced when applying it. In Chapter 10, Mark Elliott offers an overview of the development of substantive legitimate expectations in England and Wales – an overview that will surely become essential reading for law students. He suggests that the gradual acceptance of substantive expectations in English law must be understood against a changing understanding of what the public law orthodoxy is. In one of the most interesting contributions to this collection, Chintan Chandrachud develops, in Chapter 11, an account of the Indian doctrine of substantive legitimate expectations. He argues that the doctrine, although it has been pronounced by the courts, is 'fictitious' in the sense that it is almost impossible to succeed on the basis of it. In Chapter 12, Swati Jhaveri reflects on the contrasting responses of Hong Kong and Singapore to the landmark case of *Coughlan*. Sas Ansari and Lorne Sossin, in Chapter 13, examine the awkward relationship between soft law and legitimate expectations. Their study focuses on tax administration, an important pressure point for this issue in many jurisdictions. Ansari and Sossin contend that, in Canada, legitimate expectations can actually provide an important catalyst for reflecting on the role of soft law in Rule of Law terms. Finally, one of the editors, Matthew Groves, reflects on legitimate expectations in Australia, arguing that legitimate expectations have become near-extinct due to the High Court shifting to 'practical questions' that 'subsume legitimate expectations within a wider and avowedly procedural conception of fairness'.

Beyond the interesting individual contributions outlined above, this collection prompts wider reflection on the emerging project of comparative administrative law. In particular, the fact that (Thomas' chapter aside) *Legitimate Expectations in the Common Law World* is conceived as a comparison of judicial doctrine, as understood through the medium of judicial opinions, highlights an important question.[10] While the doctrinal approach remains the dominant approach to administrative law in England (and many other places) and some even suggest it is what administrative lawyers really ought to confine themselves to,[11] taking such an approach to comparative administrative law represents a scholarly choice. That choice could be said to be, broadly speaking, between two conceptions of the comparative administrative law project: the narrow and the broad.[12] A broad conception would involve examination of all aspects of the relationship between law and administration. This would extend, for example, to the study of initial decision making, tribunals, agency rule making, etc. A narrow conception involves focusing on the application of legal rules, commonly through judicial review. It has long been argued, with great force, that placing too much emphasis on a narrow, judiciocentric approach to administrative law carries the flaw of being much like showing up at a football match and focusing only on the referee.[13] While a purely narrow conception of the comparative administrative law project could introduce a degree of diversity into conventional doctrinal scholarship, many important and interesting aspects of the interaction between law and administration would be excluded. To extend the earlier analogy, a narrowly conceived comparative administrative law project would be like going to football games *in various countries* and watching only the referee. The risk is that the likely result would be a body of comparative administrative law research that has little to do with what administrations actually do. This book – with its doctrinal focus – embodies a narrow

[10]This phrasing is based on the helpful characterisation of that style provided in JL Mashaw 'The inside out perspective: a first person account' in NR Parrillo (ed) *Inside Out: Essays on Themes in the Work of Jerry Mashaw* (Cambridge: Cambridge University Press, 2017).

[11]B O'Leary 'What should public lawyers do?' (1992) 12 OJLS 505. For a counterpoint, see P Craig 'What should public lawyers do? A reply' (1992) 12 OJLS 564.

[12]This broad distinction is reflected in various distinctions drawn in the law and administration literature, eg the distinction between red and green light approaches to administrative law (C Harlow and R Rawlings *Law and Administration* (New York: Cambridge University Press, 2009) ch 1) and the distinction between internal and external administrative law (B Wyman *The Principles of the Administrative Law Governing the Relations of Public Officers* (St Paul: Keefe-Davidson Co., 1903)).

[13]For example, Mashaw, above n 10.

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conception of comparative administrative law. In the many excellent contributions here we can see the fruits of that approach. But perhaps a broader conception of the project could have opened up fuller debate about, for example, the bureaucratic impacts of the doctrine and alternative methods of protecting expectation-type interests. A perfectly fair response to this comment may be: that was not the intention of this particular work. The choice between a narrow and broad conception of comparative administrative law is, of course, not binary: there is room for both. It is, however, hoped that, in the ongoing renaissance of comparative administrative law, there will be appreciation of the whole game, and not just the referee.

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