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The Protection of Legitimate Expectations under German Administrative Law

Paper

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1. The principle of protecting legitimate expectations

The legal system of a state is underpinned by two guiding values. On the one hand, the legal order should be just, in terms of the substantial matters it provides for. In this regard, it is oriented by the guiding value of justice. On the other hand, the legal order should be reliable, meaning it is oriented by the guiding value of legal certainty. It is possible for the value of justice to come into conflict with the value of legal certainty. Accordingly, anyone involved in the legal system of a state will face the challenge of having to strike a balance between these two values. This holds true for all three branches of state power, albeit in different ways: for the legislature, for the executive, and also for the judiciary.

The concept of protecting legitimate expectations addresses an important aspect of the idea of legal certainty, and it does so from the perspective of the citizen. It is

premised on the public relying on the current status of the law, in the legitimate expectation that for a certain period, this legal situation will continue in force unchanged. It is based on this confidence that citizens will take certain decisions, for example by making economic investments, entering a certain profession, or initiating court proceedings. Where the legal position is modified ahead of time and this inures to the detriment of certain citizens, their expectations will be frustrated and they may also suffer damages. The question arises whether the citizen must accept this.

When this matter is addressed under German law, three fundamental questions need to be dealt with. Firstly, it must be established whether or not the citizen's expectation – that the status of the law as given previously will continue in force – is legitimate and merits protection. Not every expectation is legitimate, and not every expectation merits protection. Where an expectation does indeed merit protection, then the second test is to review whether or not the state must forgo its intended modification of the legislative state of play. This will generally entail a process of weighing the individual interest (in seeing the prior legal situation continue in force) against the public interest the state is seeking to safeguard in making a change. In cases in which citizens must accept the amendment of the law, the third question to be addressed is whether or not the citizens affected may demand at least a compensation of the damages they have suffered by relying on the legal situation's continuing in force.

2. The historical evolution of the concept of protecting legitimate expectations

These considerations originate in criminal law and go back as far as Roman law. The "*Allgemeines Landrecht für die Preussischen Staaten*" (the universal law of the country for the Prussian states), which was enacted in 1794 – while the Revolution was still raging in France – but had been elaborated in the years and decades previously, stipulated that newly promulgated criminal codes may not be applied to deeds committed prior to their adoption. In the period following Napoleonic rule in Germany until the revolution of March 1848, the so-called "*Vormärz*" of the first half of the 19th century, this concept was put in more general terms, while being tied in with the principle of the rule of law: In a state organised under the rule of law, it is not permissible to give retroactive effect to laws. It should be noted, however, that this principle was given up again in the course of the second half of the 19th century: In the view of the doctrine of legal positivism, the urgent social issues that needed to be addressed in

the wake of the industrial revolution and, later and more particularly, as a consequence of the First World War, no longer permitted any restrictions to be imposed on the legislator providing for these matters. Criminal law was the sole exception, as it always had been.

Then came the Second World War, and, after it had ended, the foundation of the Federal Republic of Germany. The introduction of the *Grundgesetz* (Basic Law) gave rise to two innovations that were of great significance to our topic today: the catalogue of basic rights that now had the quality of constitutional law, and the installation of a strong judiciary, comprised of the Federal Constitutional Court on the one hand and the system of administrative courts structured across three levels of instance. The new German constitution placed the principle of the rule of law above all else – a principle that traditionally has included the guiding value of legal certainty. As a result, it wasn't long after 1949 that the adjudication handed down by the German courts developed the principle of protecting legitimate expectations – initially for the executive branch, by the Federal Administrative Court, and shortly thereafter also for the legislature, by the Federal Constitutional Court.

3. The protection of legitimate expectations vis-à-vis the executive branch

The protection of legitimate expectations serves to protect the expectation of an individual that a given status of the law will continue in force unchanged. A legal situation that is so in force will be defined not only by legal statutes – acts, ordinances or by-laws. Besides these, the executive branch disposes over an instrument allowing it to likewise contribute to defining the legal situation for an individual case: the administrative act. Already before the First World War, German law adapted this instrument from French administrative law. Over the decades, the administrative act has proved to be the most important legal form in which administrative bodies can take action.

An administrative act will address a citizen, also termed the “addressee” of the administrative act, and often will procure a benefit for said citizen: a permit or concession, or perhaps a subsidy or some other grant in money's worth. Accordingly, the beneficiary is interested in seeing that particular administrative act continue in force. By contrast, an interest may evolve on the part of the administration to amend this

administrative act, or to abolish it entirely. Fundamentally, this interest may be based on two different motives, which must be distinguished with due care: Either the administrative body determines at some later point that it had been wrong in issuing the administrative act, because said administrative act has no foundation in law. Or the circumstances have changed and the administration intends to react to this change in a flexible manner. In the first case, the administration has an interest in eliminating an administrative act that from the outset was unlawful; in Germany, we call this the “retraction” of an administrative act. In the second case, the administration intends to modify the administrative act in order to bring it in line with the changed circumstances; this is termed a “revocation” of the administrative act.

a) The first case in which the Federal Administrative Court was seized in this regard concerned the retraction of a flawed and thus unlawful administrative act. Already in the very first years in which the Basic Law was in force, the German courts proceeded from the assumption that, fundamentally, any administrative acts that were unlawful could be retracted without any restriction. The administration was focused on instating – or reinstating – compliance with the law, which in every single case took precedence over any individual interests in considering the administrative act final. However, this adjudication changed in the late 1950s. The occasion was a veritable flood of actions brought on matters governed by the laws relating to the *Lastenausgleich* (equalisation and distribution of war-caused burdens), the situation of refugees, the remuneration of civil servants and their pensions. In many cases, administrative acts had been issued that granted benefits to the addressees, which formed the basis for their livelihood; some of these administrative acts dated from the time immediately following the end of World War II, while others even had been enacted while the war was still ongoing. A case brought before the court in 1956 marked the turning point, when the pension paid to the widow of a civil servant was abated. In this matter, the administrative courts decided that the abatement had to take consideration of the legitimate expectations harboured by the widow in the monthly payments continuing to be made. In October of 1957, the Federal Administrative Court issued the following headnotes, which basically continue to apply to this day: “An administrative act that was flawed from the outset because the law was applied erroneously, and that grants benefits to a party, cannot be retracted in every single case;” “by contrast, a balance must be struck ... between the public interest – which funda-

mentally is to be conceded – in having a legal status guaranteed consistently that is compliant with the law (this means that it is actually desirable, and in fact necessary, for the administrative bodies to remediate the consequences of a mistaken application of the law), and the individual interests of the citizen enjoying the benefits of the administrative act, who rightly does not wish to be betrayed in his trust in the continued validity of a decision taken by a public authority.”

In the subsequent years, the Federal Administrative Court further developed this adjudication by addressing further details. In so doing, it also found answers for the three questions I have outlined at the start. As already mentioned, it must first be reviewed whether the confidence an individual has placed in the continued existence of an administrative act at all merits protection. This is not the case wherever the individual concerned has procured the administrative act by means of wilful deceit, threats, or bribery; wherever the individual has procured the administrative act by making inaccurate statements; or wherever the individual was aware, or in any case ought to have been aware, of the administrative act's being unlawful. To put it in a nutshell: The beneficiary must be acting in good faith. Where this is the case, then – secondly – the beneficiary's interest in the continued validity of the administrative act must be balanced out against the public interest to the contrary, this being the reinstatement of a status that is compliant with the law. In this regard, German law makes a specific distinction: There is a tendency to give precedence to individual interests where the matter concerns “just money,” in other words, where the administrative acts concern monetary benefits, while the opposing public interest in abolishing an administrative act will prevail in the case of non-monetary benefits such as concessions or permits. If, according to that test, the administrative act may permissibly be retracted, then the – third – question to be addressed is whether or not an equalisation in money's worth should be provided for the disadvantage suffered by the individual who had relied on the administrative act's finality. Accordingly, the parties affected may list the losses they have incurred as a result of their reliance on the validity of the administrative act. The administrative body may counter this solely by the overriding fiscal interests of the state; it will be able to prevail on this basis only if the detrimental impacts on the national budget are likely to be so severe that it is legitimate to demand a special sacrifice from the citizen.

b) In parallel, the Federal Administrative Court made further inroads into the adjudication regarding the revocation of lawful administrative acts. As already mentioned, this is not a matter of abolishing a flawed administrative act in order to ensure that an administrative body complies with the principle of legality of administrative action. The situation is different here because the administrative body intends to eliminate the administrative act granting benefits to certain parties for other reasons than its being unlawful.

Here as well, the doctrine prevailing until the Federal Republic of Germany was founded proceeded from the assumption that administrative acts that are lawful could in principle be revoked on a discretionary basis as well. However, this principle had already been watered down in three instances. First off, it was not supposed to be possible to revoke an administrative act if it had created a subjective right. This understanding is backed by the doctrine of the “duly acquired rights.” These “rights” are modelled on the category of rights *in rem* in terms of the civil laws governing property; they are distinct from mere “powers,” which are granted under customary permits and concessions. All of this continues to play a certain role, unchanged, in the public laws governing property, such as water laws or road laws. In the context with which we are dealing, however, this is a marginal topic that has not shaped the overall legal system in a fundamental way. The other two instances in which the principle was diluted are more important: Thus, secondly, it was not possible to revoke an administrative act on a discretionary basis, even if it granted no more than mere powers, if the beneficiary had already “taken action and completed a work,” for example by constructing a building based on a building permit. This is a very compelling illustration of the concept of protecting legitimate expectations: In the legitimate expectation that the building permit would remain valid, the addressee of the administrative act has already made investments by commencing construction. And thirdly and finally, the legislature itself has created regulations in ever-increasing numbers that made any revocation dependent on the existence of certain revocation grounds. In this way, the revocation of administrative acts granting benefits to a recipient, previously a matter of discretion, was made subject to conditions.

The adjudication handed down by the Federal Administrative Court picked up on this situation and put it in more general terms. On the one hand, the court has ruled that

the administrative bodies are prohibited from revoking an administrative act granting benefits to a certain party unless they have been expressly authorised by law to do so. Where the law does permit such revocation without stipulating any pre-requisites, however, the decisive aspect is the balance struck between the public interest and that of the beneficiary. Where the beneficiary has failed to meet certain requirements tied to the administrative act, then his or her interests must rank behind the interest in revoking the administrative act. Revocation is an option also in cases in which the factual circumstances have changed following the issuance of the administrative act such that, given the new circumstances, it would no longer be permissible to issue the administrative act; however, the interest the administrative body has in revoking the administrative act must be weighed against the interests of the beneficiary in seeing it continue in force.

c) In 1976, the topic was provided for by law, the provisions of which were identically worded for the most part, both at the level of the Federation and in the *Länder*. In this context, the lawmakers codified the adjudication developed up until this time by the Federal Administrative Court on the topic of the “retraction of unlawful administrative acts,” making hardly any changes. Regarding the other matter, the revocation of administrative acts, the lawmakers mostly aligned themselves with the judiciary, but did make certain modifications. To cite but one example, they facilitated the revocation of administrative acts granting benefits to certain parties, in changed factual or legal circumstances, and insofar enhanced the ability of administrative bodies to react flexibly to developments occurring over time. Still, the legislators obligated any administrative bodies intending to revoke an administrative act because of the changed circumstances to provide compensation in money’s worth for the losses the beneficiaries had incurred as a result of their reliance on the validity of the administrative act. In this context, then, the protection of legitimate expectations does not have an effect at the primary level – in the sense of assuring the validity of the administrative act – and instead takes an effect at the secondary level – in the sense of assuring the preservation of a value.

4. The protection of legitimate expectations vis-à-vis the legislature

Citizens may see their trust in the continued existence of a status of the law betrayed not only by an administrative body – the legislature as well may disappoint them. As already mentioned, applying a criminal code to deeds committed prior to the code having been enacted has been regarded as impermissible for quite some time. In other words, the enactment of laws with retroactive effect was – and continues to be – impermissible in the area of substantive criminal law; and the Basic Law expressly prohibits this. However, as I had also mentioned, the existence of a comparable prohibition of retroactive effect outside substantive criminal law was disputed. The only aspect legal scholars were able to agree on was that any such prohibition would have to have its foundations in the principle of the rule of law; they disagreed, however, on whether any such foundation could be identified at all, and, assuming a foundation were in fact identified, they disagreed on how far the prohibition would reach.

If any restrictions under law are to be imposed on the legislature, then – leaving aside Union law – these restrictions may derive exclusively from constitutional law. It is incumbent on the Federal Constitutional Court to word such restrictions. And while the Court in fact dealt with this matter quite promptly after having been established in 1952, it did so in rather general terms. Thus, it held that laws with retroactive effect were “not impermissible *per se*.” Apparently, the Court was proceeding from the assumption that there was more to argue against the permissibility of laws with retroactive effect than for it.

In its Order of 11 May 1960, the Federal Constitutional Court introduced the distinction between the so-called real (retroactive) and the so-called artificial (retrospective) effects of laws which then went on to shape its further adjudication. A retroactive effect was given, the Court held, “if the law intervenes with facts and circumstances of the past that have already been completed;” by contrast, it held that the retroactive effect was not an issue – or not in the same way – in cases in which laws had only retrospective effect and “intervened only with facts and circumstances or legal relationships given at present that have not yet been completed and stipulate changes for the future.”

a) According to the adjudication handed down by the Federal Constitutional Court, any retroactive effect will be in principle unconstitutional and impermissible. As its reasons, the Court relied significantly on the concept of protecting legitimate expectations, which it stated was a component of the constitutional principle of the rule of law. In a state governed by the rule of law, citizens are entitled to trust that their actions, taken in compliance with applicable laws, will continue to be recognised by the legal order, along with all of the legal consequences that originally had been tied to such actions. It is not permissible for the state to retroactively strip its citizens of this legal position or to devalue it. Nothing else applies if the lawmaker has enacted a law for a limited period of time – such as a law providing for a tax benefit for a certain number of fiscal years – even if this period has not yet expired and the amendment of the law would concern only the remainder of that period.

However, there are a few exceptions to this principle, albeit within very narrowly defined bounds. For the most part, the exceptions can be traced back to the first of the three questions regarding the protection of legitimate expectations that we had posed at the outset, this being the question of whether the citizen's expectations actually merit protection. This is not the case where a citizen had to count on the law's being amended because a corresponding announcement had been made in the political sphere, or because the previous legal situation was unclear and confused and the amendment served to obtain the necessary clarity. Likewise, the citizen's confidence does not merit protection where the amendment of the law or the new provision of the law does not result in any disadvantage at all for the citizen, such as when an invalid provision is replaced by a provision that addresses the same substance and that is valid; the Court later expanded this by stating that a citizen must accept as inescapable any petty disadvantages. Finally, the Federal Constitutional Court also addressed the second of our three initial questions and accepted the adoption of a retroactive law, even in the face of contravening legitimate expectations meriting protection, if the balance struck between the two shows that the interest of the public in obtaining a new legal status outweighs the interests of the individual in seeing the previous status continue to apply. However, the overriding nature of this public interest must be very clear; the Federal Constitutional Court has stipulated "imperative grounds of

general welfare” as a pre-requisite, and it takes the meaning of the term “imperative” very seriously.

b) While, according to what I have outlined above, the retroactive effect of laws is as a rule impermissible under constitutional law, the so-called artificial retrospective effect is as a rule permissible. We need to keep in mind that the Federal Constitutional Court uses this term to designate a law that intervenes with processes that have commenced but have not yet been concluded, and that does so with effect for the future. Such amendments of the legal status are widespread and customary; prohibiting them would paralyse all legislation. This is why the mere expectation that laws that currently are valid will not change in future is not afforded any protection under constitutional law. However, the principle of protecting legitimate expectations has not lost its significance entirely in this context. On the contrary, it may force the lawmaker to create an appropriate transitional provision that prevents too abrupt a modification of the legal situation and absorbs its detrimental consequences for the parties (and their fundamental rights) affected by way of complying with the principle of proportionality.

5. The protection of legitimate expectations vis-à-vis the judiciary?

For the most part, the principles relating to the reach of the protection of legitimate expectations vis-à-vis the executive branch and the legislative branch are recognised and well-established; any modifications made today will address nothing but details. By contrast, the question of whether the judiciary is likewise subject to restrictions under the aspect of protecting legitimate expectations and, if so, how and to what extent such restrictions would apply, is entirely unresolved and continues to be disputed. Of the five supreme courts at the federal level, four have accepted that such restrictions do apply; they have cited different reasons therefor and have afforded varying ranges of effect to such restrictions. The sole exception is the Federal Administrative Court, which has not handed down any adjudication in this regard. Thus far, the Federal Constitutional Court has left this question unresolved. In scholarly literature, as good as every conceivable position has been taken.

This lack of clarity is the consequence of divergent understandings of the tasks of the adjudication by the courts and its impacts. It cannot be disputed that also the adjudication by the courts – and more particularly the rulings handed down by the supreme courts – serves to establish confidence in the continued validity of a certain interpretation of the law, and that this legitimate expectation will then be betrayed by any changes to such adjudication. This fact has given rise to the conclusion that the supreme courts should not be allowed to modify their adjudication without further ado, that they should be required to strike a balance between their intention to do so and certain aspects of the protection afforded to legitimate expectations, and even that they should publicly announce any intention to so modify their adjudication. This is countered by the argument that in the German understanding of the law, courts do not develop any laws as if they were legislators; all they are responsible for is to decide on individual disputes, with their rulings being binding upon no-one but the parties to the dispute, and that accordingly any interpretation of the law the courts may make will constitute no more than one element of the reasoning they provide for their decisions. For this reason, any legitimate expectation that may form on the part of a citizen will have to be limited to the same court taking the same decision in future where comparable cases are brought before it. However, the argument continues, there obviously can be no guarantee that this will happen in light of the judges' independence and also in light of the well-known fact that the judges sitting on any particular panel or division will change. Thus, any expectation in the continuity of adjudication would have a weak basis and accordingly would not merit any protection. Furthermore, no court has the authority to dismiss a complaint that actually is justified simply for the reason that finding for the plaintiff would entail a change to adjudication, which the court does not wish to impose on some third parties who are not even a party to the proceedings before it.

You may have noticed already that I regard the latter position to be accurate. By its very nature, adjudication is not a uniform matter of "one size fits all," and courts are free to overrule findings that have been made previously. However, no judge should give up any well-established adjudication lightly. In this regard, the principle of protecting legitimate expectations gains an ethical dimension, calling on judges to exercise due restraint and care.

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