

## An Examination of the Doctrine of Legitimate Expectation as a Ground of Review of Administrative Decisions in Nigeria

Oluchi C. Maduka, PhD.<sup>1</sup>

Opeyemi A. Gbadegesin. LLM, LLB, BL<sup>2</sup>

and

Bukola O. Ochei PhD.<sup>3</sup>

### ABSTRACT

*Legitimate expectation, as a ground of judicial review, is rooted in ideas of procedural fairness and reasonable belief that a public body should be bound by its representations where persons have relied on such representations to their detriment. Generally, the court's intervention in judicial review has been limited to purely procedural matters. However, under legitimate expectation, the court has been seen to tilt towards protecting substantive rights. The protection offered by the court under legitimate expectation is not absolute as the doctrine will not apply where the representation made by the public body is contrary to the provision of statutes. This paper adopted a doctrinal method towards examining specific Nigerian and foreign cases on substantive legitimate expectation to determine how the courts have interpreted and analysed same, most specifically where the representations are unlawful. This paper finds that the position in some selected European countries is the same as in common law, that is, legitimate expectation will not*

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<sup>1</sup> Faculty of Law, University of Ibadan. Email: [oluchichuksmaduka@gmail.com](mailto:oluchichuksmaduka@gmail.com)  
Phone: +2348060736089

<sup>2</sup> Lecturer, Department of Public Law, University of Ibadan.  
Email: [opeyemigbadegesin84@gmail.com](mailto:opeyemigbadegesin84@gmail.com) Phone: +2348032146916

<sup>3</sup> Lecturer, Department of Public Law, University of Ibadan. Email: [desiri29@gmail.com](mailto:desiri29@gmail.com)  
Phone: +2348061597055

*be anchored on unlawful representation. Though the doctrine is not well developed in Nigeria, case law show that Nigerian courts are willing to grant substantive rights as long as the representations are within the law. This paper recommends that considering the frequency with which administrative bodies in Nigeria are making ultra vires representations, the court should adopt a case to case approach instead of ruling out all unlawful representations.*

**Keywords:** Procedural fairness, Unlawful representation, legitimate expectation, Nigeria, Judicial review.

## 1. Introduction

Judicial review in Nigeria is a product of common law and by judicial review, the courts exercise ‘inherent’ powers over public bodies to ensure that administrative bodies observe the law, fulfil public duties and do not act beyond the scope of their powers<sup>4</sup>. When they do, the courts have consequent power to grant suitable remedies.<sup>5</sup> The principal remedies through which the courts exercise their supervisory jurisdiction are; writ of habeas corpus, order of certiorari, prohibition, mandamus, injunction and declaration. The Courts are expected to exercise the powers where an applicant shows that ground for a review exists in his favour. The traditional grounds for reviewing the actions of administrative bodies include ultra vires, procedural irregularity, error of law on the face of the record and power exercised for an improper purpose. The court being averse to absolute discretionary powers on the part of administrative bodies, over the years led a revolution that extended the ground of review to include unreasonableness<sup>6</sup> and the doctrine of legitimate expectation.

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<sup>4</sup> John Francis Garner and Brian L Jones, *Garners Administrative Law* (Butterworths, 1985)

<sup>5</sup> B. O. Iluyomade and B. U. Eka, *Cases and Materials on Administrative Law in Nigeria* (OAU University Press, 2007)

<sup>6</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* 1 K.B (1948). *Council of Civil Service Union v Minister for the Civil Service* UKHL (1984)

Wade and Forsyth<sup>7</sup> describe legitimate expectations as a “*welcome addition to the armoury of the courts in ensuring that discretions are exercised fairly.*”<sup>8</sup> Legitimate expectation simply means that when governments and their agents create expectations in the mind of people regarding the manner in which administrative powers will be exercised and people rely on that “promise” to their detriment, the court will intervene to compel government agencies to fulfil the legitimate expectations they have created.<sup>9</sup> Legitimate expectation is rooted in ideas of fairness and reasonableness that a public body would be bound by its representations. However, the doctrine would not apply where the representations are contrary to the public duties imposed on a public body by statutes.<sup>10</sup>

In Nigeria, administrative bodies have hidden under this exception to renege on their representations and promises that persons had relied on to their detriment. Nigeria courts have also rightly decided that unlawful representations cannot create a legitimate expectation. In order to shed more light on the position in Nigeria, the paper first examines the origin and development of the doctrine of legitimate expectation before an overview of how this concept has been interpreted and applied in other jurisdictions. The paper then examines the application of the doctrine of legitimate expectation by the Nigerian courts to show the unfair nature of administrative bodies practice of pleading ‘unlawfulness’ of their own representations after persons have relied upon it to their own detriment. The paper will then conclude and make recommendations on how best the courts may apply the doctrine.

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<sup>7</sup> H W R Wade and C F Forsyth, *Administrative Law* (10<sup>th</sup> edn Oxford University Press 2009) 447

<sup>8</sup> *Ridge v Baldwin* App Cases (1964)

<sup>9</sup> Matthew Groves, ‘Substantive Legitimate Expectations in Australian Administrative Law’ (2008) 15 *MelbULawRw* 32(2) 470 <<http://www5.austlii.edu.au/au/journals/MelbULawRw/2008/15.html>> accessed August 28, 2021

<sup>10</sup> A Perry and F Ahmed, ‘The Coherence of the Doctrine of Legitimate Expectations’ *Cambridge Law Journal* [2014] 73 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2163255](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2163255)> accessed August 25, 2021 see also, Olumide K., Obayemi and Esther Ojomo, ‘Revisiting FIRS vs halliburton – for the records’ (proshare, 16 December 2014) <<https://www.proshareng.com/news/Personal%20Tax/Revisiting-FIRS-vs-Halliburton-%E2%80%93-For-the-Records/25415>> accessed August 27, 2021;

## 2. Origin and Implications of the Doctrine of Legitimate Representation

The doctrine of legitimate expectation is founded upon a basic principle of fairness that legitimate expectations ought not to be frustrated.<sup>11</sup> A legitimate expectation is said to arise where a person responsible for taking a decision has induced in someone who may be affected by the decision, a reasonable expectation that he will receive or retain a benefit or that he will be granted a hearing before the decision is taken.<sup>12</sup>

In *Federal Board of Inland Revenue v. Halliburton West Africa Limited*,<sup>13</sup> the Court of Appeal stated that what the doctrine postulates is that where a public body or person acting in public authority has issued a promise or has been acting in a given way, members of the public who are affected by the scheme of conducting public affairs in the charted manner would, by law, require the promise or practice to be honoured or kept by the public body or person acting in public authority, save where there exist reasonable grounds for not insisting on the settled scheme of conducting public affairs. The doctrine, therefore, enjoins public bodies to be fair, straightforward and consistent in their dealings with the public.

The origin of the doctrine under English law is traceable to two cases. Whilst some writers trace its origin to the decision in *Schmidt and Anor v. Secretary of State for Home Affairs*,<sup>14</sup> others attribute the genesis to *Council of Civil*

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<sup>11</sup> J Rawls, *A Theory of Justice* (Clarendon Press 1972) 235-243.

<sup>12</sup> S A De Smith, H Woolf, J L Jowell and A P Le Sueur, *Judicial Review of Administrative Action* (De Smith, Woolf & Jowell, 5<sup>th</sup> edn, Sweet & Maxwell, 1995) 417

<sup>13</sup> (2014) LPELR-24230 CA

<sup>14</sup> (1969) 1 All ER 904; see, B Chabra, 'Doctrine of Legitimate Expectation: A Comparative Analysis of Indian Legal System with Britain Legal System. *International Journal of law and legal jurisprudence studies*. 1(6) accessed March 23 2021 <<http://ijlljs.in/wp-content/uploads/2014/10/DOCTRINE-OF-LEGITIMATE-EXPECTATION.pdf>> accessed June 23, 2021; Chamila Talagala 2009. *The Scope of the Doctrine of Legitimate Expectation as a Ground of Judicial Review of Administrative Action*. <[https://www.academia.edu/2413475/The\\_Scope\\_of\\_the\\_Doctrine\\_of\\_Legitimate\\_Expectation\\_as\\_a\\_Ground\\_of\\_Judicial\\_Review\\_of\\_Administrative\\_Action](https://www.academia.edu/2413475/The_Scope_of_the_Doctrine_of_Legitimate_Expectation_as_a_Ground_of_Judicial_Review_of_Administrative_Action)> accessed August 18, 2021; Thomas R., 'The protection of legitimate expectations in UK administrative law' (2016 Conference paper University of Bergen, Norway. [https://www.researchgate.net/publication/277010634\\_The\\_Protection\\_of\\_Legitimate\\_Expectations\\_in\\_UK\\_Administrative\\_Law](https://www.researchgate.net/publication/277010634_The_Protection_of_Legitimate_Expectations_in_UK_Administrative_Law) > accessed March 28, 2021; Jayasinghe C. 'Substantive legitimate expectations in administrative law'

*Service Union (CCSU) v Minister for the Civil Service*.<sup>15</sup> The reason for this misconception is that, in *Schmidt v Secretary of State for Home Affairs*,<sup>16</sup> the doctrine was mentioned by Lord Denning as an *obiter* while in *CCSU*, the full glare of the doctrine was laid bare. Lord Diplock in explaining the basic principles in *CCSU*'s case explained that:

“for legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it and which he has been given an opportunity to comment on; he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reason for contending that they should not be withdrawn”

Since these decisions, legitimate expectation has played an important role in numerous decisions in England and other parts of the Commonwealth.<sup>17</sup> The application of the doctrine is illustrated in the case of *A.G. of Hong Kong v Ng Yeun Shiu*.<sup>18</sup> The government of Hong Kong had announced a change of policy towards its illegal immigrants from China, but stated that “illegal immigrants from Macau will be treated in accordance with the procedure for illegal immigrants”. The applicant who was a citizen of Macau was deported without the government following the above-stated procedures.

Lord Fraser said that:

“the principle that a public authority is bound by its undertakings as to the procedure it will follow, provided they do not conflict with its duty, is applicable to the undertaking given by the

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<[https://www.academia.edu/8082103/Substantive Legitimate Expectations in Administrative Law](https://www.academia.edu/8082103/Substantive_Legitimate_Expectations_in_Administrative_Law)> accessed January 4, 2020

<sup>15</sup> (1985) AC 374 (408-409) commonly known as *CCSU* case

<sup>16</sup> [1969] 2 WLR 337; [1969] 2 Ch 149; [1968] EWCA Civ 1; (1969) 133 JP 274; [1969] 1 All ER 904

<sup>17</sup> *R v Liverpool Corporation, ex parte Liverpool Taxi Fleet Operators' Association* 2 QB (1972) 299, *Breen v AEU* 2 QG (1971) 175, *Findlay v Secretary of State for the home department* (1985) A.C. 318 (H.L).

<sup>18</sup> (1983) 2 A.C. 629

government of Hong Kong to the respondent... that each case would be considered on its merit

Forsyth avers that the basis for seeking to protect legitimate expectations is so that public trust in the government would not be left unprotected.<sup>19</sup> This is because, without trust, government becomes a choice between chaos and coercion.<sup>20</sup> Confucius an early Chinese philosopher understood the principle of trust when he stated that if the people have no faith or trust in their rulers, there would be no standing for the state.<sup>21</sup> If an administrative agency or the executive undertakes, either expressly or by prior conduct behaves in a particular way, the subject should expect that undertakings would be complied with. It would be fatal to good governance if the executive is allowed to freely reengage on its undertakings. Thus, the doctrine strives to make sure that administrative authorities are bound by their undertakings and assurances.<sup>22</sup> This protection is at the root of the constitutional principle of the rule of law, which requires regularity, predictability, and certainty in government's dealings with the public.<sup>23</sup> In *Oloniluyi v Home Secretary*<sup>24</sup> a student from Nigeria was given oral assurance that she would have no difficulty returning to the United Kingdom after going home for Christmas, she was however refused leave to enter the United Kingdom on her return.

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<sup>19</sup> Christopher Francis Forsyth, 'The provenance and protection of legitimate expectation' (1988) 47 Cambridge Law Journal. (2) 238-260. [https://www.jstor.org/stable/4507165?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/4507165?seq=1#page_scan_tab_contents) accessed March 21, 2020.

<sup>20</sup> H W R Wade and C F Forsyth, Administrative Law (10<sup>th</sup> edn Oxford University Press 2009) 447

<sup>21</sup> Confucius told his disciples that the prerequisite for government is weapons, food and trust. However, if the government must do away with any one, it should be weapons first and food second for if the governed cannot place their trust in government, then its legitimacy is undermined. See Lun Yu, 'The Analects of Confucius' <http://wengu.tartarie.com/wg/wengu.php?no=300&l=Lunyu> > accessed June 29, 2021

<sup>22</sup> Chamila S Talagala, 'The Scope of the Doctrine of Judicial Review as a Ground for Judicial Review of Administrative Actions' Bar Association Law Journal (2009) XV 1-18 <[https://www.academia.edu/2413475/The\\_Scope\\_of\\_the\\_Doctrine\\_of\\_Legitimate\\_Expectation\\_as\\_a\\_Ground\\_of\\_Judicial\\_Review\\_of\\_Administrative\\_Action](https://www.academia.edu/2413475/The_Scope_of_the_Doctrine_of_Legitimate_Expectation_as_a_Ground_of_Judicial_Review_of_Administrative_Action)> accessed September 21, 2021

<sup>23</sup> De Smith, F Harry Woolf and Jeffery Jowell, Judicial Review of Administrative Action (5th ed, Sweet & Maxwell, 1995) 417

<sup>24</sup> (1989) Imm. AR 135

The refusal was quashed by the English Court of Appeal on the ground of legitimate expectation and unfairness.

The test for application of the doctrine under common law is summarised as follows; (a) the representation underlying the expectation must be clear, unambiguous, and devoid of any relevant qualification (b) the expectation must be reasonable, (c) the representation must have been induced by the decision-maker, (d) the representation must be one which it was competent and lawful for the decision-maker to make without which reliance cannot be legitimate.<sup>25</sup>

### **3. Types of Legitimate Expectation**

Legitimate expectation has been classified as either procedural or substantive. Lord Roskill adumbrated that legitimated expectation is closely connected with a right to be heard; and where the protection afforded by the court is procedural, it connotes that the legitimate expectation cannot be denied without a hearing.

#### **3.1. Procedural Legitimate Expectation**

Procedural legitimate expectation refers to the expectation of an individual that he has a right to a certain procedure, such as the right to a hearing, as a result of the behaviour of the public body. The doctrine provided important procedural benefits in these cases, namely, the right to be notified of and to be heard in opposition to, the revocation of an existing benefit. It seems commonwealth courts have generally accepted procedural legitimate expectation.<sup>26</sup> The contentious aspect of legitimate expectation is the substantive.

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<sup>25</sup> F. Jameel, 'Public Law and Judicial Review' in S Marsoof and N. Wigneswaran (eds) *In Pursuit of Justice, Corde Et Amino With Heart and Soul, A Collection of Legal Essays in Memory of K. C. Kamalabayson, P. C.*, Colombo: Kamalabayson Foundation, 2008 at 252, citing De Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, [5<sup>th</sup> ed.] 2001 at p.425

<sup>26</sup> The principle of course is applicable in England and in Nigeria. It has been accepted in Australia, see *Attorney General (NSW) v Quin* [1990] 93 A.L.R. 1, and in Canada see *Old St. Boniface Residents Association Inc v The City of Winnipeg and the St. Boniface-St. Vital Community Committee* [1990] 3 S.C.R. 1170. See also McGilvray S. A. *Making sense of substantive legitimate expectations in New Zealand Administrative Law*. (2007). <https://www.otago.ac.nz/law/research/journals/otago036270.pdf> accessed January 3, 2021.

### 3.2. Substantive Legitimate Expectation

Traditionally, the essential aspect of English legal tradition in public law is that judicial review should be based on procedural matters.<sup>27</sup> However, since the decision in *Associated Provincial Picture Houses Ltd v Wednesbury Corp*,<sup>28</sup> it was clear that judicial attitude appears to admit of greater scope for substance. Substantive legitimate expectation relates to those cases where the court is actually concerned about whether the applicant is entitled to the substantive benefit as opposed to mere procedural fairness. It postulates that if a legitimate expectation of substantive outcome is aroused, then, save in exceptional circumstances, the body that aroused that expectation should fulfil the expectation.<sup>29</sup>

The decision in *R v North East Devon Health Authority, ex parte Coughlan*,<sup>30</sup> marked the decisive English acceptance of substantive legitimate expectations. In that case, a severely disabled patient had been assured that, if she agreed to move to a new residence, the said new residence would be her home for life. The responsible authority subsequently decided to close down the new residence, essentially for financial reasons. The English Court of Appeal held that the applicant had legitimate expectation that she would reside in the new residence for life and the denial of the expectation was an ‘abuse of power’ warranting the court’s intervention. The court considered that the lawfulness of any attempt to renege, resile on a promise, or vary the policy, upon which an expectation was anchored, would depend on whether the court was satisfied that there was an ‘overriding’ interest or reason to do so. The court made it clear that this balancing of individual and wider public interests, which would determine whether the public could override the personal, would take account of the fairness of any outcome. Consequently, the court held that failure to fulfil the assurance given to the claimant was unfair and amounted to an abuse of power

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<sup>27</sup> Peiris G. L. *Wednesbury unreasonableness: the expanding canvas.* (1987) 46 *Cambridge Law Journal*. (1) 53 [https://www.jstor.org/stable/4506978?read-now=1&seq=5#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/4506978?read-now=1&seq=5#page_scan_tab_contents) accessed June 29,

<sup>28</sup>[1948] 1 KB 223

<sup>29</sup> Forsyth *Supra* at page 241

<sup>30</sup> [2000] 2 WLR 622



There has been severe criticisms of the doctrine of substantive legitimate expectation as applied in *Coughlan's case*. The argument is that the application of the doctrine would draw the court into merit review which traditionally is not within the precinct of judicial review proceedings. Mark Aronson, Bruce Dyer and Matthew Groves<sup>31</sup> argued that the case had the potential to draw courts towards merits review. They concluded that Coughlan 'maximised judicial discretion at the cost of legal certainty.' They suggested that the problems arising from Coughlan were partly semantic, but largely much more profound because the majority of judicial review applicants want substantive outcomes, not procedural outcomes, and the courts have traditionally refused them.

#### **4. Legitimate Expectation; A Tool for Administrative Review**

##### **4.1. European Union**

It is important to preface this discussion on the application of legitimate expectation under the European Union (EU) with a note that the fundamental principle underlying the EU's application and protection of legitimate expectation is legal certainty as enshrined in rule of law.<sup>32</sup> It is also important to remark that the administrative law of the EU protects both procedural and substantive legitimate expectation. The European Court of Justice (ECJ) in determining whether to apply legitimate expectation in a case adopts a two-ladder approach. It will first determine whether the administrator's act created a reasonable expectation in the mind of the aggrieved party. If the answer is in the affirmative, then the court would decide whether the expectation is legitimate. It is when a claim answers both questions positively that the court will enforce the legitimate expectation.<sup>33</sup>

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<sup>31</sup> M Aronson, B Dyer and M Groves, 'Judicial Review of Administrative Action'. (3rd edn, Law Book Co, 2004). 395–400

<sup>32</sup> R Arigho, 'Legitimate Expectations in Irish and EU law – Lessons for Ireland?' Irish Journal of European Law (2018) 19(1) 78; *Frico v VIV*, Joined Cases 424-425/85, 1987 E.C.R. 2755

<sup>33</sup> G Quinot, 2004. 'Substantive Legitimate Expectations in South African and European Administrative Law' German Law Journal. (2008) 5(1). *Hughes v. Department of Health and Social Security [1985] A.C. 776*; *R. v. Inland Revenue Commission, ex p. Unilever Plc (1996) S.T.C. 681* ; *R. v. North and East Devon Health Authority, ex p. Coughlan [2000] 2 W.L.R. 262*

In determining the first question, the representation itself must be precise, specific<sup>34</sup> and most importantly, lawful<sup>35</sup> as it would be unreasonable to form specific expectation on an ambiguous representation or to rely on unlawful representations. The representation may take several forms: it may be an express proclamation;<sup>36</sup> it may also be in form of long-standing practice.<sup>37</sup> In *Embassy Limousines*<sup>38</sup> the applicant submitted a tender for a contract to the Commission, and following encouragement from the Commission that it would be successful in its contract tender bid, the applicant made long term investments. The Commission was held to have created a legitimate expectation that was sufficiently specific and unequivocal that the applicant successfully relied upon it.

EU Law requires individuals to be careful in foreseeing that specific representations may be withdrawn or subject to change.<sup>39</sup> But such withdrawal or change will be on a going-forward basis, not retrospectively.<sup>40</sup> The ECJ has severally ruled that it would not enforce an expectation based on a representation that is *contra legem*.<sup>41</sup> With respect to legitimate expectations which are *contra legem*, the EU position is very similar to classical common law position, which is to say that as a general rule, legitimate expectations cannot be anchored on unlawful representations.

In *Thyssen*<sup>42</sup> case the ECJ decided that the representations made by Commission officials did not create a legitimate expectation, because the

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<sup>34</sup> *Chomel v Commission, Case T-123/89, 1990 E.C.R. II-131.*

<sup>35</sup> *Consorzio Doopertaive d'Abruzzo v Commission, Case 15/85, 1987 E.C.R. 1005*

<sup>36</sup> *Frico v VIV, Joined Cases 424-425/85, 1987 E.C.R. 2755.* Express proclamation in this sense of course includes general policy statements, see *Germany v Commission, Case C-400/92, 1994 E.C.R. I-4701*

<sup>37</sup> *Ferriere San Carlo v Commission, Case 344/85, 1987 E.C.R. 4435*

<sup>38</sup> *Embassy Limousines & Services v European Parliament ECLI:EU:T:1998:302, Case T-203/96, [1998] ECR II-4239.*

<sup>39</sup> *Van den Bergh en Jurgens BV and Van Dijk Food Products (Lopik) BV v Commission, Case 265/85, 1987 E.C.R. 1155, OHG Firma Werner Faust v Commission, Case 52/81, 1982 E.C.R. 3745.*

<sup>40</sup> *Behn v Hauptzollamt Itzehoe, Case C-80/89, 1990 E.C.R. I-2659.*

<sup>41</sup> The Latin expression 'contra legem' literally means 'against the law'. A contra legem interpretation must be understood as being an interpretation that contradicts the very wording of the national provision at issue. See further Quinot G. Op cit

<sup>42</sup> *Thyssen AG v Commission, Case C-188/82, ECLI:EU:C:1983:329, [1983] ECR 3271*

representations were contrary to the clear EU rules in place which established set quotas for the distribution of steel. The Court held that officials could not express a view contrary to EU law. In *SpA Alois Lageder*<sup>43</sup> case the ECJ held the applicant could not claim legitimate expectation relying on the representation that was rendered to it which representation was in fact based on an erroneous interpretation of Union law. It must be noted, however, that some EU member states (particularly Germany and Netherlands) in their domestic forum do enforce legitimate expectation that is anchored on unlawful representation.<sup>44</sup>

Historically German courts proceeded on the principle that any unlawful administrative act could be revoked. The courts focused on compliance with the law, which in every single case took precedence over any private interest. However, this changed in the late 1950s following the deluge of actions brought pursuant to *Lastenausgleich*<sup>45</sup> the situation of refugees, the remuneration of civil servants and their pensions. Administrative acts had been issued that granted benefits to the addressees, which formed the basis for their livelihood.<sup>46</sup> In a 1956 case discussed by Forsyth,<sup>47</sup> a widow had moved from the German Democratic Republic to West Berlin after a Senator had certified to her that she would be entitled to certain welfare payments in West Berlin. Upon her arrival, arrangements for her first payments were made and paid. Subsequently, it turned out, that the requirements of the law were not fulfilled and she was not entitled to the allowance. Payments thus seized, and she was informed that she would have to repay the money that had already been paid. The higher administrative court in Berlin in deciding in favour of the widow held that there appeared to be a clash between the principle of the legality of the administration and the principle of legal certainty and that in the instant case the principle of legal certainty should prevail.<sup>48</sup>

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<sup>43</sup>*SpA Alois Lageder v Amministrazione delle Finanze dello Stato, Cases C-31-44/91, ECLI:EU:C:1993:132, [1993] ECR I-1761*

<sup>44</sup> Quinot G. Op cit

<sup>45</sup> Equalisation and distribution of war-caused burdens

<sup>46</sup> See generally Rennert K. infra

<sup>47</sup> Forsyth C. F. Op. cit.

<sup>48</sup> Rennert K. 'The protection of legitimate expectations under German administrative law'. (2016) Seminar on the protection of legitimate expectations of the Association of Councils

German courts would not recognise the legitimate expectation where the applicant procured the administrative act by means of wilful deceit, threats, or bribery; where the applicant procured the administrative act by making inaccurate statements; or wherever the applicant was aware, or in any case ought to have been aware, of the administrative act being unlawful. To succeed, the applicant must be acting in good faith.<sup>49</sup>

#### 4.2. Legitimate Expectation in Nigeria

It is apposite to remark that in seeking redress in respect of unfair practices of administrative bodies in Nigeria, judicial review procedure is underutilised and the jurisprudence on the doctrine of legitimate expectation in Nigeria is not well developed. The doctrine made its first appearance in Nigerian Administrative law in *Margaret Chinyere Stitich v AG Federation*<sup>50</sup> wherein the court granted substantive relief to the applicant. The applicant, Ms Stitich while in Western Germany bought a 1976 Model Mercedes Benz 280 Saloon car which she shipped to Nigeria. The car arrived at the Lagos harbour on 3rd April, 1982. On getting to Lagos, she went to the Ministry of Commerce to obtain the Import Licence. However, the import licence was not issued to her because according to the officials, there was a directive that the issuance of the licence should be withheld. Then on the 29th April, 1982, (three weeks after she imported the vehicle), the import licence was issued to her.

Following the promulgation of a new law on 20th April 1982,<sup>51</sup> the rate of duty payable on the type of car the applicant imported was increased from 33<sup>1</sup>/<sub>3</sub>% to 500%. The applicant was now expected to pay ₦14, 500.00 instead of the ₦1,449.22 originally assessed by Customs. The applicant refused to pay this new amount arguing that the car had arrived in the country on 3rd

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of State and Supreme Administrative Jurisdictions of the European Union (ACA-Europe) on 21 April 2016 in Vilnius, Lithuania. [https://www.bverwg.de/medien/pdf/rede\\_20160421\\_vilnius\\_rennert\\_en.pdf](https://www.bverwg.de/medien/pdf/rede_20160421_vilnius_rennert_en.pdf) accessed May 27, 2021.

<sup>49</sup> *Federal Republic of Germany v Commission of the European Communities*. Judgment of the Court of First Instance in Case T-376/07. <https://cutt.ly/3NHYYJb>. Assessed October 30, 2022; Case C-39/06 *Commission v Germany*, ECLI:EU:C:2008:349 at [23], [24] and [42]

<sup>50</sup> (1986) LPELR 3119 (SC)

<sup>51</sup> The then Economic Stabilization (Temporary Provisions) (Customs Duties) Order

April 1982 before the making of the Order on 20th April 1982. Not having paid the full 500% duty charged, the Board of Customs refused to release the car to the applicant. The applicant approached the High Court for redress.

Following the dismissal of her suit at the High Court and Court of Appeal, the applicant further appealed to the Supreme Court. The Supreme Court relying on *Attorney-General of Hong Kong v. NG Yuen Shiu*<sup>52</sup> concluded that those conditions put out by the Minister amounted to a promise to the applicant that if she fulfilled those conditions, the Minister would act in the way therein prescribed, namely, that she would be entitled to bring into Nigeria her car, paying in respect thereof the prevailing customs duty. The court further stated that if an alien could rely on the words of government in *Attorney-General of Hong Kong v. NG Yuen Shiu*,<sup>53</sup> how much more *Stitch* who was a citizen of Nigeria could rely on the procedures and conditions set out by the government. The doctrine is seen as a fulfilment of a promise made. If an executive makes a promise, it is only fair and just that such promises should be kept. The Supreme Court in the *Stitch* case boldly applied substantive legitimate expectation to grant the applicant the merit benefit

In 2000, the doctrine of legitimate expectation was also considered in *Abacha v. Fawehinmi*,<sup>54</sup> where the Supreme Court accepted that the doctrine may have an indirect effect on how the court interprets undomesticated treaties as citizens will legitimately expect the government to abide by the terms of a treaty even though it has not been domesticated.<sup>55</sup>

In *Federal Board of Inland Revenue (FBIR) v. Halliburton West Africa Limited (HWAL)*,<sup>56</sup> HWAL, a foreign company, executed contracts in Nigeria together with its Nigerian affiliate, Halliburton Energy Services Nigeria Limited (HESNL). It was agreed between the HWAL and HESNL that the HWAL would obtain contracts from third parties in Nigeria for execution by HESNL with billing for the contracts made in US Dollars. HWAL raised

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<sup>52</sup> (1983) 2 A.C. 629

<sup>53</sup> (1983) 2 AC 629

<sup>54</sup> [2000] 6NWLR 228

<sup>55</sup> Mchewere G. P. Legitimate Expectation on Protection of Human Rights in Africa: Comparing Tanzania and Botswana as well as the Federal Republic of Nigeria Experiences. Undergraduate Project. University of Dodoma

<sup>56</sup> (2014) LPELR-24230 CA

invoices and received the dollar portion of the contract amount from customers. The Nigerian subsidiary, in turn, recharged and received its share of the contract proceeds from HWAL. HWAL, in determining its taxable revenue, deducted the recharges paid to the Nigerian subsidiary. This treatment was based on guidance provided by the Federal Board of Inland Revenue (FBIR), in its Information Circular No. 9302. The FBIR subsequently disagreed with HWAL's deduction of amounts paid to the Nigerian subsidiary and issued additional tax assessments to HWAL.

The court was prepared to apply the doctrine had the claim met the threshold and the requirement for its application but unfortunately apart from the representation being unlawful; the applicant did not act *bona fide*. The court refused to apply the doctrine on the ground that the circular was contrary to Section 26 of the Company Income Tax Act. It also emerged that the applicant did not make full disclosure of the income from the transaction and also omitted to declare the income or profit its subsidiary, HESNL, was to derive from the transaction. The Court held that since HWAL did not make full disclosure of the total income in the first exercise, he could not reasonably rely on Information Circular No. 9302 to reap benefit from the doctrine of legitimate expectation which is rooted in utmost good faith by stakeholders concerned with tax matters.

Recently in *Saipem Contracting (Nig) Ltd v. Federal Inland Revenue Service*,<sup>57</sup> Saipem Ltd and its foreign counterpart contended that prior to their executing a contract, they sought the advice of the Federal Inland Revenue Service (FIRS) on their tax liability with regard to the contract; and that it was based on the advice of FIRS that there was no tax liability that they entered into the contract. Saipem argued that the representation by FIRS was done in the lawful performance of its duties and that having relied on the representation; the FIRS could not whimsically change its mind thereafter to their detriment. It was asserted that it would be unreasonable and unfair to allow the FIRS to go back on its representation, since public bodies are to act reasonably, fairly and are to be held accountable. FIRS argued that the tax regime of Saipem is governed by law and not by correspondences exchanged.

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<sup>57</sup> (2018) LPELR – 45118 (CA)

FIRS argued further that it had the power to correct its own error and that parties cannot by consent, agreement or compromises abridge the clear provision of tax laws. The Court of Appeal agreed with FIRS. Again in *Federal Inland Revenue Service v CNOOC Exploration and Production Limited*,<sup>58</sup> FIRS contended that it entered into Farm-in Agreement, with Total Upstream Limited (TUPNI) and Brasoil Services Company wherein it assigned 24% and 16% undivided interest respectively and based on the contract and the provisions of Section 4 of Deep Offshore and Inland Basin Production Sharing Contracts Act,<sup>59</sup> it was entitled to Investment Tax Credit. A letter from the Ministry of Petroleum also confirmed that the Ministry thereafter made representation *volte-face* to the effect that instead of the Investment Tax Credit, what would subsequently apply would be the Investment Tax Allowance. The Court of Appeal refused to accept that legitimate expectations were created in the two cases on the ground that legitimate expectations could not be anchored on an unlawful representation because the agency had no right to change the provisions of the statute.

The position of the Nigerian courts appears to be in tandem with the position of the European Court of Justice which has consistently held that administrative body cannot make representation contrary to the Community law and that where such representation is made it cannot create legitimate expectation. This position is, however, in contrast to the position in Germany as articulated earlier. It seems as stated by the German Court that what is at stake is a clash between the principle of the legality of the administration and the principle of legal certainty. The court adopted the position of balancing on a case-to-case basis to determine which principle should be upheld. It may be conceded that the Nigerian Courts in rejecting the tax claims in the three cases discussed above were much influenced by the public policy of generating as much revenue as possible.

It is advocated that a case by case basis would be a fairer approach than conclusively ruling out all unlawful representation. Lord Denning hinted that circumstances may arise in which an assurance or representation of fact given by a public body or one of its officers to another person and relied on by that

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<sup>58</sup> (2018) LPELR 45345 (CA)

<sup>59</sup> Cap D3 Laws of the Federation of Nigeria, 2004,

person will be held to preclude the body in question from denying its validity, or indeed its binding force, although offered otherwise than in a manner or form prescribed by law.<sup>60</sup>

The European Court of Human Rights, in *Stretch v. UK*<sup>61</sup> hinted at the possibility of balancing based on proportionality. The applicant purchased from a local authority a 22 years lease which obliged him to erect industrial buildings on the land with an option to renew. The authority during the renewal discussion informed the applicant that it lacked the statutory power to grant the option of renewal. The English Court of Appeal grudgingly accepted the authority's contention noting that it 'seems unjust' that public bodies that misconstrued their powers should be allowed to take advantage of their own errors to escape from unlawful bargains that they have made.

On further reference to the European Court of Human Rights, the court accepted that the doctrine of *ultra vires* provides an important safeguard against abuse of power. It, however, held that there is a need to balance the public interest with that of the individual. The court's reasoning is in sync with the position taken by Craig that legal incapacity should not automatically be considered an insuperable obstacle and that any potentially damaging effect of enforcing unauthorised representation should instead be balanced against the harm likely to be occasioned to the individual by frustrating the expectation.<sup>62</sup>

It is therefore argued that where an administrative body makes an unlawful representation, the court should be able to find a middle ground between the principle of legal certainty and legality of the administration. This approach is not that novel in Nigeria as the Supreme Court has held that citizens are entitled to have a legitimate expectation that where the Government has entered into a treaty, that the Government should not act contrary to the treaty

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<sup>60</sup> The reported cases in which this exception to the general has been propounded involve special elements of hardship to individuals. For example, in *Robertson v Minister of Pensions* (1949) 1 KB 227 at 232, (1948) 2 All ER 767 at 770 where an assurance about entitlement to war pension was given by a wrong department, the crown was nevertheless bound.

<sup>61</sup> [2004] 38 E.H.R.R. 12

<sup>62</sup> Craig P. Administrative law (2003 Sweet and Maxwell); Elliott M., Legitimate Expectations and Unlawful Representations. The Cambridge Law Journal [2003] 63(2) 261-264. <<http://www.jstor.org/stable/4509087>> accessed January 6, 2019



even though undomesticated.<sup>63</sup> The basic principle is that administrative bodies must exercise its discretion fairly and reasonably.<sup>64</sup>

It is apposite to remark that in seeking redress in respect of unfair practices of administrative bodies in Nigeria, judicial review procedure is underutilised and the jurisprudence on the doctrine of legitimate expectation in Nigeria is not well developed.

## **5. Conclusion**

Inconsistency of policy may amount to an abuse of discretion, particularly when undertakings or statements of intent are disregarded unfairly. Where an unlawful statement is made by an administrative body and citizens rely on the representation to their detriment or have arranged their lives in the expectation that the representation is valid, it seems unfair that the administrative body should be allowed to totally escape liability for their unlawful act. There is no apparent reason why the beneficiary of the representation should be the person to bear the full consequence of the representation. It would only be fair if the cost of holding the administrative body to its representation is balanced with the public interest in the legality of the administrative actions. It is also suggested that in appropriate cases the court should award damages instead.

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<sup>63</sup> See *Abacha v. Fawehnim* (supra)

<sup>64</sup> *Halsbury's Laws of England* (4<sup>th</sup> edn 1973) Vol. 1, Para 21