BOOK REVIEW

Alexander Brown, *A Theory of Legitimate Expectations for Public Administration* (Oxford: Oxford University Press, 2017), pp. 226

The concept of "legitimate expectations" has a long history in administrative law. Recently, political philosophers have given it a new lease of life—exploring its potential as a more general concept for distinguishing when an agent has a claim against the state for relief from the effects of a legal change. Alexander Brown has brought the legal and political-philosophical strands of legitimate expectations theory into fruitful conversation in a commendable new book, *A Theory of Legitimate Expectations for Public Administration*.

Brown's mastery of each strand is readily apparent, and he moves between them with impressive dexterity. But Brown's ambitious goal isn't merely to study each strand separately; it is to develop a normative theory of legitimate expectations for public administration that knots them together. Accordingly, he defends his account as *both* (i) a practice-dependent normative contribution to administrative law *and* (ii) a general (practice-independent) normative political theory.[1]

Ultimately, Brown only half succeeds in this more ambitious aim. In the interests of fashioning a theory that falls within the institutionally-contingent contours of administrative law practice, Brown makes theoretical moves that undermine the more general (practice-independent) normative appeal of his theory. After first describing Brown's theory, I will criticise it in three sections, pertaining, respectively, to the theory's *content*, *scope*, and deeper theoretical *justification*.

Brown's theory comprises three principles. The core principle refers to a "responsibility-based" account of legitimacy. An expectation is a legitimate expectation if a governmental administrative agency (i) had assumed a "role responsibility" or general competence over the relevant policy domain in which the relevant expectation was created and (ii) was "responsible" for creating the relevant expectation in the relevant agent (pp. 32, 62).[2] Where they are so responsible, government agencies have a prima facie obligation to fulfil rather than frustrate the legitimate expectation (the Legitimate Expectations Principle: p. 2). Where public interest considerations displace that prima facie obligation, the agency is liable for any damage to reliance interests and associated losses it directly causes by creating and then frustrating the legitimate expectation, and it has a prima facie obligation to make adequate compensation payments (the Liability Precept: pp. 2, 97–103). Other public bodies have a prima facie secondary duty to intervene where the primarily liable agency is unable or unwilling to do so (the Secondary Duties Principle: pp. 2, 103–104).

Brown defines the key concept of "responsibility" broadly, specifying three illustrative (non-exhaustive) "modes" of action/omission by which government agencies will be deemed responsible: (1) *inadvertently*, (2) *negligently*, or (3) *intentionally* causing the agent to expect

[1] On the distinction between practice-dependence and practice-independence, see, e.g., Andrea Sangiovanni, 'Justice and the priority of politics to morality', *Journal of Political Philosophy* (2008) 16(2): 137–164.

[2] Like Brown, I will focus on the second of these two conditions.

that a particular administrative course of action will be taken (pp. 64–76).[3] Since the threshold for establishing the legitimacy of an agent's expectation is quite low, the state's duty to fulfil the expectation or to compensate the agent for reliance losses arising from the frustration of the expectation will frequently be triggered. Consequently, Brown's theory is relatively conservative (protective of expectations).

The content of Brown's theory: is government responsibility really decisive?

Is government responsibility the *only* determinant of the legitimacy of an agent's expectation? Brown often claims that it is (see esp. pp. 62–64). For example, at one point Brown says that the presence or absence of responsibility on the part of a government agency matters "decisively" (p. 62). He goes on to underscore the point, stating that expectations are legitimate "if, and only if," the government responsibility conditions are met (p. 62). This means that no other considerations affect the determination of legitimacy.

If government responsibility is indeed the exclusive touchstone of legitimacy, Brown's theory is original and distinctive. Indeed, Brown makes much of its distinctiveness, contrasting his "responsibility-based" account of legitimacy with the "law-based", "justice-based" and "authority-based" accounts that have been proposed by political philosophers (chs. 2–3). But Brown's theory, read in this way, has counterintuitive implications. If an agent acts irrationally, unreasonably or viciously in forming an expectation, or if the content of their expectation is unreasonable, immoral, or unjust, this would not affect the determination of legitimacy; only government acts or omissions matter (*cf*. pp. 61–63).[4] Yet it is not difficult to find, or imagine, cases in which agents form expectations that are defective in one or other of these ways, and thus intuitively lack "legitimacy". Cases of putatively "unreasonable" expectations,[5] for example, call for a case-specific inquiry into the reasonableness of the expectation. There is no reason to think that the conduct of a government agency will always be the only or most important factor in such an inquiry.

At other points in the text, however, Brown implies that government responsibility is *not* the only determinant of an expectation's legitimacy. Brown claims that the relevant agent must have an "epistemic warrant" for holding the relevant expectation, and that the responsibility of the government agency is merely one (albeit a significant) factor among others in determining the existence of such a warrant (pp. 5, 32, 63–64).[6] At one point, for example,

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[3] Inadvertently created expectations (Mode 1), on Brown's theory, are only capable of giving rise to procedural expectations, such as an expectation that a consultation process will occur before a substantive entitlement is altered by the relevant agency (pp. 65, 73, 101).

[4] Brown advocates an inquiry into the conduct of expecting-agents at a *secondary* stage of his theory, *after* it has been determined that an expectation is legitimate, *viz*. when determining whether an expecting-agent is entitled to less than full compensation in virtue of her own conduct in "co-creating" her expectation—through a lack of reasonable due diligence, for example (pp. 134–39). But if these kinds of considerations are relevant at the stage of determining *compensation*, why are they not also (or instead) relevant at the stage of determining whether an expectation was *legitimate* in the first place?

[5] Consider the legal cases discussed by Brown on pp. 69–71 and 74–75, for example.

[6] Sometimes Brown seems to suggest that, on his theory, it is *only the responsibility of a government agency* that can provide such an epistemic warrant (compare pp. 5, 31–32, 63–64). But if this were the case, then the concept of an epistemic warrant would be defined implausibly narrowly: there is no

Brown says that an agent's epistemic warrant is "partly" based on the agent's sound or credible belief that the government agency was responsible for bringing about that expectation (p. 68; *cf*. pp. 89, 92). Elsewhere he says that government responsibility is only "*one of* the crucial elements" (p. 68, emphasis added). Later, when discussing various judicial decisions concerning legitimate expectations arising from governmental negligence, Brown speaks as though an inquiry into the reasonableness of the expecting-agent's conduct is required (pp. 73–75; see also p. 81). If this were the case, Brown's theory could escape the counterintuitive implications of making governmental responsibility the exclusively relevant determinant of legitimacy. But this would also drain the theory of its distinctiveness: Brown's much vaunted government responsibility-based account would dissolve, on close inspection, into a garden variety, agent-centred "reasonableness" account.

This ambiguity in Brown's theory can perhaps be resolved by appealing to administrative law practice-dependent considerations. In the day-to-day execution of public administration and judicial practice, consistency and predictability of the law are weighty values. These values are well served by a theory that emphasises one normative variable (here, government responsibility), yet leaves room for other considerations (agent-relative "reasonableness"; "public interest considerations" etc.) to apply in marginal cases. For political philosophers, however, the marginal cases are the interesting ones, and it is here that Brown's theory seems wanting.

The scope of Brown's theory: is the limitation to administrative actions plausible?

The scope of Brown's theory is limited to administrative actions, encompassing both "administrative policies" (e.g., secondary legislation, general rules, regulations, and policy statements) and "administrative measures" (e.g., particular administrative orders, decisions, and adjudications that relate to a single agent or small number of identifiable agents) (p. 98). It does *not* extend to primary legislation. Consequently, the state can frustrate expectations at will via primary legislation, without attracting liability under Brown's theory (pp. 113–117). While Brown's theory is, as noted, relatively conservative in the domain of administrative actions, its restricted scope makes it extremely *reformative* (non-protective of expectations) in the domain of primary legislation.

Brown gives four justifications for this scope restriction, each involving a purported disanalogy between primary legislation and administrative actions (pp. 113–117). First, extending liability for frustrating legitimate expectations to primary legislation would involve an unacceptable intrusion by the courts into parliamentary sovereignty, involving the judiciary in "questions of general policy affecting the public at large" (p. 114). Second, primary legislation entails lengthy policy development and legislative processes, which provide the public with advance notice of pending legislative changes and "a significant period of time in which to adjust their plans" (p. 115). Third, the effects of primary legislation are complex and diffuse, involving "more or less sizeable benefits and burdens, distributed between different clusters of winners and losers" (pp. 115–116). This, Brown contends, means that agents' expectations that legislation will stay the same "could potentially, if frustrated, cause lesser hardship but to a greater number of people as compared to frustrated legitimate expectations in relation to single-case administrative

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reason to think that the acts or omissions of the relevant government agency would be the *only* consideration relevant to determining whether an agent has an epistemic warrant for an expectation.

measures, which could cause greater hardship to a lesser number of people" (p. 116). Fourth, primary legislation is more sensitive to "macro-level external shocks" such as economic and technological changes, so "there is a greater onus on the part of non-governmental agents to be aware, and take responsibility for their awareness, of the fact that governments must change direction in response to changing circumstances", and this reflects a "fair social division of responsibility for the risks of frustrated legitimate expectations" (p. 116).

Undoubtedly, there are normatively relevant differences between *characteristic* primary legislation and *characteristic* administrative actions. These differences appear most starkly when one compares a routine administrative decision (i.e., one affecting a single individual made by a low-level bureaucrat) with a major piece of legislation that affects millions of people after undergoing a lengthy policy development and legislative process. But much government activity blurs these lines, meaning the characteristic features of administrative and legislative processes to which Brown appeals will frequently not apply. Sometimes legislation is rushed through with little policy development or parliamentary scrutiny. Sometimes administrative conduct involves high-political matters (e.g. reviewing the exercise of ministerial discretion). And many legislative matters could in principle be addressed *either* in primary legislation *or* secondary legislation made under it (or, in the US, via "executive orders"), making any bright line between the two look arbitrary.

Additionally, Brown's third justification rests on dubious empirical assumptions. Legislation can have an enormous effect on the expectations of (a large number of) specific individuals—consider Brexit legislation and US healthcare reform as two prominent examples. And Brown's fourth justification raises more questions than it answers about the kind of risks for which agents ought to be responsible, and what a "fair social division of responsibility" consists in.

Finally, more is at stake in this discussion of scope than the tenability of Brown's scope limitation *per se*: the responsibility-based *content* of Brown's theory is also called into question. Does it make sense to speak of legislatures as being "responsible" for inducing expectations in their citizens that laws will stay the same? Arguably not: the notion of "government responsibility" gives us little analytical leverage on the complex normative questions at stake when changes in primary legislation frustrate expectations (and Brown seems to agree: p. 114). Consequently, if Brown cannot defend his sharp border between administrative actions and primary legislation, we have even greater reason to doubt the plausibility of his theory *qua* general normative "theory of legitimate expectations".

Again, practice-dependent considerations seem necessary to fill this justificatory gap. In respect of his scope-limitation, Brown acknowledges that he is "marching in step with the English common law doctrine of legitimate expectations" (p. 113). Administrative lawyers might well be satisfied with that. Political philosophers will not be.

The justification of Brown's theory: can it be supported by deeper ideals?

In the final part of the book, Brown seeks to provide deeper normative justifications for his theory, appealing to both consequentialist (ch. 6) and deontological considerations (ch. 7). Brown's discussion in both chapters is philosophically insightful. However, the diverse theoretical considerations he invokes cannot provide a coherent justification for the particular content and restricted scope of his theory. I cannot here discuss all of Brown's

attempted justifications in the detail they merit. But I think they are each vulnerable to an objection that takes the following general form: the purported justification either (i) fails to justify the content of Brown's theory or, if it does justify the content, it (ii) entails an expansion of the scope of the theory to include primary legislation, *contra* Brown's scope restriction. I will illustrate this by discussing a few of Brown's specific justifications, starting with consequentialism.

Brown's conservative, domain-limited theory of legitimate expectations sits awkwardly with the consequentialist commitment to optimise the value of some normative variable(s) across society. Brown's first consequentialist justification appeals to the egalitarian distributive effects of his theory (pp. 148–153).[7] This is a surprising appeal. To defend it, Brown invokes hypothetical cases of already-disadvantaged *individuals* whose frustrated expectations would be avoided under his theory (pp. 151–152). But the fact that Brown's theory would resolve some individual cases in an egalitarian direction does not establish that the theory would be egalitarian in the aggregate. Long-term planning is a luxury that the poor can rarely afford, and the non-ideal societies Brown's theory is intended to regulate are marked by large inequalities in income and wealth. It therefore seems probable that a conservative theory of legitimate expectations will tend, in the aggregate, to conserve inequalities.

Similar worries attend Brown's utilitarian justification (pp. 161–182). If we assume diminishing marginal utility from consumption, a theory that tends to conserve inequalities will tend not to be utility-maximising. Against this, Brown provides a rich discussion, ranging from Jeremy Bentham to Daniel Kahneman, of the subjective value to persons of "security of expectations" and the disutility of disappointment. There are many good points here. But there remains plenty of room to doubt whether, in highly unequal societies, a conservative theory of legitimate expectations would be utility maximising, even once the heavy psychological pains of frustrated expectations are added to the utilitarian scales.

Suppose Brown turns out to be right about the utility-enhancing or inequality-reducing effects of his theory's expectation-fulfilling conservatism in the administrative domain. He would then face a different problem: the relevant consequentialist theory (egalitarianism or utilitarianism) would tell us to apply Brown's theory, *a fortiori*, to primary legislation.[8] But this would conflict with Brown's scope condition, rendering his theory incoherent with its purported consequentialist moorings.

What Brown needs is a theory that explains why governments should not frustrate the expectations of their citizens *qua* individual agents *notwithstanding* the aggregate consequences. To this end, Brown invokes Kant's Humanity formulation of the Categorical Imperative, casting expectation-frustrating failures of government "responsibility" in terms of a failure to treat agents' rationality as an end in itself (p. 192). And he suggests that Dworkin's ideal of equal concern and respect supplies further deontological support for his theory (pp. 196–198). However, a theory of legitimate expectations justified in either of these ways would seem to entail "side-constraints" on expectation-frustrating governmental action of *all* kinds, including primary legislation. If such ideals truly provide the deeper

[7] Brown unhelpfully frames this in terms of Rawls' "difference principle", but in effect he is appealing to a prioritarian form of egalitarianism.

[8] I am assuming that changes in primary legislation are likely to cause greater aggregate expectation-frustration than changes in administrative actions.

basis of Brown's theory, then, again, Brown's restrictive scope condition comes under pressure.

In sum, Brown's book is likely to be of greatest interest to administrative law theorists, who will appreciate Brown's deeply theoretical treatment of this vexed legal topic. They may, moreover, be more willing than political philosophers to forgive the concessions to existing administrative law practice that seem necessary to stitch the holes in Brown's normative arguments. But political philosophers, too, will find much in the book to chew on. Whatever the shortcomings of Brown's own theory, he has done political philosophy a service in exploring the relatively uncharted conceptual space of (practice-independent) legitimate expectations.

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