# Book Reviews

## Book Review – A Theory of Legitimate Expectations for Public Administration

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The legitimate expectations doctrine enables courts to hold the government to the expectations that it creates.[1] The doctrine is an intriguing aspect of administrative law. It merges public and private law,[2] and weakens the separation of powers.[3] For these reasons, it has divided the common law world.[4] However, judicial scrutiny of its theoretical underpinnings is often inadequate.[5] The doctrine is therefore ripe for jurisprudential analysis. In *A Theory of Legitimate Expectations for Public Administration,*[6] British academic Alexander Brown takes up this challenge.

The book is a 'work of applied legal philosophy'.[7] Brown develops a comprehensive theory regarding how the legitimate expectations doctrine should operate, and why. His central argument is that in this context, expectations derive their legitimacy from the government's responsibility for creating them.[8] Brown also addresses remedies. He argues that an agency has a prima facie obligation to fulfil both procedural and substantive legitimate expectations.[9] If this is impossible or unacceptable, the offending agency (or, if necessary, an alternative agency) should generally pay reliance damages.[10] In this way, the 'government as a whole' delivers administrative justice.[11]

*A Theory of Legitimate Expectations for Public Administration* is a valuable addition to the literature. Administrative law textbooks give legitimate expectations surprisingly little attention.[12] Moreover, few books

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[1] Matthew Groves, 'Substantive Legitimate Expectations in Australian Administrative Law' (2008) 32(2) *Melbourne University Law Review* 470, 471.
[2] Ibid 474, 489-90.
[3] Ibid 491-2.
[4] See generally Mathew Groves and Greg Weeks (eds), *Legitimate Expectations in the Common Law World* (Hart Publishing, 2017).
[5] See, eg, *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 (22 November 2005) [67] (Lord Laws).
[6] Alexander Brown, *A Theory of Legitimate Expectations for Public Administration* (Oxford University Press, 2017).
[7] Ibid 1.
[8] Ibid 61-72.
[9] Ibid 2.
[10] Ibid.
[11] Ibid 103.
[12] See, eg, William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 450-62.

are devoted to the doctrine. Of those that are, most are edited books with a comparative focus.[13] They lack the theoretical depth of Brown's work. There is one exception: Schonberg's comprehensive *Legitimate Expectations in Administrative Law*.[14] However, Schonberg's analysis was published in 2000.[15] Brown addresses more recent case law.[16] Furthermore, Brown diverges from Schonberg on several points. These include, for example, the operation of the doctrine where agencies act ultra vires.[17]

The book has a number of strengths. It offers a highly original perspective, as Brown's theory contradicts many aspects of the case law on legitimate expectations.[18] His approach is also sharply analytical. His interrogation of concepts that judges often employ unreflectively (such as 'fairness'[19] and 'justice'[20]) is particularly incisive. These features of the book make for stimulating reading.

The book is also accessible. It is concise and well structured. Brown avoids jargon, and adopts a conversational tone. This accessibility has drawbacks. For example, Brown begins by setting out his vision for the doctrine.[21] Only later does he provide a philosophical justification for this vision.[22] Integrating these sections would have increased the book's complexity. However, it would also have made Brown's exposition more compelling. Nevertheless, achieving such accessibility in a legal philosophy monograph is a remarkable and worthwhile achievement.

Two aspects of Brown's approach are, however, problematic. The first issue is the book's claim to universality. Brown urges courts in all countries to adopt his approach.[23] However, in some jurisdictions this will be impossible. In Australia, for example, constitutional restrictions may preclude courts from enforcing substantive legitimate expectations.[24] Moreover, the force of Brown's argument will vary among jurisdictions. For example, Brown argues that where courts enforce expectations in accordance with his theory the benefits from reducing the 'pain of disappointment' will necessarily outweigh the costs to administrators.[25] This argument is unsound. The relative benefits and costs will differ

[13] See, eg, Groves and Weeks, above n 4.
[14] Soren Schonberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, 2000).
[15] Ibid.
[16] Brown, above n 6, xi-xiv.
[17] Ibid 100. Cf Schonberg, above n 14, 164-5, 234-5.
[18] See, eg, Brown, above n 6, 25.
[19] Ibid 30-1.
[20] Ibid 57-9.
[21] Ibid 61-147.
[22] Ibid 148-205.
[23] Ibid 207-10.
[24] See, eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, 21, 24-5 (McHugh and Gummow JJ) ('*Lam*').
[25] Brown, above n 6, 164, 177.

between countries. Brown's failure to address these issues restricts the depth of his analysis. However, the book's accessibility does allow readers to easily identify insights that apply in their particular jurisdictions.

The second issue is the book's 'pluralistic' approach.[26] In two separate chapters, Brown provides both consequentialist and deontological justifications for his theory.[27] He draws on the work of diverse philosophers, from Rawls[28] and Bentham[29] to Kant[30] and Dworkin.[31] In doing so, Brown aims to provide 'unequivocal normative support' for his work.[32] If consequentialism fails to support his approach, deontology steps in to justify it.[33] The defensibility of this methodology is questionable. Pluralist philosophers generally offer more principled justifications for drawing on contradictory theories.[34] Conversely, including both chapters does cater for readers with different philosophical viewpoints. For this reason, this aspect of the book is ultimately successful.

In conclusion, *A Theory of Legitimate Expectations for Public Administration* is recommended to academics, practitioners and students with an interest in this doctrine. It may also interest the judiciary. Indeed, courts have previously referred to Schonberg's work on this topic.[35] For this audience, Brown's work is timely. One influential judge recently suggested that inquiry into the philosophical basis of the legitimate expectations doctrine is unnecessary.[36] Brown's rich analysis powerfully refutes this claim, and is a welcome contribution to administrative law scholarship.

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[26] Ibid 211.
[27] Ibid 148-82, 183-205.
[28] Ibid 148-53.
[29] Ibid 161-5.
[30] Ibid 190-2.
[31] Ibid 192-8.
[32] Ibid 211.
[33] Ibid.
[34] See generally, eg, Michael Gill, *Humean Moral Pluralism* (Oxford University Press, 2014).
[35] See, eg, *Lam* (2003) 214 CLR 1, 22 (McHugh and Gummow JJ).
[36] *The United Policyholders Group v A-G of Trinidad and Tobago* [2016] UKPC 17 (28 June 2016) [118] (Lord Carnwath).
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