

General Principles of Administrative Law

§ 6 Legal Certainty and Protection of Legitimate Expectations

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Principle of legality by itself does not assure that the administration always acts in accordance to the law:

- insufficient knowledge
- insufficient staffing level
- new jurisprudence
- corruption
- stupidity

Principle of legality would require that:

- every illegal administrative action should be undone or should not create legal effects
- but: Legal certainty can necessitate the weakening of this principle

§ 6 Legal Certainty and Protection of Legitimate Expectations

A) Legal Certainty and Nullity/Inexistence of Administrative Acts and Contracts

B) Legal Certainty in favour of the Administration? Time-Limits for Judicial Review

C) Protection of Legitimate Expectations of the Citizen

A) Legal Certainty and Nullity/Inexistence of Administrative Acts and Contracts

Legal certainty as regards to individual decisions can only exist if – in general – even an illegal decision is not considered as null and void / inexistent / invalid but as valid (and correctable)

Administrative decisions (contracts) that are always considered as invalid in case of illegality may be dangerous

- For the citizen: danger misuse of “nullity” created by the administration
- For the administration: danger of “never ending procedures”

But:

Are there cases in which illegal individual decisions should be (necessarily) considered as null and void / inexistent / invalid?

- An administrative order is contradictory and unintelligible.
- The illegality of an administrative decision is obvious (gifts given by administration, speculative operations etc.).
- The administrative decision is obviously immoral or imposes something that is forbidden by penal law.

B) Legal Certainty in Favour of the Administration? Time-Limits for Judicial Review

Recommendation Rec(2004)20 on judicial review of administrative acts

Art. 2 para c:

National and legal persons should be allowed a reasonably period of time in which to commence judicial review proceedings

Explanatory memorandum:

- Time limit should not be too short, otherwise the parties may not be able to lodge an appeal against an administrative act.
- 30 days seem to be the minimum
- Time usually starts running from the moment the citizen is deemed to have taken cognizance of the act
- No explication of the reasons of time limits.

B) Legal Certainty in Favour of the Administration? Time-Limits for Judicial Review

German Federal Constitutional Court ([BVerfGE 60, 253, 270](#)) :

- In a state where administration is subject to intense judicial review, it seems to be indispensable that administrative acts become non-appealable after a reasonable amount of time
- Otherwise the state may become incapable of action which will do harm to the freedom of everybody
- Non-appealability may be considered as a constitutional value

But:

- It has to be explicitly foreseen by law
- There is no constitutional obligation to foresee time limits
- It is often not foreseen for judicial review of contracts of administration

B) Legal Certainty in Favour of the Administration? Time-Limits for Judicial Review

Necessity of Indication of Remedies?

[Resolution \(77\)31 on the Protection of the Individual in Relation to the Acts of Administrative Authorities:](#)

V - Indication of remedies

Where an administrative act which is given in written form adversely affects the rights, liberties or interests of the person concerned, it indicates the normal remedies against it, as well as the time-limits for their utilisation.

B) Legal Certainty in Favour of the Administration? Limits for Judicial Review

Time-

Consequences of non-appealability of administrative decisions:

- The citizen cannot question the legality of the decision: No claim regarding the withdrawal of the act; no state liability
- But: In extreme cases the decision may be considered as invalid
- The decision may be enforced by administration and will serve as a basis for other decisions
- The administration may still withdraw the decision for reasons of illegality

C) Protection of Legitimate Expectations of the Citizen

[ECtHR, judgement of 2009/09/15, application no. 10373/05 \[Moskal v. Poland\], para 44, 64, 82 et seq.\)](#)

The principle of legal certainty can (also) oppose the **withdrawal of unlawful administrative decisions**; hence the public interest in such a withdrawal has to be weighed against the interest of the affected party to maintain/uphold the decision. In doing so, one/the authority must ensure that the affected party will not suffer of disproportionate burdens, if the administrative decision is withdrawn.

[ECtHR, judgement of 2003/06/24, application no. 44277/98 \[Stretch vs. UK\], para 37 et seq.](#)

By subsequently declaring **administrative contracts**, which grant proprietary rights within the meaning of Article 1 of Protocol No. 1 to the ECHR to the individual (for example, the ones assigning State's land to the individual), unlawful and not providing an adequate compensation thereof, the State risks of placing a disproportionate burden at the "ordinary citizens", who were unaware of such errors committed by public authorities

C) Protection of Legitimate Expectations of the Citizen

Expectations of the citizen regarding measures, which were (originally) legal: May the citizen trust in “vested” rights?

- law and facts may change
- political circumstances may have changed

Often different solutions for single case decisions and public contracts

Expectations of the citizen regarding illegal measures

Principle of legality of administration

(nemo censetur ignorare legem/
ignorantia juris non excusat)



Protection of legitimate expectations

(the citizen does not have to know law better than the administration)

C) Protection of Legitimate Expectations of the Citizen

Recommendation CM/Rec(2007)7 on good administration :

Article 6 – Principle of legal certainty

1. Public authorities shall act in accordance with the principle of legal certainty.
2. They may not take any retroactive measures except in legally justified circumstances.
3. They shall not interfere with vested rights and final legal situations except where it is imperatively necessary in the public interest.
4. It may be necessary in certain cases, in particular where new obligations are imposed, to provide for transitional provisions or to allow a reasonable time for the entry into force of these obligations.

Article 21 – Changes to individual administrative decisions

Public authorities can amend or withdraw individual administrative decisions in the public interest if necessary, but, in doing so, they should have regard to the rights and interests of private persons.

C) Protection of Legitimate Expectations of the Citizen

Protection of legitimate expectations only makes sense, when the administrative measure is **beneficial** to at least one individual

- I. Expectations regarding the continuance of administrative decisions
- II. Expectations based on information and advice given by administration
- III. Expectations based on (formal) “assurances”/promises given by administration
- IV. Expectations based on tolerance?
- V. Believe in equal treatment?
- VI. Special problems in “multipolar“-relationships

I. Expectations Regarding the Continuance of Administrative Decisions

Absolute Protection of Expectations (not even Legitimate)

- Time limits for withdrawal/revocation of (unlawful) administrative decisions
- Exclusive enumerations of reasons for withdrawal/revocation in particular administrative regulations
- The more important an investment seems to be, the more legitimate is the absolute protection of expectations, at least after a certain time
- Differentiation between legal and illegal acts

Keep in mind: This sort of protection only works in the case of illegal acts, when they are valid in spite of their illegality

I. Expectations Regarding the Continuance of Administrative Decisions

Relative Protection in Case of Worthiness of Protection

Keep in mind: The problem only arises when the decision is *illegal and valid* in spite of its illegality

- Conditions of expectations: You have to believe in the continuance of the decision
- Conditions of *legitimate* expectations (i. e. no false pretence, bribery, having given substantially correct and complete information, awareness of the illegality of the decision)
- Did you bring your expectation into action?
- Sort of protection: Continuance of the decision or withdrawal including a compensation?

II. Expectations Based on Information and Advice Given by Administration

- If a public authority gives information and advice, these have to be true, unambiguous and complete.
- If the civil servant is not competent/no legal expert, he has to reveal that: Incompetence is no excuse
- **Minimal protection:** The citizen has to be put into the financial situation he would be in when the information would never have been given
- **Maximal protection:** The citizen has to be treated by the administration as if the advice he followed would have been true
- Problem of the civil servant's fault if it is considered as a requirement of state liability
- Problem of contributory negligence

III. Expectations Based on (Formal) “Assurances”/Promises Given by Administration

- Can a public authority commit itself to do something (make a certain decision, to enact a regulation etc.) or leave something undone (not to intervene) in the future?
- Can this type of promise create a claim for the citizen even if the promised action may be illegal?

German solution:

- **Conditions of validity:** The promise has to be written, made by the competent authority and unambiguous.
- In case of illegality of the promised action: The promise may be withdrawn under the same conditions as the promised action itself
- Duration of validity: As long as facts and legal framework do not change
- Other possibility: public contract

IV. Expectations Based on Tolerance?

- Does steady tolerance of an illegal situation by a public authority generate any right of tolerance in the future?
- Do administrative powers prescribe?.

V. Believe in Equal Treatment?

- The administration gives an illegal benefit to one citizen: Does this mean that the rights of other citizens are treated equally?
- **(No) Right to be equally illegally treated by administration?** When a public authority gives an illegal benefit to one citizen, does it have to treat other citizens similarly?
- Respect of the principle of equality before the law as a limit for *discretionary powers*: When a public authority decides (not) to intervene, the like has to be treated similarly

VI. Special Problems in “Multipolar“-Relationships

Time limits to appeal may also generate legitimate expectations of the beneficiary

But: No legitimate expectations before the time limit of appeal is expired

Beneficiary might have interest in the third party being informed on time

What happens when no time limit is foreseen (contracts)?

