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THE PRINCIPLE OF THE LEGITIMATE EXPECTATIONS

1 Origin of the principle of the legitimate expectations¹

1.1 “Higher” sphere

It is generally accepted that the principle of legitimate expectations is a partial “sub section“ of the legal certainty as a constitutional² tenet. “A well-

1 Príspevok bol vypracovaný v rámci grantového projektu APVV č. 14-0061 „Rozširovanie sociálnej funkcie slovenského súkromného práva pri uplatňovaní zásad európskeho práva“.

2 „... principle of the legitimate expectations protection is tightly attached to the principles of the rule of law and arises from the Constitution – Article 1, section 1. The Constitutional Court consider to be necessarily stated that according to the conclusion of the social philosophy, when the limits of legitimate expectations given by law are uncertain, freedom is uncertain as well.“ Constitutional Court of the Czech Republic, file reference IV ÚS 167/05.

„The Constitutional Court as a guardian of law and order is obliged to respect the rule of law, where the protection of legal certainty, protection of legally acquired rights and legitimate expectations are guaranteed ...“ Constitutional Court of Slovakia file reference PL. ÚS 12/05.

„The first root – the principle of the protection of acquired rights – was recognised for the first time by the courts in a judgment of the Central Appeals Court for the Civil Service and Social Security Matters (CRvB) of October 31, 1935. In this case the salary of civil servants, including that of the town clerk of the municipality of Utrecht, was substantially reduced in March 1935, with retroactive effect to April 1934, in accordance with the statutory regulations in force at that time. This meant that the civil servant concerned was required to pay back a sizeable part of the salary that had already been paid to him in the previous year. The town clerk objected to this and appealed to the Central Appeals Court on the ground that the statutory regulation on the basis of which the salaries had been cut down was contrary to the law. The Central Appeals Court held that the town clerk was in the right and ruled that the salary reduction was contrary to the principle of legal certainty. According to the Central

known example in this connection is the classification by Nicolaï, who regards the fundamental principle of legal certainty as the basic concept for law as such and from which three principles can be derived for constitutional and administrative law, namely: (a) the principle of substantive legal certainty which requires the executive to respect acquired rights; this principle imposes limits above all on the retroactive effect of regulations and the withdrawal of decisions; (b) the principle of procedural legal certainty which requires that decisions must be clear and definite; (c) the principle of legitimate expectations which requires that executive bodies fulfil legitimate expectations wherever possible; this principle is of particular relevance to the expectations created by promises and policy rules.” [1]

1. 2 Public or private or ...

When trying to determine the area of origin of the institute of legitimate expectations, mostly the public (especially administrative) law comes into account¹. At least on national² level of Slovak legal environment acknowledged

Appeals Court, this principle had the effect in this case of preventing the exercise of a power in respect of a civil servant which amounted to “a regulation that related to the period during which he had received his annual salary in accordance with the valid provisions and that would bring about a retrospective change in those regulations which would affect him adversely”. Since the regulation undermined the acquired rights of the civil servant, it was therefore judged to be unlawful. As this regulation lacked legal effect owing to its infringement of the principle of legal certainty, the decision to reduce the salary was quashed.“ in Berge, Gio ten; Widdershoven, R.J.G.M. (1998) Netherlands reports to the fifteenth international congress of comparative law / Rapports néerlandais pour le quinzième congrès international de droit comparé, pp. 421 - 452 (Conference report), pp. 425-426.

1 According to the views shared on specialized forum <http://www.lexforum.sk/446>: Klinka, T. „... in my personal point of view, the constitutional (!) doctrine of legitimate expectations as created by ECHR can be applied only in the field of public law and its aim is to protect the individuals from the authority arbitrariness ...“ & Novotný, M.: „ ... i agree that there are no legitimate expectations in private law relations.“

2 Not only in Slovakia, also the legal doctrine from other states advocates this belief, e. g.: „The article examines the nature of the interest protected by the administrative law doctrine of legitimate expectations. It suggests that the independent development of administrative law in this context should be considered in light of the distinction between the reliance and expectation interests established in private law. It does not argue, however, that the protection of reliance and expectations in administrative law should overlap their protection in private law, since the relevant considerations in these two contexts are not identical.“ in Barak-Erez, D.: The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation

by the author, as well as some resources from abroad: “As is well known, the protection of legitimate expectations has gradually become a central principle of administrative law” [2].

On the other hand “The basic concept that it must be possible to rely on the statements of the counterparty in legal matters applies not only in constitutional and administrative law but also in other fields of law, notably criminal law and private law”[3]¹.

What is more, the root of subject principle can be found in private law (at least according to legal doctrine in the Netherlands): “Indeed, the principle of legitimate expectations in the Netherlands can probably be traced back the furthest in private law: for example the decisive factor in the conclusion of a legal act in private law and the determination of the content of such an act has long been not only the will of the parties but also the legitimate expectations created by this act” [1, p. 425].

1. 3 Administrative, proprietary ...

Another scope of subject principle can be seen under the light of protected interest.

In judicial practise (probably first of its kind in area of former Czechoslovakia on basis of internal research), legally puristic inexact approach occurred [4]: legitimate expectations were related not only to proprietary rights (as a well-known attitude), but to

- (i) property rights in wider conception and different from proprietary;
- (ii) protection of the administrative body procedure in accordance to legal order that can be trust by the party and their actions followed the procedural proceeding with confidence;
- (iii) the party can reasonable expects that the judicial decision will be enforceable;
- (iv) when any information is provided by the administrative body within its scope of power, such information can be considered credible.

“... different forms of legitimate expectations are mentioned in this decision of Constitutional Court. On one hand it is the legitimate expectation in accordance to pro-proprietary rights protection - in wider sense of property,

Interests. European Public Law, Volume 11, Issue 4. Kluwer Law International, 2005. p. 583. online <http://www.tau.ac.il/law/barakerez/articals/legitimate.pdf> .

1 According to the private law and criminal law consultative reports of J.B.M. Franken and J. de Hullu on the principle of legitimate expectations and legal certainty in the Netherlands prepared for the Association for the Comparative Study of Law in Belgium and the Netherlands, Deventer 1997. online <https://dspace.library.uu.nl/handle/1874/43885> .

on the other hand it is the legitimate expectation as a main principle of the administrative law – at some point considered to be an integral part of good administration. In the second mentioned approach, it is a typical vertical relation between the administrative body and the recipient of the legal regulation which occurs when the administrative body creates certain situation that is determinant for acting of a concrete party who believes in the rightness of administration procedure without considering the possibility of failing this trust.” [5]

Cited approach of the Constitutional Court of the Czech Republic has been developed in subsequent cases.

Different interpretation of legitimate expectation has been developed in judicial practise as well:

(i) foreseeability of legal regulation that is certain and consistent^{1 2} that relates to the law-making process. “The principle of legitimate expectations

1 e. g. Constitutional Court of Slovakia file reference I. ÚS 287/04.

2 “The second root of the principle of legitimate expectations is the principle of consistency, which is derived from the American and English legal tradition. This principle was first applied in the judgments of the Food Supply Arbitration Tribunal (Scheidsgerecht voor de Voedselvoorziening), although this tribunal did not actually give the principle a name. A feature of the type of cases heard by the Arbitration Tribunal was the large measure of discretion conferred to by the competent administrative bodies: there were few if any statutory rules governing the taking of decisions in connection with the food supply. As it was necessary to observe a certain consistency in the application of these discretionary powers and as there had to be a degree of predictability about the decisions to be taken, the administrative authorities concerned adopted what were known as “policy rules”, regulating the exercise of the powers in practice. These rules indicated how they would use their discretion in a specific situation. The case law of the Arbitration Tribunal shows that the adoption of policy rules was not an activity undertaken without engagement. The Tribunal took the view that the expectations created in the mind of the individual by the policy rules should in principle be fulfilled. If this were not the case, the decision was quashed as being contrary to the principle of legitimate expectations ... The meaning of the consistency principle has now been expanded to such an extent that administrative authorities are in principle not only obliged to fulfil the legitimate expectations created by policy rules, but may also even have a legal duty to adopt policy rules governing the exercise of their discretionary powers. In this respect the consistency principle has evolved as a necessary concomitant to the principle of legality.” in Berge, Gio ten; Widdershoven, R.J.G.M. (1998) Netherlands reports to the fifteenth international congress of comparative law / Rapports néerlandais pour le quinzième congrès international de droit comparé, pp. 421 - 452 (Conference report), pp. 426-427.

as it is currently interpreted in constitutional and administrative law has two roots historically, namely the principle of the protection of acquired rights and the principle of consistency. The constituent requirements for fulfilment of the principle of legitimate expectations in the case of the various executive acts can be traced back to these two roots.”[1, p. 425];

(ii) judicial decisions need to be consistent in legally similar cases [6]. This interpretation has become an integral part of legal order – Act no. 160/2015 Coll. on Civil Procedure as amended¹, however the concept of “long-term judicial practise” is used in connection and it is marked as a legal certainty („Legitimate expectation belongs under the principle of legal certainty“ [7]).

2. Legitimate expectations in context of private law

As stated before, the protection of individual right within horizontal legal relations is perceived by legal doctrine as “problematic”.

Preferred interpretation for applying the principle of legitimate expectations is given to vertical relations, mainly in public – administrative and procedural law.

Albeit different stance can be found in judicial practise. E. g. in case of:

- contractual obligation [8]
- right to inherit [9]
- right to salary [10]

the Constitutional Court applied the principle of legitimate expectation within the horizontal substantive relations, within the scope of property rights.

Mentioned opinion of Constitutional Court was examined by legal doctrine and the result was that it was not appropriate: “Involving the principle of legitimate expectations into property legal disputes is in contrary to origin concept of this institute and the way that European bodies use it” [5].

2. 1 Contractual obligation

“In civil law, the position of the principle of ‘legitimate expectations’ is more ambiguous. ‘Legitimate expectations’ are not aimed at public bodies but at all conceivable subjects of the law (contractual partners, tortfeasors, shareholders, family members, etc). It does not relate primarily to law (in the objective meaning) and its practical implementation, but to (subjective) rights and obligations. Moreover, the rule is basically reciprocal, so not only the legitimate expectations of one party, but those of both of them must be taken into account in order to evaluate respective legal consequences.” [11]

Legal doctrine in Slovakia [12] and the Czech Republic [13] operates with legitimate expectations as an instrument connected to contractual obligation, mainly in accordance to violation of obligation.

¹ Article 2, Section 220 par. 2, Section 393 par. 2,

According to our point of view, it is reasonable to utilize subject institute also in contractual obligations. There is no reason (except historical) that would restrict the use of legitimate expectations when supporting the right arising from a contract. It is legally recognized sort of legal act that entitles parties to expect certain way of behaviour and acting from the other party that could be enforced under the legal order.

2.2.1 Consumer relations

Consumer protection represents one of the earlier parts of the legislation that directly dealt with the legitimate expectations: “The category of ‘legitimate expectations’ started to appear on the European level in the first consumer directives from the 1980s and 1990s.” [11]

In case C-310/15¹ (Court of Justice of the European Union), the Court of Justice used a concept of the legitimate expectations of the average

1 “It is apparent from the casefile in the main proceedings that, on 27 December 2008, Mr Deroo-Blanquart acquired a Sony laptop in France – model VAIO VGN-NR38E – which was equipped with preinstalled software including Windows Vista Home Premium operating system and various other software applications. When using that computer for the first time, Mr Deroo-Blanquart refused to subscribe to the operating system’s ‘end-user licence agreement’ (EU-LA), displayed on that computer’s screen, and requested, on 30 December 2008, reimbursement from Sony of the part of the purchase price of the computer corresponding to the cost of the preinstalled software. By letter of 8 January 2009, Sony refused to process that reimbursement, submitting that the VAIO computers with preinstalled software form part of a single and non-separable offer. Following discussions, Sony offered, on 15 April 2009, to cancel the sale and to reimburse Mr Deroo-Blanquart the entirety of the sale price, namely EUR 549, subject to the return of the equipment purchased. Mr Deroo-Blanquart declined that offer and, by a document lodged on 17 February 2011, issued proceedings against Sony before the tribunal d’instance d’Asnières (District Court, Asnières, France) for payment, inter alia, of EUR 450 as a lump sum for the preinstalled software, and of EUR 2 500 for the damage suffered as a result of unfair commercial practices ... After noting that the applicable provisions of national law fall within the scope of Directive 2005/29, the Cour de cassation (Court of Cassation) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling: ‘(1) Must Articles 5 and 7 of Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2006 concerning unfair business-to-consumer commercial practices in the internal market be interpreted as meaning that a combined offer consisting of the sale of a computer equipped with pre-installed software constitutes a misleading unfair commercial practice where the manufacturer of the computer has, via its retailer, provided information on each item of preinstalled software, but has not specified the cost of each individual component? (2) Must Article 5 of Directive 2005/29 be interpreted as meaning that a combined offer

consumer (the case was about commercial practice of the sale of a computer equipped with preinstalled software without any option for the consumer to purchase the same model of computer not equipped with preinstalled software and considering it or not to be an unfair commercial practise as well as the possibility to indicate the price for computer and software separately).

The legitimate expectations of consumer are also examined in an online world [14], still with no concrete resolution: “At present, the issue appears much more complicated and there is a definite need for more detailed insights into the pros and cons of applying the adage. Such insight is also required to determine what exactly constitutes the ‘legitimate expectations of the consumer in an online environment’, and what these expectations imply in view of liability positions. Aside from the considerations related to the legitimate expectations of consumers, other arguments should be considered as well when analysing the necessity of new legislative measures on consumer liability given the specifics of the online world.”

3. Conclusion

We consider the legitimate expectation to be an important part of legal order.

We agree with the classification as an institute of constitutional law, but we see its signification not only in area of public – administrative law, but in area of private law as well.

There is no doubt that general legal institutes should be apply wherever their application is possible and useful. Legal purism should not prevail over needs of practice, they are supposed to be balanced and help each other:

“Is it necessary at all to deal with concepts like ‘legitimate expectations’ ...? They are hard to grasp, without clear content and scope of applicability and

consisting of the sale of a computer equipped with preinstalled software constitutes an unfair commercial practice where the manufacturer leaves the consumer no choice other than to accept the software or cancel the sale? (3) Must Article 5 of Directive 2005/29 be interpreted as meaning that a combined offer consisting of the sale of a computer equipped with preinstalled software constitutes an unfair commercial practice where the consumer is unable to obtain a computer which is not equipped with software from the computer manufacturer? ... It must therefore be ascertained whether the behaviour of the trader entails a possible violation of honest market practices or of the principle of good faith in the trader’s field of activity, which in the present case is the manufacturing of computer equipment for the general public, in the light of the legitimate expectations of the average consumer ... ” in <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d67bb6f22ec57e4c569a19e1dfba87642b.e34KaxiLc3qMb40Rch0SaxyMbxj0?text=&docid=183106&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=278945> .

extremely conditional on factual circumstances. Practitioners would agree that one cannot rely on them before the courts, because their application depends very much on the judge's discretion ... All we need is to learn to process and apply them so that they do not give the impression of legal scholars' whims but are perceived as a workable and useful element of law." [11]

1. Berge, Gio ten; Widdershoven, R.J.G.M. (1998) *Netherlands reports to the fifteenth international congress of comparative law / Rapports néerlandais pour le quinzième congrès international de droit comparé*, pp. 421 - 452 (Conference report), pp. 424.
2. Barak-Erez, D.: *The Doctrine of Legitimate Expectations and the Distinction between the Reliance and Expectation Interests. European Public Law, Volume 11, Issue 4. Kluwer Law International, 2005. p. 584. online <http://www.tau.ac.il/law/barakerez/articals/legitimate.pdf>*
3. Berge, Gio ten; Widdershoven, R.J.G.M. (1998) *Netherlands reports to the fifteenth international congress of comparative law / Rapports néerlandais pour le quinzième congrès international de droit comparé*, pp. 421 - 452 (Conference report), pp. 424-425.
4. *Constitutional Court of the Czech Republic file reference IV. ÚS 525/02*
5. Langášek, T.: *Ochrana legitimního očekávání v judikatuře Ústavního soudu. online <https://www.law.muni.cz/sborniky/dp08/files/pdf/ustavko/langasek.pdf>.*
6. *e. g. Constitutional Court of Slovakia file reference III. ÚS 252/04, II. ÚS 566/05.*
7. *The Supreme Court of Slovakia file reference 2MCdo/4/2015*
8. *Constitutional Court of the Czech Republic file reference I. ÚS 353/04.*
9. *Constitutional Court of the Czech Republic file reference I. ÚS 544/06.*
10. *Constitutional Court of the Czech Republic file reference I. ÚS 185/04.*
11. Balarin, J. *The Principle of Legitimate Expectations in the New Czech Civil Code. Elte law Journal, 2014/2. online <http://eltelawjournal.hu/principle-legitimate-expectations-new-czech-civil-code/>*
12. *See Jurčová, M., Štefanko, J.: Porušenie povinnosti v zmluvnom práve. In Štefanko, J. (ed.) Prostriedky nápravy v zmluvnom práve. Trnava : Trnavská univerzita v Trnave, Právnická fakulta, 2017, p. 10 – 26. online <http://publikacie.iuridica.truni.sk/wp-content/uploads/2017/07/prostriedky-napravy-v-zmluvnom-prave.pdf>*
13. ŠILHÁN, J. *Právní následky porušení smlouvy v novém občanském zákoníku. Praha : C. H. Beck, 2015.*

14. See Prins, J. E. J. (2003). *Consumers, Liability, and the Online World. Information & Communications Technology Law*, 12(2), 143-164.

Mészáros P. The principle of the legitimate expectations

In the article it is considered the legitimate expectation to be an important part of legal order. The author agrees with the classification as an institute of constitutional law, but we see its signification not only in area of public – administrative law, but in area of private law as well. Legal doctrine in Slovakia and the Czech Republic operates with legitimate expectations as an instrument connected to contractual obligation, mainly in accordance to violation of obligation. The author has no doubt that general legal institutes should be apply wherever their application is possible and useful. According to the author's point of view, there is no reason (except historical) that would restrict the use of legitimate expectations when supporting the right arising from a contract. Legal purism should not prevail over needs of practice, they are supposed to be balanced and help each other. When concluding a contract, both parties have their expectations – coming from legal order and the regulation given by contract. Legitimate expectations as a legal principle should not covered only rights arising from public – administrative law as the historical and origin approach suggests, but the principle has to be interpreted also from the point of view of its grammatical sense, as shown by judicial practice.

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