ISSN 1392-1592 (print). ISSN 2351-6364 (online). TEISĖS PROBLEMOS. 2015. Nr. 1 (87)

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PUBLIC INTEREST AND LEGITIMATE EXPECTATIONS IN SPANISH ADMINISTRATIVE LAW

The present article offers an analysis of the relationship between public interest and the principle of protection of legitimate expectations in the context of Spanish Administrative Law. It reaches the conclusion that these two concepts are not in conflict.

I. THE CONCEPT OF PUBLIC INTEREST AND ITS RELATIONSHIP TO LEGAL EXPECTATIONS

The concept of public interest is one of the most basic concepts in Spanish Administrative Law. Administrative Law is described in Spanish legal discussions as the Law specific to Public Administrations[1], and these Administrations are in turn described as fiduciary organizations whose purpose is not to pursue their own goals, but rather to pursue precisely the public interest.

What is the public interest? The public interest is the set of goals pursued by the Public Administration, which are established by the legal system, and hence mainly by legislatures through the Laws that the Administration must obey[2].

The relationship between these interests and the protection of legitimate expectations is clear in the Spanish system. If the Administration has created, whether legally or illegally, a situation of legitimate expectations in a person, the recognition of this situation can "collide" with public interest, because it hinders the achievement of administrative goals.

[1] *García de Enterría E.* and *Fernández T. R.* Curso de Derecho Administrativo, 15th ed., Civitas, Madrid, 2011, pp. 33 ff.

[2] *García de Enterría E.* Democracia, Jueces y Control de la Administración, 5th ed., Madrid, 2000, pp. 226 ff.

Thus for example, a license to open a pub with amplified music that has been granted illegally, but that has created legitimate expectations in its recipient, constitutes an obstacle to the public objective of reducing the noise level in an area with a high noise level.

Likewise, the failure to revoke a subsidy granted to a person who in the end was unable to achieve the public aim that justified this subsidy constitutes a loss of public money that could be employed in a more efficient achievement of said purpose.

As is clear in the scope of executive administrative action, the concept of public interest is far from being abstract: the public interest is specifically identified with the interest pursued by the regulation that justified the specific administrative action that has created the situation of legitimate expectations[3]. Turning for a minute once again to the previous examples, in the case of the subsidy, the public aim that would justify a reimbursement of the subsidy is to be found precisely in the goal that was legally stipulated for these funds. In the case of authorization of disruptive activities, such as amplified music, the revocation or revision of the authorization must be justified by better protection of society from noise pollution, and not by other collective interests.

II. THE PROTECTION OF LEGITIMATE EXPECTATIONS AS A CONSTITUTIONAL PRINCIPLE

The relationship between legitimate expectations and the public interest must not, however, be seen as a confrontation between two conflicting concepts but rather a question of delimitation between two public interests:. the purpose of the Administration or Legislator in taking a certain action, and the necessity of to preserving legal certainty for the persons affected in this decision of the public power.

The protection of whoever has legitimate expectations for the action of any of the institutions of the State is an essential value in a State governed by the rule of Law. This value also has an important economic sense in asociety that is dynamic and open to capital flows that seeks security for investments. It is also an important value in a Social State, in which many individuals depend on the continuity of the protective action of the State and adopt vital decisions with the legitimate expectation that this protective action is going to continue.

For this reason, the protection of legitimate expectations is a principle of constitutional rank in different European systems.[4] We will take a look at the situation in Spain.

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[3] *Bocanegra Sierra R.* Lecciones sobre el acto administrativo, 4th ed. Civitas, Madrid, 2012, p. 229.

[4] *Stern K.* Das Staatsrecht der Bundesrepublik Deutschland, I., 2nd ed., C. H. Beck, München, 1984, pp. 834 ff.; *Weber-Dürler B.* Vertrauensschutz im öffentlichen Recht, Helbig und Lichtenhahn, Basel, 1983, pp. 47 ff.

The Spanish Constitution, in Article 9.3, expressly recognizes legal certainty as a general principle of constitutional rank. At the same time this Article contains a specific rule for addressing the problems derived from the temporal succession of laws and more specifically from legal retroactivity.

Article 9.3 of the Constitution specifically establishes that: "The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the nonretroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter[5]."

Due to this explicit recognition of the principle of legal certainty, many Spanish authors[6] and the Constitutional Court itself[7] consider that the protection of legitimate expectations is sufficiently anchored in the Spanish constitutional system through the principle of legal certainty, and in Germany doctrine usually holds this to be the case.

We agree in essence with this opinion, but it is too simplistic. The framework of constitutional implications created by affirming the principle of protection of legitimate expectations against lawmakers or in defence of a precedent or of an illegal administrative regulation is not the same as that implied by the mere invocation of the protection of legitimate expectations againstthe Administration's intent to revise a simple administrative act, however illegal this act may be.

This consideration makes it necessary to take into account one important dissenting position on doctrine that has insisted, in the context of the limitation on the lawmakers, that the protection of legitimate expectations is not a principle of constitutional order/rank.[8] In defence of this opinion, we may state that in Spanish Constitutional Law, the set of problems created by the limitation on the lawmaker's power to define includes rules in our Constitution that are sometimes more specific than a generic appeal to legal certainty/ protection of legitimate expectations and that would hence need to appeal to a more general clause without establishing a very specific constitutional mandate. This is the case, as we shall see, in the field of the retroactivity of law.

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[5] I cite the official translation available at: <*https://www.boe.es/diario_boe/txt.php?id=BOE-A-1978-40001*>.

[6] As an example: *Castillo Blanco F. A.* La protección de la confianza legítima en el Derecho Administrativo, Marcial Pons, Madrid-Barcelona, 1998, pp. 97-100; *Velasco Caballero F.* Las cláusulas accesorias del acto administrativo, Tecnos, Madrid, 1996, pp. 281-283; *García Luengo J.* El principio de protección de la confianza en el Derecho Administrativo, Civitas, Madrid, 2001, pp. 115 ff.

[7] At least since the ruling of the Constitutional Court 126/1987, dating from July 16.

[8] *García de Enterría E.* La responsabilidad patrimonial del Estado en el Derecho Español, Civitas, Madrid, 2005, pp. 26 ff.

However, the principle protections of legitimate expectations in its most genuine and original version – which we will refer to, conventionally, as protection of legitimate expectations in concrete cases- which is connected with the Constitution through the principle of legal certainty can be defended in the Spanish system. We need only take into account that the Administration in discharging its most characteristic duty from the legal standpoint, unilateral application of Law to the specific case, makes use of one of the most intense and exorbitant powers recognized by the Legal System: the privilege of binding unilateral decision that is manifested in the ability to issue administrative acts.

This privilege is explained at the institutional level by the need to bestow efficacy on the Administration's action and at the same time, and inseparably from this, to guarantee to the affected individuals thatthe administrative decision obeys legal requirements in the specific case and that the individual may take it as a point of departure for his own activities. In this context, he administrative act basically performs a function of stabilization and clarification of legal situations for the individual[9].

This basic function of the institution would be undermined if the Administration itself could withdraw from its final administrative decisions without being subject to any material requirement. In this context there is a conflict between the Administration's aim when it wishes to contravene the regulation of the case that it has established itself alleging reasons of appropriateness or legality and the constitutional principle of legal certainty, which requires the continuanceof this regulation that was issued unilaterally, to the extent that said action was effectively and expression of the Administration's unilateral intent.

The importance of this certainty in the content of administrative actsis parallel to the certainty that must be maintained regarding court rulings, and it has unmistakable constitutional relevance[10].

On the other hand, these requirements of the principle of legal certainty, even when they are established with respect to illegal regulations of the specific case do not infringe upon or question to any extent the principle of legality or the lawmakers' power to define.

In this regard, in the most complex case –the limitation of judicial review of an illegal administrative act- the application of the protection of legitimate expectations does not infringe on legality. It simply seeks to determine what should be the correct consequence of the illegality already committed by the Administration and

[9] *Bocanegra Sierra R*. La teoría del acto administrativo, Iustel, Madrid, 2005, pp. 24 ff., with numerous references in this regard.

[10] For a classic argument in this regard of the German Federal Constitutional Court, BVerfGE 60, 253, 269-270.

determine who must assume the legal consequences of this illegality. The protection of legitimate expectations in specific in no way determines the Administration's future action nor does it create a rule contrary to the Law or to any general provision, nor does it serve as a precedent, since its point of departure is the very illegality of the Administration's action while it simply resolves the problem of attributing in each specific case the consequence of said illegality from the constitutional perspective of the guarantee of legal certainty.

The principle of protection of legitimate expectations in this precise sense is applied strictly on a case-by-case basis: this principle can never undermine the efficacy of the legal regulations.

III. CRITERIA USED TO RESOLVE THE "CONFLICT" BETWEEN THE PUBLIC AND THE INDIVIDUAL INTEREST

The idea of the need for a balancing test between the existence of legitimate expectations worth protecting, and the public interest that the Administration has in reversing said situation using a form of revocation or revision of the administrative action on which the legitimate expectations were based has been present in the Spanish case law since the late 1980's.

We may consider the *leading case* on this subject to be the Sentence dating from February 11, 1990 (Ar. 1258), the subject of which is a lawsuit arising from subsidies to private educational centres,[11] and whose legal background 2 contains an express recognition of the principle of protection of legitimate expectations, which has been reiterated by the Supreme Court to the present day[12]: "*In the conflict arising between the legality of the administration's actions and the legal certainty deriving from these actions, the latter takes precedence, due to the application of a principle, which, although it is not foreign to those constituting our Legal System, has already been implicitly recognized by this Chamber now passing judgement, in its Ruling of February 28, 1989, and reproduced afterwards in its last Sentence dating from January 1990. Allthough this principle was forged in the Legal System of the German Federal Republic, it has been adopted by the Jurisprudence of the European Court of Justice, in which Spain participates, and which consists in the "principle of protection of legitimate expectations" which must be applied not merely in the presence of any type of psychological*

[11] In this case the Supreme Court decides in favor of a center that confided in a communication from the Administration drafted in confusing terms due to which it understood that it had received a resolution when it was a mere proposal for a resolution, obliging the Administration to subsidize the additional teaching unit that it had not admitted in the final resolution.

[12] In this regard, the Supreme Court Ruling of February 23, 2000, Ar. 7047.

conviction in the beneficiary, but rather when it is based in external signals given by the Administration that are sufficiently conclusive to reasonably induce this individual to confide in the legality of the Administration's actions, combined with the fact that, ***given the weighing of the interests in dispute – the individual interest and the general interest*** *-, the revocation or leaving the act without effects, creates damages in the assets of the beneficiary who reasonably trusted in the aforementioned situation of the Administration that he has no reason to have to sustain derived from expenses or investments that could only be reinstated to him with serious damage to his assets since not all these damages are of a simple economic nature*."

From this moment on, the principle of the protection of legitimate expectations begins to be cited repeatedly in the most diverse contexts as a limit to the powers of the Administration in a jurisprudence that today enjoys an express legal recognition since, according to the reform of the Law 30/1992, concerning the Legal Regime of the Public Administrations and Common Administrative Procedure (hereinafter, LPC) adopted by the Law 4/1999, dating from January 13, article 3.1 of this regulation established that: "*The Public Administrations serve the general interests with objectivity and act in accordance with the principles of efficacy, hierarchy, decentralization, de-concentration and coordination, with complete obedience to the Constitution, the Regulations and the Law. Likewise, they must respect in their actions the principles of good faith and legitimate expectations*."

The LPC also has another more specific reference to the protection of legitimate expectations in Section 106 of the LPC, which sets forth that the exercise of the powers of revision (in its broader sense) will not be possible, among other reasons, if this breaches good faith, and this mention is understood nowadays[13] as referring to the protection of legitimate expectations.

This express recognition of the principle of the protection of legitimate expectations is not satisfactory, because it does not specify the regulatory content nor the conditions that govern the application of the principle in the Spanish system in the same way that the regulations that have included this principle in EU Law or German Law.[14] In particular the Law does not offer criteria for determining when public interest in changing the solution adopted previously must prevail. Hence it fails to take advantage of the opportunity to convert the principle of protection of legitimate expectations into a precise instrument in service of legal certainty and to include the broad experience in its use accumulated both in EU Law and Comparative Law.

The very paucity of Section 3.1. of the LPC, which, as we have just seen, is limited to the formal recognition of the principle of protection of legitimate expectations,

[13] In this regard, *Castillo Blanco F. A*. ibid., p. 281 and *García Luengo J*. ibid, pp. 106-107.

[14] *García Luengo J*. ibid, pp. 112 ff.

has meant that the task of interpretation of the principle in Spain has been mainly one of a jurisprudential nature. It has fallen to the Courts responsible for the judicial review of administrative activity to incorporate the principle into the Spanish legal system, to define the scope of its application, the requirements for recognition in each specific case and its effects.

In spite of this there have never been clear criteria for resolving this balancing test. Nevertheless in order to assert a situation of legitimate expectations it is necessary that the following criteria be met:

Firstly, that the Administration has performed an action or omission significant enough to serve as a basis for the legitimate expectations.[15]

Spanish jurisprudence on the principle of protection of legitimate expectations has required from the very beginning[16] that expectations should be based on "*external signs produced by the Administration that are conclusive enough to reasonably lead one to trust in the legality of the administrative action.*"

When defining such "external signs", the Supreme Court appears to be extremely generous, since it often states that[17]: "*conclusive acts which create legitimate expectations in the interested party are:*

a) The creation by the Administration of «external signs» which, even without being legally binding, guide the citizen towards a certain conduct [Ruling of 8 June 1990, Court 3, section 3;Ruling of 19 July 1996, Court 3, Section 5; Ruling of 22 March 1991, Court 3, section 3].

b) The recognition or establishment by the Administration of an individualised legal situation where it is reasonable to expect normal development [Ruling of 27 January 1990, Court 3, section 5]."

Secondly, that the citizen is not responsible for the fact that the administrative action is illegal or contrary to the public interest.[18] In this regard the Supreme Court Ruling -SCR- of 1 December of 2003 (Ar. 9362) insists that the citizen must reasonably understand that, by its conduct, the Administration has assumed that in the case at hand the citizen has complied with "*the duties and obligations which pertain to him*", something which cannot be stated about somebody deliberately seeking to deceive. Likewise, SCR of 25 October 2004, Ar. 7179 establishes that legal certainty

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[15] See, among many others, the following Rulings of the Spanish Supreme Court: *STS*, of February 1, 1990, (Ar. 1258) or, more recently, of February 23, 2000, Ar. 7047.

[16] In this regard, with a formulation which extends practically to the present, we find SCR of 1 February 1990, Ar. 1258.

[17] See in this regard, SCR of 1December 2003, Ar. 9362.

[18] See, among many others the ruling of the Spanish Supreme Court of January 15, 1999, Ar. 269 or that of October 25, 2004, Ar. 7179.

cannot be invoked by anyone who is to blame for the Administration not having the correct information when issuing a decision (in the case of a tax payment), due to having deliberately concealed it from the Administration.

Thirdly, in the case of illegal conduct by the Administration, the person who has the legitimate expectation has not held this legitimate expectation while aware of the illegality or while unaware as a result of negligence.[19]

This requirement is fundamental for the proper application of the principle, as it appeals to its ultimate objective: to provide security to whomever has legitimately placed their trust. In this regard, the level of diligence required depends on the group of persons to whom the interested party pertains in each case; the same level of diligence is not required, for instance, from a large company when it acts in the scope inherent to its business activity, as from a person at risk of social exclusion whose right to social benefits has been recognised.

Diligence in the awareness of legality is already a requirement which is reflected in our contentious-administrative jurisprudence, as is evident in the Supreme Court Rulings of 17 February 1997, Ar. 1147, of 24 September 1996, Ar. 6855 (Labour Court), or the ruling of 3 May 2004 (Ar. 2876), which also insists on the fact that an absence of motivation or the very difficulties of the Administration when clarifying the situation, reinforces the private individual's expectation (SCRs of 31 March 1998, Ar. 3082 and of 17 February 1999, Ar. 1815).

In the fourth place, the existence of legitimate expectations requires that the person affected has adopted a decision that cannot be reversed or that he only could do so with a disproportionate sacrifice[20].

In the last analysis, this requirement has been imposed by the principle of equality since if the individual has not invested or adopted very significant decisions as a result of the Administrative decision, it would grant him a privilege with respect to those persons who cannot claim a similar situation.

Finally, case law still requires a balancing test against public interest[21], for which it does not establish any criterion (although we should consider that the requirements that we have indicated for assertion of a situation of legitimate expectations are already in and of themselves criteria for the fact that the individual's interest should be taken into account). This is the case even though doctrine has generally performed that for the exercise of powers of revision it is necessary that the Administration allege a current public interest, and moreover, a public interest of the same type as

[19] *SSTS* of February 17, 1997, Ar 1147, of March 31, 1998, Ar. 3082 or of May 3, 2004 (Ar. 2876).

[20] This prerequisite has been required at least since the *STS* of February 1, 1990, Ar. 1258.

[21] For example, *STS* of November 15, 1999, Ar. 9300 with citation of other rulings to the same effect.

the one that was pursued when issuing the act that it now is intends to revoke.

Although echoes of these ideas are to be found in administrative practice and in case law, there is no basis for asserting that they are accepted by the courts. The courts prefer to rule on a case by case basis without making an effort to establish criteria that would enable us to anticipate future rulings.

In my opinion, the problem of the relationship between legitimate expectations and public interest must not be viewed as a conflict, but rather must be approached by delimiting the institution of the protection of legitimate expectations.

The existence of a current, active public interest is a prerequisite of the revision for legal reasons or in the case of expediency. Once it has been possible to assert the existence of current public interest, then it is necessary to ask whether in the specific case there is a situation that justifies the protection of legitimate expectations.

This problem should be tackled by adequately delimiting when a situation creates an expectation entitled to protection, and in this respect it is difficult to maintain that an administrative action that seriously detracts from the public interest has created legitimate expectations entitled to protection, since it is difficult for a person to be able to confide that an action seriously damaging to the public interest is legal.

Hence in my opinion the main weight must be accorded to the criterion regarding the diligence that can be required of the person who alleges a situation of legitimate expectations. If said situation is capable of causing serious risk or damage to the public interest, then greater diligence willaccordingly be required of the person who alleges the legitimate expectation that the said situation is not subject to change, and hence it will be more difficult to recognize in this a situation of legitimate expectations entitled to protection.

In Spain, this criterion is applied appropriately in the very extensive practice of the Labour Courts. These Courts do not authorize the retroactive revocation of social benefits received by persons who have limited economic resources, while at the same time they do not usually address allegations of the protection of legitimate expectations when these allegations are made by companies when confronted with requirements for amounts that have been improperly withheld from Social Security.

It is very significant that the case that usually is generally understood as the origin of the protection of legitimate expectations in Germany, is the attempt of the Administration in Berlin to withdraw a pension from an elderly woman who had moved to the city from the former East Germany, after she had been assured that she would continue to receive the same amount.[22] From the objective standpoint there is damage to the public interest, but in this case it is an isolated damage that does not cause a structural effect. Nevertheless a single ruling in favor of a big company can

[22] See Rule of OVG Berlin 10.14.1956 in DÖV 1957, pp. 753-754.

cause a structural damage to the public interest, although as the Court of Justice of the European Union continually reminds us in its rulings on matters regarding the revocation of illegal State aid, big companies must necessarily make use of legal assessment, and hence a high level of diligence can be required of these companies[23].

In other words, the public interest is required in the revision of a situation that has created legitimate expectations, but it must not definitively decide that the expectations need not be protected, which will in fact normally depend on other criteria related chiefly with the quality of expectations themselves created in the individual.

There are two grounds that justify this assertion. In the first place, it is an impossible task to establish a hierarchy between the public interest and the protection of legitimate expectations from the moment that the latter is described as a principle with constitutional status.

In the second place, the fact that the protection of legitimate expectations prevents the Administration from revising one of its own actions, even though it is illegal, does not mean that its connection to legality, or its obligation to carry out the public interest that this establishes has been violated. Rather an error has simply occurred in applying the Law to a specific case, which does not hinder the proper pursuit of the public interest in the future.

The safeguarding of the decision already made, when it has created legitimate expectations contributes moreover to reinforce the institutional function of the executive power, since it permits the individual to have legitimate expectations about the decisions of the Administration and to invest his effort and capital safely with due legal certainty, which is doubtless a question of public interest in and of itself. The best German doctrine has expressed this idea precisely, when it speaks of the clarifying function of the administrative act, which is parallel to the function performed by the force of *res iudicata* of the rulings of the courts[24].

In some countries, France is a good example, this consideration is so intense,

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[23] As an example, the Judgment of the European Court of Justice of 20 March 1997, Land Rheinland-Pfalz v Alcan Deutschland GmbH, Case C-24/95, § 25: In that connection, although the Community legal order cannot preclude national legislation which provides that the principles of the protection of legitimate expectations and legal certainty are to be observed with regard to recovery, it must be noted that, in view of the mandatory nature of the supervision of State aid by the Commission under Article 93 of the Treaty, undertakings to which aid has been granted may not, in principle, entertain a legitimate expectation that the aid is lawful unless it has been granted in compliance with the procedure laid down in that article. A diligent businessman should normally be able to determine whether that procedure has been followed (Case C-5/89 Commission v Germany, cited above, paragraphs 13 and 14, and Case C-169/95 Spain v Commission, [1997] ECR I-0000, paragraph 51)."

[24] *Vogel K.* Die Lehre von Verwaltungsakt nach Erlass der Verwaltungsverfahrensgesetze, BayVBl, 1977, pp. 617 ff.

that legally a final act cannot be revised because the deadline for appeal has passed, except in a very restricted number of cases[25], in spite of the fact that public interest is asserted in this regard. Something similar occurs with certain rulings of administrative judges in the USA[26] or even, with differing nuances, in Austria[27].

In other systems such as the German system[28], in the legal system of the Euro-

[25] Since the decision of the Conseil d'Etat in the case of Dame Cachet of 3 of November 1922 (Rec. Lebon, p. 790).

[26] *Casad R. C.* and *Clermont K. M.* Res Iudicata, Carolina Academic Press, Durham, 2001, pp. 208-209.

[27] In Austria the possibility of ex officio annulment is very limited by § 68 of the General Administrative Procedures Act (AVG): "(1) Except in the cases referred to in articles 69 and 71 [which treat the unusual cases of reopening and reinstatement of proceedings], submissions by parties requesting an amendment to an administrative decision which is not or is no longer subject to appeal shall, unless the authority finds a reason for the issue of an order in accordance with paragraphs (2) to (4) below, be rejected on the ground of res judicata.
(2) Administrative decisions under which no person is accorded any rights may be annulled or amended ex officio by the authority or independent administration review board which issued the decision or, in the exercise of its right of review, by the competent higher authority.
(3) Other administrative decisions may, with a view to the protection of public interests, be amended by the authority which issued the decision in the last resort, or by an independent administration review board if such board rendered the decision, or by the competent higher authority, if the amendment is necessary and unavoidable in order to eliminate an adverse situation threatening the life or health of persons or to prevent serious harm to the national economy. The authority shall in all cases proceed with the greatest possible respect for acquired rights.
(4) An administrative decision may further be declared invalid ex officio by the competent higher authority in the exercise of its right of review, if such decision:
1. Was issued by a non-competent authority or by an authority composed of a panel of members which was improperly constituted;
2. Would have a consequence contrary to criminal law;
3. Is not enforceable in practice; or
4. Contains a defect expressly rendering it liable to invalidation under the provisions of law.
(5) A declaration of invalidity on the grounds set forth in paragraph (4) 1 above shall cease to be admissible after the expiry of three years from the time specified in article 63 (5).
(6) The power granted in the administrative regulations to the authority to withdraw or limit entitlements outside appeal proceedings shall remain unaffected.
(7) No person shall be entitled to exercise the right of amendment and annulment conferred upon the authority under paragraphs (2) to (4) above. Any maliciously filed petition for a review or amendment of a decision shall be punishable in accordance with article 35."
Translation taken from: <http://www.refworld.org/docid/3ae6b5a7e.html>.

[28] In the German system, the revision of illegal administrative acts and the revocation of lawful administrative act are regulated in the Federal Administrative Procedure Act of May 25th 1976, especially in its §§ 48 and 49, which make the possibility of a revision or revocation depend on the requirements for protection of the legitimate expectations. See, as an example: *Knoke U.* Rechtsfragen der Rücknahme von Verwaltungsakten, Duncker und Humblot, Berlin, 1989, pp. 148 ff. and *Blanke H. J.*, Vertrauensschutz im deutschen und europäischen Verwaltungsrecht, Mohr Siebeck, Tübingen, 2000, pp. 171 ff.

pean Union[29] or in Spanish Law, which extends its influence to several American countries[30]- protection from a revision at the initiative of the Administration itself is not so automatic; it depends on whether in the specific case the conditions have been met so that the individual can allege that he had legitimate expectations in the act, and that said legitimate expectations must not be violated.

Finally, I will refer to two interesting questions. First, the question of when the individual acquires an interest that can create legitimate expectations, and secondly, the question of how to defend the third-party interests that are damaged by the action of the Administration that created this legitimate expectation.

IV. THE CONCEPT OF LEGALLY ACQUIRED INTEREST

In Spanish Administrative Law, the legal positions of the individual that are subject to legal protection go further than the typical subjective rights, and they extend to any situation in which the individual's legal sphere is affected by an administrative action that he considers illegal. This means that in defence of his interests the individual is always entitled to take the Administration to court due to a conduct that he considers to be illegal.

Beginning from this idea it is easy for the citizen to demonstrate an interest worthy of protection that can collide with the public interest, and ultimately a court will have to rule on which of the interests must prevail in the specific case.

In this regard, the normal situation is that the Administration has acted so as to create with its action a right or expectation on the regulation of a specific case that benefits the individual or even if it causes him damages, it does so to a lesser extent than the Administration could do by the use of its powers. For example, by granting to a company a subsidy, even when it does not meet the legal prerequisites, or by assuring that on a certain lot it is possible to erect a building or by levying a fine but in a lower amount than would be legally appropriate.

V. THE PROTECTION OF THIRD-PARTY INTERESTS

One of the questions posed by the protection of legitimate expectations in the field of

[29] *Blanke H. J.* ibid, pp. 487 ff.

[30] *Coviello P. J. J.* La protección de la confianza del administrado. Derecho argentino y comparado, LexisNexis, Buenos Aires, 2004; *Milla Silva J.* Influencia y recepción del principio de protección de la confianza en el Derecho Administrativo Chileno. Interactive: <*www.jornadasdederechopublico2012.pucv.cl*>; *Viana Cleves M. J.* El principio de confianza legítima en el Derecho Administrativo colombiano, Universidad Externado de Colombia, Bogota, 2007; *Rey Vázquez L. E.* El principio de confianza legítima. Su posible gravitación en el Derecho Administrativo Argentino. AFDUC 17, 2003, pp. 259-282.

action by the Administration is the protection of the third parties when they realize that the Administration does not react against the beneficiary of an illegal administrative act. To continue with the above example, how could the interests of the neighbors affected by the music of the pub, or the competitors of the company that has received an illegal subsidy be protected?

In such cases the protection of the legitimate expectations yields to the need to grant legal protection to third parties, who are subject to damages by an illegal action of the Administration. However this protection can only be assured in the short period of time (normally one or two months) in which the said affected parties can appeal the administrative action. Once the act is final, then the interest of the third party can no longer play a part, since he has formally consented to the Administration's action.

This solution is found very often in comparative law, and it is similar in essence to the solution codified in German law[31].

VI. CONCLUSIONS

The protection of legitimate expectations is a well-established principle in the daily practice of Spanish Administrative Law. In the mid- to late 1980's, discussion of this principle began in doctrine and jurisprudence, and this discussion was influenced by the Law of the European Communities of that era, who had in turn received the principle from German Law.

The relationship between the principle of protection of legitimate expectations and public interest is not a simple matter since it requires use of the subtleties of the principle of legality.

Today the principle of legality is not merely the adaptation of Administrative conduct to "Gesetz", but rather also to "Recht", with the latter being understood as a set of principles that are both binding for the lawmaker and also that must be taken into account by the Administration together with the specific Law that it applies in each case.

In the practice of Spanish Public law, the protection of legitimate expectations is invoked in differing contexts, but it has its genuine scope of action in the limitation of the powers of revision of administrative acts whether these be legal or illegal.

In this specific scenario, there appears to be a conflict between the public interest that advises that the Administration revoke the illegal or inadequate act and the protection of the citizen who can invoke his legitimate expectations of the continuance of the act adopted unilaterally by the Administration.

[31] The same solution in essence in the § 50 of the German Federal Administrative Procedure Act.

Rather than a conflict, this is a problem of determining in each specific case who should assume the consequences of an action by the Administration that is illegal or contrary to public interest.

The existence of a situation of legitimate expectations, which depends on a series of criteria explained in this article, will render the Administration unable, in the specific case, to use its power to revoke acts that are illegal or contrary to the public interest.

REFERENCES

1. *Blanke H. J.* Vertrauensschutz im deutschen und europäischen Verwaltungsrecht, Mohr Siebeck, Tübingen, 2000.
2. *Bocanegra Sierra R.* La teoría del acto administrativo, Iustel, Madrid, 2005.
3. *Bocanegra Sierra R.* Lecciones sobre el acto administrativo, 4th ed. Civitas, Madrid, 2012.
4. *Casad R. C.* and *Clermont K. M.* Res Iudicata, Carolina Academic Press, Durham, 2001.
5. *Castillo Blanco F. A.* La protección de la confianza legítima en el Derecho Administrativo, Marcial Pons, Madrid-Barcelona, 1998.
6. *Coviello P. J. J.* La protección de la confianza del administrado. Derecho argentino y comparado, LexisNexis, Buenos Aires, 2004.
7. *García de Enterría E.* Democracia, Jueces y Control de la Administración, 5th ed., Madrid, 2000.
8. *García de Enterría E.* La responsabilidad patrimonial del Estado en el Derecho Español, Civitas, Madrid, 2005.
9. *García de Enterría E.* and *Fernández T. R.* Curso de Derecho Administrativo, 15th ed., Civitas, Madrid, 2011.
10. *García Luengo J.* El principio de protección de la confianza en el Derecho Administrativo, Civitas, Madrid, 2001.
11. *Knoke U.,* Rechtsfragen der Rücknahme von Verwaltungsakten, Duncker und Humblot, Berlin, 1989.
12. *Milla Silva J.* Influencia y recepción del principio de protección de la confianza en el Derecho Administrativo Chileno". Interactive: <*www.jornadasdederechopublico2012.pucv.cl*>.
13. *Rey Vázquez L. E.* El principio de confianza legítima. Su posible gravitación en el Derecho Administrativo Argentino. AFDUC 17, 2003, pp. 259-282.

14. *Stern K.* Das Staatsrecht der Bundesrepublik Deutschland, I., 2nd ed., C. H. Beck, München, 1984.

15. *Viana Cleves M. J.* El principio de confianza legítima en el Derecho Administrativo colombiano, Universidad Externado de Colombia, Bogota, 2007

16. *Velasco Caballero F.* Las cláusulas accesorias del acto administrativo, Tecnos, Madrid, 1996.

17. *Vogel K.* Die Lehre von Verwaltungsakt nach Erlass der Verwaltungsverfahrensgesetze, BayVBl, 1977, pp. 617 ff.

18. *Weber-Dürler B.* Vertrauensschutz im öffentlichen Recht, Helbig und Lichtenhahn, Basel, 1983.

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VIEŠASIS INTERESAS IR TEISĖTI LŪKESČIAI ISPANIJOS ADMINISTRACINĖJE TEISĖJE

Santrauka

Straipsnyje pateikiama santykio tarp viešojo intereso ir teisėtų lūkesčių apsaugos Ispanijos administracinėje teisėje analizė. Jame daroma išvada, kad tarp šių dviejų koncepcijų konfliktas neegzistuoja.

Iš tiesų tikroji teisėtų lūkesčių apsaugos apraiška yra viešojo administravimo institucijų įgaliojimų *ex officio* peržiūrėti sprendimus ribojimas. Kai viešojo administravimo institucija nustato, kad vienas jos aktų yra neteisėtas ar prieštarauja viešajam interesui, remiantis Ispanijos teise, ji gali siekti jį peržiūrėti: kai kuriais atvejais ji tai atlieka tiesiogiai, kitais – pasitelkdama teismą, tačiau toks pasirinkimas ribojamas teisėtų interesų apsaugos principo, kuris Ispanijos doktrinoje suprantamas kaip sudėtinė įgaliojimų apribojimų dalis, įtvirtinta 1992 m. lapkričio 29 d. Įstatymo Nr. 30/1992 *dėl viešojo administravimo institucijų teisinio režimo ir bendrosios administracinės procedūros* 106 straipsnyje.

Taigi teisės akto atšaukimas ar pakeitimas negalimas, jei tenkinami tam tikri kriterijai, kuriuos galima apibūdinti taip:

Pirma, būtina, kad administracinis aktas būtų buvęs paskelbtas ir kad jis būtų pakankamai svarbus, kad galėtų sukelti teisėtus lūkesčius.

Antra, asmuo negalėtų turėti teisėtų lūkesčių, jeigu teisės aktas yra neteisėtas arba prieštaraujantis viešajam interesui dėl priežasčių, kurias sukėlė asmuo savo paties veiksmais. Pavyzdžiui, tai galėtų būti atvejis, kai asmuo pateikė viešojo administravimo institucijai netikslią informaciją arba jei jis papirko valstybės tarnautoją, kad ją gautų.

Trečia, jeigu teisės aktas yra neteisėtas, reikėtų, kad asmuo nežinotų apie jo neteisėtumą, ir net jei jis to nežinojo, tai toks nežinojimas neturi būti nerūpestingo elgesio rezultatas (dėl to, kaip rodo ES teisė, bendrovei sunku pagrįsti teisėtų lūkesčių situaciją remiantis neteisėtu teisės aktu, nes bendrovės rūpestingumas, susijęs su teisėtumu, yra didesnis nei fizinio asmens). Šiais tikslais taikomas rūpestingumo lygis priklauso nuo teisės akto adresato. Vadinasi, tais atvejais, kai kalbama apie pagalbą asmenims, esantiems socialinės atskirties rizikos grupėje, taikomi mažesni teisinio žinojimo rūpestingumo reikalavimai nei tais atvejais, kai pagalba teikiama didelėms kompanijoms, turinčioms daug teisės patarėjų.

Ketvirta, tuo atveju, jeigu teisės aktas yra neteisėtas, būtina, kad asmuo būtų padaręs svarbius sprendimus remdamasis tuo teisės aktu, tuo įrodant, kad jis pastaruoju pasitikėjo ir būtent dėl to jis atsidūrė išskirtinėje situacijoje lyginant su asmenimis, kurie negavo neteisėtos naudos.

Galiausiai visais atvejais, remiantis jurisprudencija, reikia, kad asmens interesams būtų teikiama pirmenybė viešojo administravimo institucijos atžvilgiu peržiūrint ar pakeičiant teisės aktą.

Nepaisant paskutinės sąlygos dėl interesų pasvėrimo, remiantis Ispanijos teise, kuri per-

ėmė šią taisyklę iš ES teisės (kuri savo ruožtu ją perėmė iš Vokietijos teisės), teisėtų lūkesčių apsaugos principas yra formulė sprendžiant, kieno pareiga yra paskutiniame etape prisiimti atsakomybę už neteisėtą ar viešosios valdžios institucijos viešajam interesui prieštaraujantį teisės aktą, ir laikoma, kad tam tikrais atvejais, remiantis teisinės valstybės principu, šią atsakomybę turi prisiimti pati viešosios valdžios institucija, kuri negali atimti naudos, suteiktos asmeniui net ir tuo atveju, kai ji gauta neteisėtu būdu.

Tai nereiškia, kad tokiu būdu yra pažeidžiamas teisėtumo principas: viešosios valdžios institucija niekada neprivalo priimti neteisėtą aktą remdamasi teisėtų lūkesčių apsaugos principu. Tai tik neteisėtų teisės aktų, kurie buvo pradėti realiai įgyvendinti, teisinių pasekmių apibrėžimo klausimas.

Teisėtų principų apsaugos principo taikymas ribojamas galimu trečiųjų asmenų teisių buvimu, kai šios teisės galimai buvo pažeistos teisėtus lūkesčius sukūrusiu teisės aktu. Taigi, jei laiku ir tinkama tvarka nukentėję tretieji asmenys pateikia skundą, nei viešojo administravimo institucija, nei teismai nesvarstys galimybės taikyti teisėtų lūkesčių principą. Tokiu atveju galios tik taikomos teisės nuostatos.

Apibendrinant, tai yra principas, kuriuo siekiama materialinio administracinių aktų panaikinimo ar pakeitimo problemų sprendimo. Toks sprendimas gali būti pasiektas tik esant specifinėms kiekvienos bylos aplinkybėms, ir priklauso ne tik nuo viešosios valdžios institucijos elgesio, bet ir nuo individualaus naudos gavėjo elgesio, taip pat ir nuo iš jo reikalaujamo rūpestingumo lygio.