In the Independent Review of Administrative Law (March 2021) at §3.8, the Independent Panel raises the concern regarding the current state of law that the grounds of judicial review makes it difficult for a public body to predict whether or not a proposed course of action will end up being successfully legally challenged. I agree with the proposed statement, especially taking into account the ambiguity of two specific grounds, legitimate expectation and anxious scrutiny.

The tension between fairness and flexibility lies at the heart of contemporary administrative law debates. While legitimate expectation, born from Lord Denning's seminal judgment in *Schmidt v Secretary of State for Home Affairs*[1], evolved to enforce substantive representation by public bodies. Similarly, the emergence of "anxious scrutiny" as a heightened standard of review for decisions impacting fundamental rights has introduced uncertainty over when and how courts will intervene, particularly amid overlapping frameworks like proportionality and Wednesbury unreasonableness.

Legitimate Expectation

Legitimate expectation(LE) as a ground of judicial review first emerged in Lord Denning MR's decision in *Schmidt v Secretary of State for Home Affairs*[2] where he held that an alien who had been granted temporary residence had a legitimate expectation of being heard before deportation. It is worth noting that the first legitimate expectation was developed to ensure fairness which requires the procedures promised to be followed. This was later solidified in *Attorney-General of Hong Kong v Ng Yuen Shiu*[3], where the Privy Council ruled that an assurance of a fair hearing before deportation created an enforceable procedural right.

However, in the development of the principle, there emerged a second situation where the public authority promised certain substantive benefits, which divided the ground of legitimate expectation into two categories with different principles to be applied, namely, substantive legitimate expectation and procedural legitimate expectation.

Initially, courts were reluctant to recognize substantive legitimate expectations, fearing they would interfere with executive discretion. However, early support emerged in tax cases where authorities made binding representations. In *R v Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd*[4], Bingham LJ held that the Revenue could be estopped from resiling from clear assurances, provided they were "clear, unambiguous, and devoid of relevant qualification." Similarly, in R v Inland Revenue Commissioners, ex p Unilever [1996] STC 681, the court ruled that a long-standing practice of accepting late tax returns created a legitimate expectation that could not be abruptly withdrawn without notice.

The most significant development came in *R v North and East Devon Health Authority, ex p*

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[1] Schmidt v Secretary of State for Home Affairs [1969] 2 Ch 149
[2] *Ibid*
[3] *Attorney-General of Hong Kong v Ng Yuen Shiu* [1983] 2 AC 629
[4] *R v Inland Revenue Commissioners, ex p MFK Underwriting Agents Ltd [1990] 1 WLR 1545*

Coughlan[5], where the Court of Appeal recognized that legitimate expectations could be substantive—enforcing the actual benefit promised, not just the procedure, as the court found that some promises are so specific and weighty that fairness demands their enforcement. Not only recognizing it, the *Coughlan* [6]also blurred the line between procedural and substantive expectations by recognizing 3 categories of LE. The difference between type 1 and type 3 is slightly obscure and it is hard to draw a dividing line between the two. Therefore, it undoubtedly causes uncertainty for the authority to decide whether it should just give weight to its previous policy (or representation) before deciding whether to change course, or that it is so unfair that to frustrate the expectation that it will amount to an abuse of power. And the court also expressed the intention to let the concept open to future develop in a case by case basis.[7]

Procedural legitimate expectations do not compel a particular outcome but ensure that decision-making adheres to fairness. Courts are generally more willing to enforce procedural safeguards, as they do not interfere with the merits of executive decisions. Unlike procedural legitimate expectations, the courts are reluctant to accept substantive legitimate expectations and try to narrow its scope of application. As Laws LJ warned in *R v Secretary of State for Education, ex p Begbie*[8] "enforcing substantive expectations risked turning courts into "arbiters of the merits of public policy."

Even though the court's wavering attitude towards substantive attitude can cause uncertainty for the authority to predict whether a decision would be challenged. The rationale behind the court's reluctance is cogent. It is intuitive under separation of power that the government or public authority should have freedom to change its policy, and the court should not interfere with substantive policy decisions, viewing them as the exclusive domain of the executive and legislature. Consequently, though with the recognition of such ground, the court is not willing to apply it in a broad way, especially in macro-economic/political areas which the authority has a greater say (*R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131[9]).

Another uncertainty involved in legitimate expectations is the standard of review, which determines to what extent and how the authority can resile from public representations. The judgment of *Coughlan* does not explicitly resolve whether Wednesbury unreasonableness[10] or proportionality is the appropriate standard. However, it leans towards a flexible approach, where the court assesses the "overriding public interest" to justify the departure (para.60–64). This resembles a proportionality-like analysis, albeit without strict adherence to the structured proportionality test used in human rights cases.

Having the continuing controversy in mind, the court in *The United Policyholders Group and others v*

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[5] *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213
[6] *Ibid.*, at paras. 56, 57
[7] *Ibid,* at para.71
[8] *R v Secretary of State for Education, ex p Begbie* [2000] 1 WLR 1115
[9] *R v Secretary of State for Education and Employment, Ex p Begbie* [2000] 1 WLR 1115, 1131
[10] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223

The Attorney General of Trinidad and Tobago (Trinidad and Tobago)[11]review the principle set out in *Coughlan* and conclude that "In summary, the trend of modern authority, judicial and academic, favours a narrow interpretation of the Coughlan principle, which can be simply stated."[12]I believe this reveals the court's inclination to weaken the influence of *Coughlan* to avoid potential uncertainty caused by the decision. The same inclination can also be found by Laws LJ stated in *Begbie*. The facts in Coughlan were seen by the court as "discrete and limited" raising "no wide-ranging issues of general policy".[13]

Therefore, fortunately, it seems that this uncertainties have not been proved problematic, or at least these uncertainties have been diminished by the court's narrow interpretation. As the Independent Panel itself reports, quoting from Professor David Feldman's suggestion, legitimate expectation is "the last gasp of a despairing advocate". Because it is not an easy ground to rely on.

Anxious Scrutiny and Wednesbury unreasonableness

The Wednesbury unreasonableness test, originating from Associated Provincial Picture Houses Ltd v Wednesbury Corporation[14], sets a high threshold for judicial intervention, requiring decisions to be "so unreasonable that no reasonable authority could have come to it" (Lord Greene MR). This standard traditionally provided public bodies with clarity, as challenges rarely succeeded absent egregious irrationality. However, the emergence of proportionality—a stricter test derived from human rights jurisprudence—has introduced a parallel framework. Proportionality demands that restrictions on rights be (1) rationally connected to a legitimate aim, (2) minimally impairing, and (3) proportionate in balance (Hysan Development Co Ltd v Town Planning Board [2016] 19 HKCFAR 372, Ribeiro PJ). Crucially, these tests coexist rather than follow a strict sequence. In Hong Kong, Wednesbury remains the default standard for administrative decisions, while proportionality applies only when constitutional rights are engaged (Ramsden, Anxious Scrutiny in Hong Kong Administrative Law, pp. 354–355).

The concept of "anxious scrutiny" emerged in English law as a standard for cases involving fundamental rights. In *Bugdaycay v Secretary of State for the Home Department*[15], Lord Bridge held that decisions affecting "the most fundamental of all human rights" warrant "the most anxious scrutiny," requiring authorities to demonstrate rigorous justification. This principle was adopted in Hong Kong in Secretary for Security v Prabakar[16], where the Court of Final Appeal (CFA) mandated "rigorous examination" of refugee determinations, obliging decision-makers to independently verify claims and provide cogent reasoning (Ramsden, pp. 356–357). Anxious scrutiny operates as a heightened form of review within the framework of JR, demanding closer scrutiny of evidence and reasoning.

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[11] *The United Policyholders Group and others v The Attorney General of Trinidad and Tobago (Trinidad and Tobago)* [2016] UKPC 17
[12] *Ibid,* at para.121
[13] *Ibid,* at p 1131
[14] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223
[15] *R v Home Secretary, ex p Bugdaycay* [1987] 1 AC 514 (CA)
[16] *Secretary for Security v Prabakar* (2004) 7 HKCFAR 187

Linking "anxious scrutiny" to "fundamental rights" in Hong Kong is confusing because the term "fundamental rights" typically refers to constitutional rights under the Basic Law. When dealing with such rights, courts routinely apply the proportionality test, often adopting stricter standards like "strict scrutiny" or "reasonable necessity" rather than "anxious scrutiny."[17] While the court might be using "fundamental rights" in this context to refer to common law rights (distinct from constitutional right) or rights derived from unincorporated human rights treaties. However, the court seems to fail to explain rigorously the origin of such rights.

Johannes Chan, in *A Sliding Scale of Reasonableness in Judicial Review*[18], argues that judicial scrutiny should vary based on the gravity of the issue. For example, in Hong Kong's Harbour Protection cases[19], courts applied heightened scrutiny to reclamation decisions, requiring "cogent and convincing evidence" to override statutory presumptions against reclamation. The CFA emphasized that the Harbour's status as a "special public asset" necessitated a "compelling, overriding, and present public need" for reclamation[20]. However, this sliding scale creates ambiguity. In Society for the Protection of the Harbour v Chief Executive-in-Council (No 2)[21], Hartmann J struggled to define the appropriate standard, noting that "something more rigorous than the standard Wednesbury test is required" but cautioning against conflating it with proportionality (p. 79). Such judicial equivocation leaves public bodies uncertain whether their decisions will face traditional Wednesbury review or a heightened standard.

Furthermore, the term 'fundamental right,' to which anxious scrutiny specifically applies, involves some uncertainty. In Comilang v Director of Immigration[22], the Court of Appeal confined anxious scrutiny to "non-derogable and absolute rights," rejecting its application to family unity claims. Conversely, in Pagtama v Director of Immigration[23], Au J tied scrutiny to the "grave and adverse impact" of decisions. This divergence creates confusion over which interests warrant heightened review.

It is practically clear that when constitutional rights are at stake, proportionality test is to be applied. However, when the right derogated is a fundamental one, then the court would use anxious scrutiny, which can be disaggregated into several interrelated duties of the public authority, namely to give adequate reasons, to inquire and investigate whether an individual's claim should be approved, to consider and address those factors that are favorable to the individual, and to apply a high standard of fairness in procedural design. All these factors give the court a high level of discretion, which sometimes causes uncertainty of decision or even extends to judicial overreach.

In conclusion, I think the uncertainty within anxious scrutiny is more serious than that in legitimate

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[17] *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, para.62
[18] A Sliding Scale of Reasonableness in Judicial Review (2006 Acta Juridica 233)
[19] *Town Planning Board v Society for the Protection of the Harbour* [2004] 1 HKLRD 396
[20] Ibid, at p. 242
[21] *Harbour v Chief Executive-in-Council* (No 2) [2004] 2 HKLRD 902
[22] *Comilang v Director of Immigration* [2018] 2 HKLRD 534
[23] *Pagtama v Director of Immigration* [2016] HKEC 85

expectation. To mitigate uncertainty, courts should clarify thresholds for anxious scrutiny: define whether anxious scrutiny applies only to non-derogable rights(or fundamental rights?) or extends to decisions with grave societal impacts. The CFA in Harbour could have specified whether the "overriding public need" test aligns with proportionality or a modified Wednesbury standard. Secondly, judges should explicitly outline how competing interests are balanced. In Hysan, Ribeiro PJ's four-stage proportionality test provided clarity for planning decisions. Similar frameworks for anxious scrutiny—e.g., requiring authorities to address risk levels, alternatives, and public interests—would reduce ambiguity (Ramsden, p. 367).