Legal Studies (2020), **40**, 286–300
doi:10.1017/lst.2019.29

S·L·S
The Society of Legal Scholars

RESEARCH ARTICLE

Do we need a theory of legitimate expectations?

Joe Tomlinson*†

University of York, York, UK; Research Director, Public Law Project
*Author email: joe.tomlinson@york.ac.uk

(Accepted 23 August 2019)

Abstract

In recent years, it has become common to see claims that the doctrine of legitimate expectations has no sufficiently defined purpose, and that administrative law scholars should do more theoretical work to bring coherence to this area of law. In this paper, I suggest this 'conceptual critique' of legitimate expectations is misplaced and that, instead, it reveals a much wider failing of contemporary administrative law scholarship. First, I show how there has not yet been, and is unlikely to be, a satisfactory answer to the conceptual critique. Following on from this premise, I suggest that the assumptions underlying the conceptual critique are faulty and, administrative lawyers need to fundamentally alter and expand how they study legitimate expectations. The aim now, I argue, must be to move towards providing an account of the practice of legitimate expectations in the wider context of public administration. My specific argument in this paper is thus a case for a significant reorientation and an expansion of the study of how law protects legitimate expectations, but the wider suggestion is that the same shift is required in administrative law scholarship generally.

Keywords: public law; legitimate expectations; conceptual foundations; administrative law; administrative justice; judicial review

Introduction

Is there a convincing account of the purpose of protecting legitimate expectations through administrative law? It has become almost *de rigueur* in recent years to suggest that there is not, and to suggest that scholars need to do more theoretical work to compensate for this.[1] This paper responds to two influential articulations of this 'conceptual critique' of legitimate expectations.[2] In particular, it traces the prominent arguments of Christopher Forsyth and Paul Reynolds, both of whom suggest that the doctrine would be assisted by identification of some sort of 'meta-value' that can offer useful guidance on controversial questions related to legitimate expectations.[3] By sifting through each of the prominent accounts – found in both case law and scholarship – of the doctrine, I show that none of them manage

†Much of the research underpinning this paper was undertaken as part of a project funded by a University of Manchester President's Scholarship. I am very grateful to Robert Thomas for many extensive and helpful discussions on this topic, as well as Javier Garcia Oliva. I am also grateful to Adam Tucker, Adam Perry, Paul Daly, Graham Gee, and Richard Kirkham for valuable comments on various drafts. The usual disclaimers apply.

[1]P Reynolds 'Legitimate expectations and the protection of trust in public officials' (2011) PL 330; C Forsyth 'Legitimate expectations revisited' (2011) JR 429; J Watson 'Clarity and ambiguity: a new approach to the test of legitimacy in the law of legitimate expectations' (2010) 30(4) Legal Studies 633.

[2]This label is used as shorthand for the particular critique elaborated by these scholars as the core concern seems to be lack of a guiding concept.

[3]In this context, a 'meta-value' is a sole value that represents the overarching and distinct purpose that the doctrine serves within public law – a value which can also offer guidance as to how difficult questions concerning the doctrine ought to be resolved. The term is referred to in P Daly 'A pluralist account of deference and legitimate expectations' in M Groves and G Weeks (eds) *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2016) p 111.

to satisfy the conditions implicit within the critique of what a 'good' theory of legitimate ought to do. I therefore suggest that, instead, we need to revisit some of the assumptions of the critique; namely, that there is a pressing need for the type of theory scholars such as Reynolds and Forsyth propose, and that there is a pressing need in this area for more theory at all. I argue that both assumptions are faulty. If we are to theorise about legitimate expectations, then what I will refer to as a value pluralist approach is preferable. Taking this approach, there is much less to worry about in the state of the current law than those who adopt the conceptual critique appear to suggest. Furthermore, I argue there is no pressing need for more theory in this area of administrative law. If anything, contemporary administrative law scholarship is disproportionately dominated by a focus on both common law judicial principles and abstract debates: the debate around the conceptual critique is an artefact of this state of affairs. The pressing need is not for more theory, but for an account of the practice of legitimate expectations in the wider context of public administration. My specific argument in this paper is a case for a significant reorientation and an expansion of the study of how law protects legitimate expectations, but my wider suggestion is that the same shift is required in administrative law scholarship generally.[4]

My argument here is structured around two broad tasks: explaining how there has been no satisfactory answer to the conceptual critique so far; and explaining why the assumptions underlying the conceptual critique are faulty and why administrative lawyers need to alter and expand how they study legitimate expectations. I take up the first of these tasks in the first four parts of the paper. In part 1, I introduce the conceptual critique. I also set out what the conceptual critique implies a good theory of legitimate expectations ought to do. Parts 2 and 3 analyse accounts of the doctrine which can be extracted from contemporary judgments and scholarship respectively. Part 4 analyses the preferred account of both Reynolds and Forsyth: that maintaining trust in government is the purpose of the doctrine. Through discussing various accounts of the doctrine, I demonstrate how no account can satisfy the conceptual critique's conditions for a good theory of legitimate expectations – even the account of the doctrine offered by those who advance the critique does not achieve this. In the final two parts of this paper I take up the second task. In part 5, I argue, in contrast to Reynolds and Forsyth, that if we are to build a theory of legitimate expectations then a value pluralist approach to legitimate expectations ought to be preferred. In the final part of the paper, I argue that recent administrative law scholarship has focused excessively on both abstract theory and common law principles of judicial review. Given these two imbalances, I suggest there is no pressing need to argue for more theory in administrative law – at very least, there is no pressing need for more theory in respect of legitimate expectations. Instead, the scholarship requires an understanding of the practice of legitimate expectations in the wider context of public administration.

1. The conceptual critique

Particularly since the landmark case of *Coughlan*, which recognised the protection of substantive expectations, there has been an intense debate across the common law world about whether the development of legitimate expectations is to be welcomed,[5] and the case law remains a source of 'continuing controversy'.[6] It is this long-running debate, or perhaps a fatigue from perceived lack of progress in the debate, from which the conceptual critique emerged. As Forsyth puts it:

> Today we are overwhelmed by the decided cases as well as the scholarly writing… notwithstanding those many judgments and the acres of scholarly writing, we have made little progress… there

[4]The claim substantiated fully here pertains to legitimate expectations specifically. While it is suggested that this is indicative of a wider pattern of thought in administrative law scholarship, a much wider argument would be necessary to substantiate that claim fully.

[5]See generally M Elliott 'From heresy to orthodoxy: substantive legitimate expectations in English public law' in Groves and Weeks, above n 3; J Tomlinson 'The narrow approach to substantive legitimate expectations and the trend of modern authority' (2017) 17(1) Oxford University Commonwealth Law Journal 75.

[6]*United Policyholders Group v Attorney General for Trinidad and Tobago* [2016] UKPC 17 at [79]–[81].

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

> is a real danger that the concept of legitimate expectation will collapse into an inchoate justification for judicial intervention… it seems to me that the time has come to return to fundamentals. So we should ask fundamental questions about the justification and the task of the concept of legitimate expectations.[7]

Much of the possible criticism of legitimate expectations now represents well-trodden territory for academics, but this particular criticism – that the doctrine suffers from the absence of a clearly identified purpose – has, however, not been so thoroughly examined. This is so even though more and more scholars have referred to this concern in recent years.[8] Such concerns have also been reflected in the Court of Appeal. In a 2005 decision, Laws LJ stated that he was left unfulfilled by the present conceptual understanding of the doctrine (referring to the understanding of the doctrine as an instrument of 'fairness' that existed to protect against the 'abuse of power'). Laws LJ stated, after applying the 'fairness amounting to an abuse of power' test, that 'it very unsatisfactory to leave the case there. The conclusion is not merely simple, but simplistic. It is little distance from a purely subjective adjudication… It is superficial because in truth it reveals no principle'.[9] For Laws LJ, a clearer account of the doctrine purpose, one that 'lies between the overarching rubric of abuse of power and the concrete imperatives of a rule-book',[10] was required to 'move the law's development a little further down the road'.[11] If these broad lines of thought are correct, then it follows, some scholars claim, that the doctrine risks becoming a 'semantic label too easily open to being argued (and perhaps applied) in entirely inappropriate cases'.[12]

This paper challenges this conceptual critique on multiple fronts. First, however, it is important to explain precisely what I take the conceptual critique to mean and how I will assess various accounts of the doctrine's purpose. The discussion here focuses on the critiques of Christopher Forsyth and Paul Reynolds, both of whom suggest separately that the doctrine would be assisted by identification of some sort of 'meta-value', as this would offer useful guidance on controversial questions related to the doctrine. It focuses on the work of Forsyth and Reynolds for three key reasons. First, theirs are the most widely-cited and most developed versions of the critique. Secondly, they take a substantially similar approach – referencing and supporting each other in their accounts. Thirdly, it is important when engaging with a widely-adopted argument not to combine multiple scholars and create a strawman.[13]

The conceptual critique, as articulated by Reynolds and Forsyth, suggests that a theory of legitimate expectations ought to comply with certain conditions. Though they do not always explicitly state what type of theory they seek, these criteria are evident in the arguments they put forward. The criteria which can be extracted from their critique are, broadly stated, that: the theory has to fit the present doctrine's role, at least in some broad sense; the theory has to show some fidelity to existing legal principle; the theory has to be able to provide practical guidance in cases; and the theory has to be based on one 'meta-value' or overarching purpose.[14] While these criteria are not defined closely, they provide a sense of what is to be valued in a theory according to Reynolds and Forsyth.[15] In the next three parts of this paper, I assess whether any accounts of the purpose of legitimate expectations provided by the judiciary and scholars meet these broad criteria. My argument is that none of the accounts considered

[7]C Forsyth 'Legitimate expectations revisited' (2011) JR 429 at 429–430.

[8]Daly, above n 3, p 101.

[9]*R (on the application of Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [67].

[10]Ibid, at [67].

[11]Ibid, at [67].

[12]Reynolds, above n 1, at 335.

[13]M Taggart 'Prolegomenon to an intellectual history of administrative law in the twentieth century: the case of John Willis and Canadian administrative law' (2005) 43(3) Osgoode Hall Law Journal 223 at 230.

[14]These points can all be inferred from Reynolds, above n 1, and Forsyth, above n 7.

[15]This set of criteria are similar to the criteria set out in SA Smith *Contract Theory* (Oxford: Oxford University Press, 1993) ch 1 (discussing the criteria of fit, coherence, morality, and transparency).

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

do meet these criteria and, as a result, we ought to revisit the key assumptions underpinning the conceptual critique.

2. Judicial accounts

Since the early days of the doctrine, the judiciary has, on occasion, offered various views on the purpose of protecting of legitimate expectations (in particular, Laws LJ has made various contributions from the Court of Appeal). Since the early 1980s onwards, the judiciary has justified the doctrine primarily by reference to three ideas. First, within contemporary English jurisprudence legitimate expectations is perhaps most widely understood as a basic principle of fairness.[16] There are many cases where fairness is referenced as a justification for the protection of procedural legitimate expectations throughout the 1980s.[17] As the courts toiled with the notion of substantively protecting expectations throughout the 1990s, the fairness conception was progressively extended beyond its initial procedural form in order to accommodate the protection of substantive expectations.[18] To this day, the notion of fairness is referenced heavily in legitimate expectations judgments, justifying the position set out in de Smith that legitimate expectation is a 'basic principle of fairness'.[19] Second, an account which has become prominent from the mid-1990s onwards, though it appears to be of earlier origin, holds that the doctrine exists to prevent the abuse of power. The core of this account is that legitimate expectations ought to be protected as to do otherwise would be to allow the state to abuse its powers, which it ought to exercise in the public interest.[20] The abuse of power account quickly became more pervasive in legitimate expectations cases as substantive protection was being recognised and developed by the courts. Reference to abuse of power is, much like fairness, now commonplace in judgments. Indeed, it is now common to hear the two ideas run together, with a court asking: is the public authority's conduct so unfair as to amount to an abuse of power?[21] A third prominent account is that the protection of legitimate expectations is a requirement of good administration.[22] Laws LJ has offered the most developed version of this account, suggesting that good administration requires that 'public bodies… deal straightforwardly and consistently with the public'.[23] Good administration is, he argued, is akin to the right to a fair trial and the principle of no punishment without law.[24]

The main criticism advanced, including by Reynolds and Forsyth, about each of these accounts is that they do not tell us what distinguishes legitimate expectations cases from other cases, ie they do not define sufficiently the purpose of the doctrine. The value 'added' to administrative law protections by the doctrine is most visible and most significant when an expectation founds the basis for the court

[16] *Attorney General of Hong-Kong v Ng Yuen Shiu* [1983] 2 AC 629; *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 415 (Lord Roskill), 412 (Lord Diplock).

[17] For instance see *R v Inland Revenue Commissioners, ex p MFK Underwriting Agents* [1989] STC 873.

[18] Eg *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213.

[19] H Woolf et al *de Smith's Judicial Review* (London: Sweet and Maxwell, 7th edn, 2013) p 662.

[20] *Coughlan*, above n 18, at [57]; *R v Inland Revenue Commissioners, ex p Preston* [1985] AC 835 at [71]; *R v Secretary of State for Education, ex p Begbie* [2000] 1 WLR 1115 at 1129; *Nadarajah*, above n 9, at [52].

[21] This was the question asked in *Coughlan*, above n 18, at [78] (Lord Woolf MR). See also *R (Parents for Legal Action Ltd) v Northumberland County Council* [2006] EWHC 1081 (Admin) at [68]; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2008] UKHL 61 at [135]; *Paponette & Others v Attorney General of Trinidad and Tobago (Trinidad and Tobago)* [2010] UKPC 32 at [32]. The implication of these dicta, on a plain language reading at least, appears to be that the abuse of power account of the doctrine presents a higher threshold for claimants than unfairness. It would seemingly follow from this that the abuse of power account is somehow narrower than the fairness account. There is, however, no clear dicta on this point.

[22] *Nadarajah*, above n 9; *Ng Yuen Shiu* [1983] 2 AC 629; *Council of Civil Service Unions* [1985] AC 374 at 401; *R (on the application of Niazi) v Secretary of State for the Home Department* [2008] EWCA Civ 755; *Bancoult (No 2)*, above n 21, at [182]; *R (on the application of Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 at [311]–[312]; *R (on the application of British Medical Association) v General Medical Council* [2008] EWHC 2602 (Admin).

[23] *Nadarajah*, above n 9, at [68].

[24] Ibid, at [68].

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

protecting a claimant who can establish no other basis for protection, ie where the legitimate expectation is the sole reason for protection.[25] A convincing account of legitimate expectations must explain this distinctiveness, so the criticism goes. None of the accounts of the doctrine found in the case law achieve this. They are, instead, general justifications for public law protections – or what Paul Daly calls administrative law 'mission statements'[26] – but explain little if anything about the particular significance of protecting expectations induced by public bodies.[27] In other words, the 'promiscuity'[28] of these concepts can be said to leave the doctrine without 'any real content'.[29] Recently, in *Gallaher,* the Supreme Court made a similar point, stating '[s]uch language adds nothing to the ordinary principles of judicial review'.[30] Curiously, it was this criticism that appears to have given cause for Laws LJ to advance good administration as an alternative account of the doctrine.[31] However, the very same criticism can be levelled at that explanation.

Another line of criticism that has been developed by Forsyth and Reynolds is that the accounts of the doctrine in the case law do not offer practical guidance as to how legitimate expectations cases ought to be decided. Laws LJ has persistently articulated this complaint too. In reference to the abuse of power account, he stated in the *Begbie* case that '[t]he difficulty, and at once therefore the challenge, [is] in translating this root concept or first principle into hard clear law'.[32] The core of the complaint here is that the present understandings of the purpose of the doctrine in the case law are playing no useful role in identifying whether the court should intervene or not in any given case.[33] Thus, so the criticism goes, when the courts state that they are protecting expectations on the basis of ensuring fairness or preventing the abuse of power etc, they are, in essence, making what Reynolds has labelled a 'conclusory statement' about the doctrine rather operating on the basis of some coherent account of the purpose of this area of law.[34] On this view, the accounts found in the case law are no more than an ex-post gloss applied to a decision made by other means.

3. Other accounts

Various other accounts of legitimate expectations can be found outside the domestic case law.[35] Can these alternative accounts meet the call for theory made by the conceptual critique?[36] Three of the most prominent alternative accounts of the doctrine are explained and examined here: that legal

[25]R Moules, *Actions against Public Officials: Legitimate Expectations, Misstatements and Misconduct* (London: Sweet & Maxwell, 2009) p 49. See also P Elias 'Legitimate expectations and judicial review' in J Jowell and D Oliver (eds) *New Directions in Judicial Review* (London: Stevens, 1988) pp 40–42.

[26]Paul Daly describes 'mission statements' as attempts 'to formulate a general principle that unifies disparate strands of case-law', a practice that he sees as 'attractive' but 'facile': see P Daly 'The language of administrative law' (2016) 94 Canadian Bar Review 519.

[27]This complaint is well articulated by Reynolds, above n 1.

[28]F Ahmed and A Perry 'The coherence of the doctrine of legitimate expectations' (2014) 73(1) CLJ 61 at 69.

[29]Reynolds, above n 1, at 335. This point is well demonstrated by Elliott's study of the deployment of the phrase 'abuse of power' in the case law, in which he identifies five distinct uses: M Elliott 'Legitimate expectations and the search for principle: reflections on *Abdi & Nadarajah*' [2006] JR 281 at 284.

[30]*R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25, [2018] 2 WLR 1583 at [41]. For wider discussion on the remarks on language in this case, see S Daly and J Tomlinson 'Administrative inconsistency in the courts' [2018] JR 190.

[31]*Nadarajah*, above n 9, at [67].

[32]*Begbie*, above n 20, at [67].

[33]Reynolds, above n 1, at 332; Forsyth, above n 7, at 431; S Schønberg *Legitimate Expectations in Administrative Law* (Oxford: Oxford University Press, 2000) p 8.

[34]Reynolds, above n 1, at 333. See further how Knight observed, '[w]hether one thinks about legitimate expectations in terms of fairness [or] abuse of power… it is extremely unlikely that it will provide the answer to the case at hand': CJS Knight 'Expectations in transition: recent developments in legitimate expectations' [2009] PL 15 at 18.

[35]Those considered here are those most frequently referred to, explicitly or implicitly, in English legal jurisprudence and scholarship.

[36]A similar inquiry, albeit within different terms, was undertaken in Schønberg, above n 33, ch 1.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

certainty is the basis of the doctrine; that protecting legitimate expectations is a requirement of the constitutional principle of the Rule of Law; and that the doctrine exists in order to protect losses created by public authorities when expectations that have been relied upon are disappointed. I argue that none of these accounts offer convincing responses to the conceptual critique.

Much of the conceptual analysis of legitimate expectations within EU law has revolved around the idea of legal certainty.[37] Broadly stated, legal certainty requires that the law must provide those subject to it with the ability to regulate their own conduct in accordance with the law. The suggestion that promoting legal certainty is the purpose of legitimate expectations is powerfully stated in Schwarze's leading treatise on *European Administrative Law*, in which it is argued that that the principle of legitimate expectations has emerged 'as a corollary of the principle of legal certainty'.[38] A review of CJEU case law indicates that the Luxembourg court views legal certainty and legitimate expectations as being extremely closely related, almost to the point of considering them to be the same thing.[39] Occasional mention of legal certainty is also made in a number of English legitimate expectation cases.[40] What does adopting a legal certainty account of legitimate expectations entail? Fordham states that '[w]hat is in play [in legal certainty issues] is the idea that people deserve to know where, *in law*, they stand'.[41] Popelier offers a more extensive exposition of the same core idea, explaining that legal certainty is designed to secure personal autonomy so that all people are able to make decisions relating to their future.[42] It would follow from such broad understandings of the idea that, if promoting legal certainty is the purpose of the doctrine, legitimate expectations will be protected only insofar as such protection will enhance the overall clarity and predictability of the law.

In terms of whether *any* fit can be established between legitimate expectation and legal certainty, it is readily apparent that both legal certainty and legitimate expectations can operate to protect individuals, and their autonomy, from arbitrary and unfair exercises of public powers, and occasionally the demands of both will be identical. It is thus difficult to deny that at least *some* link exists between legal certainty and the protection of legitimate expectations, and Reynold and Forsyth do not deny this too. However, this understanding of the doctrine falls down – according to the criteria of Forsyth and Reynolds – because legal certainty and the protection of legitimate expectation are separate and may conflict.[43] Thomas highlights this potential for conflict, explaining that '[l]egal certainty is an objective value… whereas legitimate expectations operate in the context of a specific relationship between an individual, or a specific class, and the administration'.[44] For Reynolds, the potential for conflict between legal certainty and the protection of expectations is perhaps best demonstrated by the fact that the doctrine of legitimate expectations has been consistently rejected by French courts, as it is understood to be incompatible with French law's absolute insistence on the *principe de sécurité des situations juridiques*.[45] Put simply, French public law does not incorporate the protection of legitimate expectations in favour of prioritising certainty of the law as a whole.[46] Reynolds and Forsyth also point to the fact that legitimate expectation and legal certainty both have distinct origins,

[37]On the 'connected' principles of legal certainty and legitimate expectations in EU administrative law see P Craig *EU Administrative Law* (Oxford: Oxford University Press, 2012) ch 18.

[38]J Schwarze *European Administrative Law* (London: Sweet & Maxwell, 1st (English) edn, 1992) p 872.

[39]Eg *Salumi v Amministrazione delle Finanze* [1981] ECR 2735.

[40]*Begbie*, above n 20, at [29].

[41]M Fordham 'Legitimate expectation II: comparison and prediction' (2001) JR 262 at 263 (emphasis added).

[42]P Popelier 'Legitimate expectations and the law maker in the case law of the European Court of Human Rights' (2006) EHRLR 10. There are clear links between the concept of legal certainty and the concept of the Rule of Law here; see for example the role of legal certainty in J Raz *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 2009) ch 11. On the general concept of legal certainty see further HWR Wade 'The concept of legal certainty: a preliminary skirmish' (1941) 4(3) MLR 183; Lord Mance 'Should the law be certain?' (The Oxford Shrieval Lecture, 11 October 2011).

[43]Reynolds, above n 1, at 339–41.

[44]R Thomas *Legitimate Expectations and Proportionality in Administrative Law* (Oxford: Hart Publishing, 2000) pp 45–46.

[45]The principle of stability of legal issues/legal certainty.

[46]Schwarze, above n 38, p 869.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

despite emerging from the same legal system: both concepts originate from German law and within that jurisprudence they are separate.[47] Legal certainty is based on the principle *rechtssicherheit*, a principle that demands certainty of the content of law and is primarily employed in cases concerning retroactive law, whereas the protection of legitimate expectations is derived from the principle of *vertrauensschutz*, which seeks to ensure that 'everyone who trusts the legality of a public administrative decision should be protected'.[48] As such, legal certainty is not deemed a convincing account of legitimate expectations by the conditions required by the conceptual critique.

Proponents of the Rule of Law account of legitimate expectation have cropped up both in this jurisdiction and others.[49] This account conceives the doctrine as one aspect of the constitutional principle of the Rule of Law. In particular, there is usually a link drawn between the idea that the Rule of Law requires the protection of individual autonomy and for individuals to be able to plan ahead and foresee, with some degree of certainty, the consequences of their actions.[50] The laws, and the public officials who administer them, are thus under a general obligation to ensure adequate predictability. From this Rule of Law requirement, we can, so the argument goes, justify the protection of legitimate expectations created by administration.

The Rule of Law account is convincing to the extent that a purpose of the doctrine could said to be ensuring sufficiently stable conditions for individuals to live their life within. This account of the doctrine could be criticised in multiple ways, but its main failing on the approach of Reynolds and Forsyth would surely be that it is too broad.[51] It is trite to observe that, despite a rich history, the Rule of Law remains a notoriously vague and contested concept.[52] By those who believe that the Rule of Law is more than a 'self-congratulatory rhetorical device',[53] different analytical understandings of its precise meaning are, implicitly or explicitly, developed, advanced, and defended.[54] There is a very broad range of nuanced theories concerning precisely what the Rule of Law demands. The extent of that range, and the disagreements within it, is perhaps best seen in the well-known and significant distinction between 'thin' (or 'formal') and 'thick' (or 'substantive') accounts of the Rule of Law.[55] It follows from the evident ambiguity of the Rule of Law that it will not suffice to meet the conceptual critique, as it cannot identify what the particular role of the doctrine is. Furthermore, even if it is clear that the Rule of Law demands the protection of legitimate expectations, it will not offer practical guidance on how the doctrine ought to be applied.

In many legitimate expectation cases, the court seems most concerned about protecting claimants' reliance interests[56] that have been either lost or affected by the disappointment of expectations, eg the loss of construction costs subsequent to unlawfully granted planning permission.[57] This is, perhaps, a

[47]R Errerra 'Legitimate expectation – principle of law to be applied only in relation to the implementation of EC Law – legal certainty' (2006) PL 858; Schwarze, above n 38, p 938.

[48]M Schroeder 'Administrative law in Germany' in R Seerden and F Stroink (eds) *Administrative Law of the European Union, Its Member States and the United States – A Comparative Analysis* (Antwerp: Intersentia Uitgevers Antwerpen, 2005) p 119.

[49]Eg P Craig 'Substantive legitimate expectations and the principles of judicial review' in M Andenas (ed) *English Public Law and the Common Law of Europe* (London: Key Haven, 1998) p 23 at pp 45–47; Woolf et al, above n 19, pp 563–64.

[50]For example see Raz, above n 42, ch 11.

[51]Some other possible criticisms of the Rule of Law account are discussed at length in Schønberg, above n 33, pp 12–24.

[52]J Waldron 'Is the rule of law an essentially contested concept (in Florida)?' (2002) 21(2) Law and Philosophy 137.

[53]JN Shklar 'Political theory and the rule of law' in AC Hutchinson and P Monahan (eds) *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) p 1.

[54]For an overview of the debate concerning the concept of the Rule of Law see J Waldron 'The rule of law' in EN Zalta (ed) *The Stanford Encyclopedia of Philosophy* (Fall 2016 edition).

[55]On this distinction, see PP Craig 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) PL 467 at 467.

[56]It could be said that there are two main forms of detriment: concrete detrimental reliance, such as the expenditure of money pursuant to a representation, and moral detriment, where the harm may be, for instance, emotional suffering. I refer at this point only to the former.

[57]D Barak-Erez 'The doctrine of legitimate expectations and the distinction between reliance and expectation interests' (2005) 11(4) European Public Law 583.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

corollary of the natural concern of the courts that the redress provided via judicial review should be as practically effective as possible. Can it be said, however, that the whole doctrine ought to be understood as a means of protecting reliance interests?[58] Schønberg offers a possible formulation for understanding the protection of legitimate expectations in reliance terms: a public authority's freedom to take action in the public interest is limited to the extent that it causes harm to particular individuals; if a public authority has induced a person to rely upon its representations or conduct, realising that such reliance was real possibility, it is under a prima facie duty to act in such a way that the reliance will not be detrimental to the representee; the authority must honour the expectations created by its representation or, at least, compensate the person affected for his reliance loss.[59] For Forsyth and Reynolds, such a theory of legitimate expectation would likely not suffice, as it seems to contradict established legal principle. While the presence of reliance interests in a case may lead a court to adopting a more rigorous approach to scrutiny of the reasons advanced by the public authority for disappointing an expectation, there is no strict requirement that detrimental reliance be present for a legitimate expectation to be protected.[60] This position, which has recently been affirmed by the Supreme Court, undermines any possible account of the doctrine based on reliance interests.[61]

4. Trust in Government

A growing school of thought amongst administrative lawyers is that the doctrine of legitimate expectations is about protecting trust placed in administrative bodies by members of the public. This is also the account of legitimate expectations that Reynolds and Forsyth put forward. It is argued here that the theory fails by Reynolds' and Forysth's own criteria, despite their claims to the contrary. First, it is important to explain the account in a little more detail.

Over two decades ago, Forsyth highlighted how trust in government is essential and the, then young, doctrine of legitimate expectations was concerned with ensuring that trust was maintained.[62] To Forsyth, the trust account of the doctrine is that those who have placed their trust in the promises of officials should not go without a remedy if that trust is breached. Wade and Forsyth further state that the trust account 'captures precisely why legitimate expectations should be protected'.[63] As the literature on legitimate expectations grew and grew over the past few decades, more and more references to trust appeared. Thomas, for example, noted trust as a 'justification' for the principle[64] and Schønberg, in a study of legitimate expectations, argued that effective administration is impossible without trust.[65]

More recently, the suggestion that the purpose of the doctrine is to protect trust in government appears to have gained traction. Much of the impetus for this could possibly be attributed to the widely-cited work of Reynolds and Forsyth. The trust account is now also beginning to be referred to in judgments. Perhaps the most important example of this, to date, is how the concept of trust has entered the jurisprudence of the Upper Tribunal (Immigration and Asylum Chamber). In the

[58]A clear account of this idea is provided in Schønberg, above n 33, pp 9–11. This idea is also visible in GT Pagone 'Estoppel in public law: theory, fact, and fiction' (1984) University of New South Wales Law Journal 267 at 275–76; R Cranston 'Reviewing judicial review' in G Richardson and H Genn (eds) *Administrative Law and Government Action: The Courts and Alternative Mechanisms of Review* (Oxford: Clarendon, 1994).

[59]Schønberg, above n 33, p 10.

[60]*R (Bibi) v Newham LBC* [2001] EWCA Civ 607 at [55]. See also *Bancoult (No 2)*, above n 21, at [60] (Lord Hoffmann), where it is stated that '[i]t is not essential that the applicant should have relied upon the promise to his detriment, although this is a relevant consideration'.

[61]*In the matter of an application by Geraldine Finucane for Judicial Review* [2019] UKSC 7 at [62] (Lord Kerr); [156]–[160] (Lord Carnwath).

[62]C Forsyth 'The provenance and protection of legitimate expectations' (1988) 47 CLJ 238.

[63]HWR Wade and CF Forsyth *Administrative Law* (Oxford: Oxford University Press, 11th edn, 2009) p 447.

[64]Thomas, above n 44, p 45.

[65]Schønberg, above n 33, p 25.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

Mehmood case,[66] the then President of the Chamber, McCloskey J, endorsed Professor Forsyth's statement that '[g]ood government depends upon trust between the governed and the governor. Unless that trust is sustained and protected officials will not be believed and the Government becomes a choice between chaos and coercion'.[67] McCloskey J then went on to state that 'the two basic ingredients of what the law has come to recognise as a substantive legitimate expectation are satisfied where there is an unambiguous promise or assurance by a public official *in which the affected citizen reposes trust*'.[68] This statement was again confirmed by McCloskey J in the *Iqbal* case.[69]

What precisely is meant by 'trust' in this context? For Reynolds, the idea of 'trust' refers to the trust that the individual places in the actions of a public authority that induce the expectation. Thus legitimate expectations ought to be protected because to do otherwise would be to permit a breach of the individual's trust in the public authority.[70] While the protection of legitimate expectations may serve to promote 'general' trust in government (something that it has been suggested is essential to its effective functioning and legitimacy),[71] Reynolds suggests the purpose of the principle ought to be the protection of what he refers to as 'specific' instances of trust between the state and the individual. [72] This refinement is seen as necessary, as arguing to the contrary would be to accept that a legitimate expectation could be simply an expectation that the claimant is treated fairly or 'properly', thereby becoming a concept which is 'uselessly overextended'.[73] According to Reynolds, establishing the existence of a specific instance of trust to show the presence of an expectation is one matter but whether the court ought to afford legal protection to that expectation is another matter entirely.[74] Thus, that 'specific trust exists is a necessary, but not a sufficient condition to establishing [the protection of] a legitimate expectation'.[75] It follows that what needs to be shown:

> [I]s that a relevant representation has been made by the public authority and that it has been received by the claimant: this will be sufficient to form a rebuttable presumption that the claimant trusted the public authority to stand by that representation.[76]

Another question prompted here is what sort of 'representation' is capable of inducing 'specific trust'? For Reynolds, an administrative body's promises, policies, and practices will seemingly all suffice as long as they are capable of giving rise to a specific instance of trust: '[i]t is entirely possible for a representation made by way of a policy statement to incite specific trust that that public official will stick to her word'.[77]

There is at least one crucial point where the trust account falls down by reference to Reynolds's and Forsyth's own criteria for a theory of legitimate expectations. That problem revolves around the distinction between expecting and trusting. The general, ordinary language definition of 'trust' is a

[66] *Mehmood (Legitimate Expectation)* [2014] UKUT 469 (IAC) at [13]–[16].
[67] Ibid, at [15], quoting Wade and Forsyth, above n 63, p 447.
[68] Ibid, at [15] (emphasis added).
[69] *Iqbal (Para 322 Immigration Rules)* [2015] UKUT 00434 (IAC) at [11] (McCloskey J).
[70] Reynolds, above n 1.
[71] The idea that general public trust in government institutions is a virtue is itself a highly controversial claim. In an authoritative work on the topic, Hardin advanced the thesis that '[t]rusting institutions makes little sense for most people most of the time': see R Hardin 'Do we want trust in government?' in ME Warren (ed) *Democracy & Trust* (Cambridge: Cambridge University Press, 1999) p 23.
[72] Reynolds, above n 1, at 343–47.
[73] Ibid, at 343.
[74] Ibid, at 346–47.
[75] Ibid, at 344.
[76] For Reynolds, 'receipt' of the representation will 'necessarily require that the applicant understands the representation to the extent necessary to form a true legitimate expectation (that is one based on specific trust). This will not require the comprehension of complex policies but simply basic comprehension of the decision-maker's representation regarding the claimant (individually or as a class)', see ibid, fn 99.
[77] Ibid, at 348.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

firm belief that something is reliable, true, or able.[78] The general, ordinary language definition of 'expect' is to regard something as likely.[79] The trust account of the doctrine ignores that one can *expect* something without *trusting* that it will happen. That is to say, one can regard something as likely to happen (and maybe even hope it will happen) without holding the firm belief (or trusting) that it will happen. An example helps to illustrate this point. Suppose that there are three housemates who, after two years of cohabiting, have developed a consistent practice of washing up immediately after each time they have cooked and eaten. If housemate *X* has cooked and eaten, then housemates *Y* and *Z* may both *expect* her to wash up immediately afterwards (an expectation that would be rooted in past, consistent practice). It is also perfectly possible and plausible that housemate *Y* does a have a firm belief (ie trusts) that housemate *X* will wash up. At the same time, it is equally possible and plausible that housemate *Z* has developed such firm belief about the future conduct of housemate *X*. Housemate *X* could have, for instance, proven to be unreliable in other interactions in a way which prevents housemate *Z* from moving beyond having an expectation to having a firm belief. There is, therefore, a clear gap between the concepts of trust and expectation. In this respect, the trust account of legitimate expectation is somewhat artificial – despite being advanced by Reynolds and Forsyth, it seems to fail by their own standards for a theory as it does not relate to what the doctrine actually does. There are, though, two main possible rejoinders to this point which must be addressed.

The first possible rejoinder is to argue that it ought to be a requirement, for a legitimate expectation claim to be valid, that a claimant has *actually* placed trust in a public authority. The problem with this line of argument is that it forces an unjustified distinction, potentially between similar cases, to be made between those individuals who have actually placed trust in a promise, policy, or practice of an administrative body and those who did not (and merely had an expectation). This is an arbitrary distinction (especially where not trusting the public authority that induced the expectation may, in the face of that expectation being disappointed, appear to have been the wiser view). Returning to the example introduced above makes this point clearer: in the event that housemate *X* does not wash up after eating, does housemate *Y* have a legitimate grievance and housemate *Z* not? It seems difficult to argue seriously that this is the case yet this first rejoinder would inevitably lead us to the conclusion that it is. The classic case of *Coughlan* also demonstrates this point.[80] The claimant in that case was clearly nervous about the promises made by the authorities and therefore deliberately sought reassurances. It would surely not vary the legal analysis if Miss Coughlan had ultimately continued not to be convinced of the authority's promises and never actually placed trust in them.

A second possible rejoinder concerns an apparent distinction between 'trust' in an administrative body and 'trusting' that the body will adopt a certain course of action. There is certainly a distinction between these two senses of 'trust'. For instance, an individual may 'trust' that someone will betray them, but, under those conditions, it would be unwise to 'trust' them. As discussed above, Reynolds suggests the purpose of legitimate expectations ought to be seen as the protection of what he refers to as 'specific' instances of trust between the state and the individual.[81] This refinement is seen as necessary, as arguing to the contrary would be to accept that a legitimate expectation could be simply an expectation that the claimant is treated fairly or 'properly', thereby becoming a concept which is stretched beyond meaning.[82] It would seem, therefore, that the trust referred to by those who defend the trust concept aligns with 'trusting' that the agency will adopt a certain course of action in particular circumstances. It is this sort of trust – which ultimately relates to one's view as to the probability of a particular eventuality – which the above critique of the trust account, it has been suggested, undermines.

The trust account of the doctrine is therefore artificial, as it does not adequately connect with how the doctrine applies in reality. Such a conclusion does not undercut the fact that in many cases the

[78] *Oxford English Dictionary and Thesaurus* (Oxford: Oxford University Press, 2007) p 1107.
[79] Reynolds, above n 1, at 358.
[80] *Coughlan*, above n 18.
[81] Reynolds, above n 1, at 343–47.
[82] Ibid, at 343.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

desire to protect specific instances of trust in public authorities may provide powerful normative justification for the protection of legitimate expectations – in many cases, it is evident it does. What we are left with now, however, is no satisfactory response to the conceptual critique as it is expressed by Reynolds and Forsyth.

5. Doing different theory

If the search for theory in response to the conceptual critique has failed to provide a compelling answer, are the assumptions underlying the conceptual critique correct? In the final two parts of this paper I revisit two key assumptions of the critique; namely, that there is a need for the particular sort of theory scholars such as Reynolds and Forsyth suggest, and there is a pressing need in this area for more theory. It is suggested that both of these assumptions are not necessarily correct.

In response to the failure to find a solution which fits the conceptual critique, it could be argued that it is important to continue the search for some meta-value that will 'provide invaluable guidance to difficult questions concerning the scope and effect of the doctrine'.[83] In other words, once the core normative function of the doctrine is understood then guidance about how present controversies are to be resolved can be uncovered. The problem here is that such a search does not, as the above analysis demonstrates, appear to yield an obvious answer. It also seems unlikely that some presently unknown and compelling account of the doctrine will somehow emerge.

Another response is to argue that a different type of theory is more viable. More specifically, we need to depart from some or all of the criteria that Reynolds and Forsyth appear to suggest are required of a theory in the context of legitimate expectations. This is Paul Daly's approach to building an account of the purpose of legitimate expectations.[84] Jettisoning the approach of Reynolds and Forsyth, Daly has provided a 'value pluralist account' of legitimate expectation, which 'rather than assigning priority to any one value – or casting about for an alternative meta-value that is not easily found in the cases', instead 'attempts to accommodate them all, reconciling them where necessary'.[85] On this value pluralist approach, it is accepted that multiple normative values underpin the protection of legitimate expectations and where, in particular cases, those values conflict (both with each other and with values related to, for instance, wider constitutional norms), reconciliation must be sought as far as is possible.

This value pluralist approach is more viable for a range of reasons. It is only normal that the 'doctrine may not map clearly onto the various justifications offered for it from time to time'.[86] This approach also seems to more closely reflect that the doctrine applies in a wide range of factual scenarios spanning the vast functions of the modern administrative state. Given that it is a general principle of judicial review with broad application, it is inevitably the case that various values will be in play, or be less or more significant, in different legitimate expectations cases.[87] Furthermore, the doctrine is 'still developing'[88] and is part of a wider system of judicial review that is constantly evolving.[89] Like every new doctrine, especially of common law origin, legitimate expectations 'has not followed inexorably from an agreed set of first principles', nor could it be reasonably expected to.[90] The doctrine of legitimate expectations also imposes both procedural and substantive restrictions on administrative

[83]Ibid, at 330.

[84]Daly, above n 3.

[85]Ibid, p 111, citing the influence of SR Munzer *A Theory of Property* (Cambridge: Cambridge University Press, 1990). The concept of 'pluralism' is much-debated within legal theory. Here, however, it is simply a term used, as Daly uses it, to refer to the presence of more than one normative value.

[86]Daly, above n 3, p 101.

[87]P Cane, *Administrative Law* (Oxford: Oxford University Press, 5th edn, 2011) pp 9–11; *AXA General Insurance Ltd v HM Advocate* [2011] UKSC 4 at [170] (Lord Reed).

[88]*Rowland v Environment Agency* [2003] EWCA Civ 1885 at [100] (May LJ).

[89]*Council of Civil Service Unions* [1985] AC 374 at 414 (Lord Roskill).

[90]Daly, above n 3, p 102.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

power. Cases involving substantive expectations typically involve different normative values – or, at least, differing emphasis on certain values – than cases involving procedural expectations.[91] This was demonstrated, for instance, through how the courts 'had little difficulty in recognising the existence of procedural legitimate expectations'[92] but underwent some degree of turmoil in deciding to accept the protection of substantive legitimate expectations. This therefore seems a more realistic approach to theory building in respect of legitimate expectations, if we wanted to build one.

6. Doing more than a theory

A more pressing response, I would argue, to the question of whether we need a theory of legitimate expectations – one which goes to the heart of contemporary administrative law scholarship – is whether there is a need for more theory in this area at all? I would suggest the answer is 'no'. Contemporary administrative law scholarship contains two serious imbalances, both of which are embodied in the conceptual critique.

The first imbalance evident in this debate is a focus on common law principles as applied in judicial review. There is well-established critique of the dominant mode of administrative law scholarship in England and Wales: the vast majority of the administrative justice system is beyond its 'horizon'.[93] Study generalist or specialist scholarly journal that features public law work, and there is a high possibility that any public law commentary to be found focuses on judicial doctrine. Indeed, the term 'administrative law' is often equated with only the principles of judicial review. This could be seen as odd given the volume of cases dealt with in other parts of the system. Public authorities take millions of decisions each year,[94] and it has long been observed that much of that decision-making involves an interpretation of legal norms.[95] Even in the realm of dispute resolution, judicial review is marginal. Administrative review – that is, internal reconsideration by the relevant decision-maker – is now the largest public law dispute mechanism.[96] Tribunals – which are recognised judicial bodies – have long determined many more cases than judicial review does.[97] To be clear, there is not a near-obsessive focus on judicial review in administrative law scholarship, there is a near-obsessive focus on just the principles of judicial decision-making within judicial review. Many scholars have much to say about reasonableness, proportionality, procedural fairness etc. Comparatively little has been said about the rest of judicial review as a process.[98] Furthermore, the scholarship is primarily centred on the Court of Appeal and Supreme Court – courts which, by the nature of their permission criteria alone, deal with exceptional cases. The Administrative Court has consistently been marginalised in the vast majority of scholarship (which is, of course, not the only venue for judicial review: various tribunals have powers of judicial review).[99] Even within the discussion of judicial principles, some areas are debated almost endlessly while other areas are relatively neglected. There has, for

[91]Ibid, p 102.

[92]P Craig 'Substantive legitimate expectations in domestic and community law' (1996) 55 CLJ 289 at 290.

[93]G Richardson and H Genn 'Tribunals in transition: resolution or adjudication?' (2007) PL 116 at 118–19.

[94]For an overview of initial decision-making volume and trends see R Thomas and J Tomlinson 'Mapping current issues in administrative justice: austerity and the "more bureaucratic rationality" approach' (2017) 39(3) Journal of Social Welfare & Family Law 380.

[95]There has been much more work on this in the US than UK, eg JL Mashaw 'Between facts and norms: statutory interpretation of agency norms as an autonomous enterprise' (2005) 55 UTLJ 497. The core observations are not new, though: see B Wyman *The Principles of the Administrative Law Governing the Relations of Public Officers* (1903).

[96]Thomas and Tomlinson, above n 94, at 389–92.

[97]R Thomas 'Current developments in UK tribunals: challenges for administrative justice' in S Nason (ed) *Administrative Justice in Wales and Comparative Perspectives* (Cardiff: University of Wales Press, 2017).

[98]There are, of course, some important exceptions, eg R Rawlings 'Modelling judicial review' (2008) 61(1) Current Legal Problems 95; M Sunkin and V Bondy *The Dynamic of Judicial Review Litigation* (The Public Law Project, 2009); R Thomas 'Mapping immigration judicial review litigation: an empirical legal analysis' (2015) PL 652.

[99]S Nason 'Regionalisation of the Administrative Court and the tribunalisation of judicial review' (2009) PL 440.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

instance, been a swell of literature on substantive review.[100] At the same time, remarkably little has been said about the general principles of statutory interpretation in a public law context.[101] This is so in the face of the fact that the overwhelming majority of judicial reviews are claims about straightforward interpretation of an Act of Parliament or secondary legislation. These are entrenched oddities of scholarly perspective in contemporary administrative law.

The second imbalance on display in the debate about the conceptual critique is that, within its often extremely narrow focus, much of the debate around legal principle trades on abstractions. Public law in the UK was, historically, said to be anti-theoretical. In the past few decades, there has been a huge growth in the role of theory.[102] Administrative law in particular has also seen the effects of the influence of theory.[103] One of the effects of an increased connection with theory has been an ever-increasing focus on the abstract.

Various scholars have warned about over-relying on abstractions. It was a concern widely voiced by scholars of the functionalist style, which consistently cautioned of the dangers of getting bound up in concepts at the expense of material substance.[104] As the new millennium came, the functionalist style declined but the complaint about the use of abstractions did not go away. The main critique regarding the role of abstraction in public law thought appears now to be emanating from Graham Gee and Grégoire Webber. Their first crack at the problems with abstraction was an article on the 'grammar' of public law.[105] They observe that the 'dominant grammar' of public law is a 'product of abstraction that, at times, overemphasizes certainty and simplicity in a search for systematic coherence within the constitution, even where none exists'.[106] This argument is made in the context of the scholarship of prominent political constitutionalists, but the particular concern about abstraction was given fuller consideration in a later article on 'rationalism' in public law.[107] This work articulated many of the old functionalist concerns about abstraction through the framework of conservative philosopher Michael Oakeshott.[108] While abstractions have their place, having so much administrative law scholarship trade in the abstract means that practice can be – and has been – left understudied and not properly taken into account.[109]

The conceptual critique of legitimate expectations is an artefact of both of these major imbalances in contemporary administrative law thought. It, first, represents the focus on common law principles as applied in judicial review. The sheer amount of literature produced on legitimate expectations highlights this. As the case law developed, myriad articles and books were produced.[110] At least from one perspective, there is a serious sense of disproportion here: there are, collectively, more monographs, journal articles, and book chapters considering the potential perils of the doctrine of substantive expectations than there are cases where a public authority has been directed to act in line with its

[100]For which I am partly responsible, see JW Rylatt and J Tomlinson 'Something new in substantive review' (2016) JR 204. For an exasperated overview of the debate see Lord Carnwath 'From judicial outrage to sliding scales – where next for *Wednesbury*?' (ALBA Lecture, 12 November 2013).

[101]Lots of discussion has focused on the Human Rights Act 1998 and hard cases such as *R (Evans) v Attorney General* [2015] UKSC 21, where fundamental constitutional norms are said to be engaged, but there has been little said about routine cases involving statutory interpretation.

[102]This is commonly observed. For a good account see G Gee and G Webber 'Rationalism in public law' (2013) 76 MLR 708.

[103]Taggart, above n 13, at 229.

[104]M Loughlin 'The functionalist style in public law' (2005) 55 UTLJ 361.

[105]G Gee and G Webber 'A grammar of public law' (2013) 14 German Law Journal 2137. I have built on similar themes in an administrative justice context: see J Tomlinson 'The grammar of administrative justice values' (2017) 39(4) Journal of Social Welfare and Family Law 524.

[106]Gee and Webber, above n 105, at 2137.

[107]Gee and Webber, above n 102.

[108]M Oakeshott *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Fund, 1991).

[109]Gee and Webber, above n 102. See also C Harlow 'Politics and principles: some rival theories of administrative law' (1981) 44 Modern Law Review 113 at 117.

[110]There have now been at least five full-length books on legitimate expectations.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

earlier representation.[111] In the swelling literature, little has been said about how other administrative justice institutions manage situations where expectations are disappointed.[112] Ombudsmen, for instance, seem an institution which may be well placed to practically resolve grievances of this sort but are not adequately discussed.[113] The conceptual critique also plainly emphasises the abstract. The conceptual critique is perhaps the most excessive example of this, but nearly all debate has neglected practice in favour of more abstract debate. There has been scholarship on distinguishing sources of legitimate expectations,[114] comparative doctrinal scholarship,[115] discussion about judicial power and the clarity of principles,[116] discussion of how cases can be conceptually 'mapped',[117] and much more. All of this has been going on while administrative law scholars have broadly accepted an entirely deficient account of the practical aspects and impacts of the doctrine.[118]

To be clear, it is not my contention that it is a failing that we have a conceptually advanced and lively debate. Rather, the contention is that it is an egregious failing of scholarship that the conceptual debate is so advanced while, at the same time, our scholarship generally lacks accounts of the overall outcomes of legitimate expectations claims, what actually determines those outcomes (which may well be disconnected from what judges say to be deciding factors), the potentially multifaceted impacts of the doctrine on government, the doctrine's (likely variable) application in different policy sectors, how other administrative justice institutions deal with expectation-type grievances, and many other aspects of the material conditions and consequences of the doctrine. This situation is made even more disconcerting by the fact that many of the claims involved in the existing literature depend on empirical claims and other processes outside of judicial review.

These tendencies are also reflected elsewhere in the legitimate expectations scholarship. Take, for instance, the concern about substantive expectations representing a worrying extension of judicial power. Many critics of substantive legitimate expectations consider themselves as such because they fear that the doctrine represents the judiciary straying beyond their appropriate institutional and constitutional limits.[119] Much of that critique is premised on discussions in judgments. Certainly, what is said in judgments is of crucial importance in advancing and assessing claims about increased and potentially excessive judicial power. But this is only *one* means of assessing judicial power. Another means is looking at outcomes, ie the eventual results that the cases have actually brought about. If one were to advance a claim about a legal principle usurping the decision-making powers of public authorities, it would be of great concern – perhaps of greater concern than what is merely said in judgments – to build a detailed account about the extent to which such powers are actually usurped in practice through the outcomes of cases. The fact that this is lacking in the scholarship is indicative of the general neglect of practice in this area.

Another example can be seen in how a growing chorus of public lawyers are now arguing that there is a need to disaggregate different doctrines that supposedly lie within what we currently call legitimate expectations. The core contention here, as Jason Varuhas has put it, is 'that courts have often analysed cases in terms of legitimate expectations, which are not properly analysed as such, and more

[111]At least in the English and Welsh jurisdiction. See generally R Thomas 'Legitimate expectations and the separation of powers in English and Welsh administrative law' in Groves and Weeks, above n 3.

[112]The best analysis of alternative systems is contained in a practice text, see Moules, above n 25, chs 1, 9, 10.

[113]Moules, above n 25, ch 10.

[114]Eg R Clayton 'Legitimate expectations, policy, and the principle of consistency' (2003) 62 CLJ 93.

[115]Eg Groves and Weeks, above n 3; AK Sperr and D Hohenlohe-Oehringen (eds) *The Protection of Legitimate Expectations in Administrative Law: A Comparative Study* (Oxford: Hart Publishing, forthcoming).

[116]Eg Forsyth, above n 7; C Stewart 'Substantive unfairness: a new species of abuse of power?' (2000) 28 Federal Law Review 617.

[117]Eg J Varuhas 'In search of a doctrine: mapping the law of legitimate expectations' in Groves and Weeks, above n 3.

[118]There are some notable but very rare exceptions, eg Thomas, above n 111.

[119]Eg Forsyth, above n 7. On the idea of the courts having constitutional and institutional limitations see J Jowell 'Of vires and vacuums: the constitutional context of judicial review' in C Forsyth (ed) *Judicial Review and the Constitution* (Oxford: Hart Publishing, 2000) p 330.

https://doi.org/10.1017/lst.2019.29 Published online by Cambridge University Press

appropriately analysed by reference to other review doctrines'.[120] Rebecca Williams makes much the same point in her argument that we ought to 'realise that there may in fact be three different varieties of legitimate expectation, which have different conceptual and normative bases, which thus require different "ingredients" to be made out by the claimant and which can each be protected in a variety of ways'.[121] While this argument does not carry the exact same flaw as the conceptual critique addressed above – though it may carry others[122] – it does reveal a similar attempt to analyse administrative law through isolating common law principles and side-lining their function vis-à-vis administration and in practice more generally.[123]

Given these two imbalances, there is no pressing need to argue for more theory in administrative law – at very least, there is no pressing need for theory in respect of legitimate expectations as Forsyth and Reynolds contend.[124] On the contrary, contemporary administrative law scholarship is dominated by a focus on both common law principles applied in judicial review (with a corresponding neglect of the rest of the administrative justice system) and the abstract (with a corresponding neglect of practice). The pressing need in contemporary administrative law scholarship is for an account of the practice of legitimate expectations in the wider context of public administration.

Conclusion

This paper has followed the prominent articulations of the conceptual critique of legitimate expectations. In particular, it followed the arc of the arguments offered by Forsyth and Reynolds, both of whom suggest that the doctrine would be assisted by identification of some sort of 'meta-value'. It has shown that no account of the purpose of protecting legitimate expectations convincingly responds to the conceptual critique: each of them, even the alternative theories proposed by such critics, fail as compelling 'meta-values' for the doctrine. As an alternative, it has been suggested that developing a value pluralist account of the doctrine may be a preferable approach. More significantly, this paper has raised the question of whether building a theory of legitimate expectations ought to be a priority for administrative lawyers. Increasingly complex debates about why legitimate expectations ought to be protected have been going on while administrative law scholars have accepted entirely deficient accounts of the practice of the doctrine and its role in wider context of public administration. On this basis, it has been suggested that constructing theories of legitimate expectation – though they may have use – ought to be of secondary importance to constructing an empirical account of the conditions and effects of legitimate expectations. The alternative path is to continue to expand a theoretically refined body of scholarship with a baked-in ignorance of practice.

[120]Varuhas, above n 117, p 18.

[121]R Williams 'The multiple doctrines of legitimate expectations' (2016) LQR 639 at 639.

[122]See eg P Craig 'Taxonomy and public law: a response' (2019) PL (forthcoming).

[123]Some attempts are made to connect with public administration, but they are fleeting. For instance see Williams, above n 121, at 652–53.

[124]The suggestion here is that the example of legitimate expectations is representative of administrative law scholarship more generally. As noted above, a much broader study would be required to systematically demonstrate that thesis.

Cite this article: Tomlinson J (2020). Do we need a theory of legitimate expectations? *Legal Studies* **40**, 286–300. https://doi.org/10.1017/lst.2019.29