Book Review -- The Protection of Legitimate Expectations in German Constitutional Law and in EC Law

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Review of K.-A. Schwarz, *Vertrauensschutz als Verfassungsprinzip. Eine Analyse des nationalen Rechts, des Gemeinschaftsrechts und der Beziehungen zwischen beiden Rechtskreisen* (Studien und Materialien zur Verfassungsgerichtsbarkeit Vol. 87, Nomos, Baden-Baden 2002, 665 p., ISBN 3-7890-7789-5, 88 EUR)

[1] This voluminous study, a German *Habilitationsschrift* which the author, K.-A. Schwarz submitted to the faculty of law of the University of Göttingen, analyses an "evergreen" in public law, to be found in all the legal systems of the European Union's Member States: the general principle of the respect for legitimate expectations.

[2] Individuals and undertakings regularly claim the protection of legitimate expectations when the legislator or administrations change the rules which determine or influence their private and/or economic life. Such changes may be caused by the need of reassessment of given regulatory and policy approaches in the light of factual changes (e.g. demographic changes inducing a re-organisation of pension schemes) and/or of new political priorities (e.g. favouring the use of new renewable energies at the expense of traditional, more polluting sources). Moreover, changes in the case law of highest courts can also raise the question to which extent it has to take into account legitimate expectations.

[3] Leaving aside the particular case of retroactivity of penal laws which is generally recognised to be incompatible with the rule of law, the individual's interest in "maintaining" a given legal situation favourable to him does, in principle, not prevail over the general interest in changing this situation articulated by the democratically legitimated bodies (legislatives, administrations and, to a certain extent, also judges), provided that the latter have respected their respective constitutional requirements imposed on their action. However, it is recognised in most democratic states governed by the rule of law that there may be instances in which the individuals' interest in keeping (at least temporarily) a legal situation may have to be protected as legitimate expectations.

[4] If most legal systems recognise, as a matter of principle, that legitimate expectations are able to constitute a (constitutional) limit to public powers, there is great divergence on how to define the conditions for such protection. It is not surprising that answers to this question vary greatly according to the dogmatic viewpoint of the observer and, of course, its legal traditions. German scholars have been concerned, during the last years, on the way in which the European Court of Justice (ECJ) interprets the principle of the protection of legitimate expectations which traditionally gets a rather broad interpretation by German courts and laws. This is, e.g., illustrated by the fact that the German Law on Administrative Procedure (*Verwaltungsverfahrensgesetz*) leaves much room for the individuals' interest in maintaining an administrative act even in those cases in which such an act proves to be unlawful. The different conceptions of legitimate expectations in EC law and in German administrative law have led to practical difficulties in those cases in which a Member State has to execute EC law – in particular when Germany was to revoke administrative acts granting state subsidies which were found to be incompatible with EC law. In fact, the ECJ requires that Member States respect, when applying their own national administrative law, the (more restrictive) Community conception of the protection of legitimate expectations in order to ensure a uniform application of the EC rules on state subsidies and, thus, to avoid that Member States deviate from these compulsory norms by means of a divergent (read: too generous) interpretation of the principle.

[5] It is against this background that Schwarz has undertaken his study which analyses the principle of the protection of legitimate expectations in the case law of the German Federal Constitutional Court (BVerfG) and of the European Court of Justice (ECJ). He also discusses to which extent there exist conflicts between both concepts and courts. The book is divided into two parts, the first being nearly twice as large as the second. Part One (ca. 350 pages) deals with the protection of legitimate expectations in German constitutional law, including a section covering the historical roots of the principle. Part Two (ca. 180 pages) describes, first, this principle as it applies in EC law (including already a major section of ca. 30 pages on its integration into the German administrative law) and, second, the sometimes tenuous relationship between the German and the EC concepts (30 pages). The latter analysis is, thus, not subject of a third part as one may have expected when reading the sub-title of Schwarz's study. The conclusion of the study devotes 25 points to Part One and 11 points to Part Two. The lack of a list of abbreviations is largely compensated by the fact that the reader finds a very useful index of the BVerfG's and ECJ's case law related to legitimate expectations.

[6] The structure of the book under review indicates already that Schwarz's study deals, first of all, with the principle of the protection of legitimate expectations in German law and, as EC law is concerned, primarily from a German perspective. This is also underlined by the fact that the rather impressive bibliography (ca. 780 titles) contains almost exclusively German writings except three titles in Latin, three in English (one of which being a country report from Germany) and two in French. Some readers, in particular EC and comparative lawyers, attracted by the (more general) title of the book may regret this exclusive focus on the German situation. Very critical readers may also ask whether the author should not have adopted a less "encyclopaedic" style in order to deliver a more concise and shorter piece.

[7] Leaving this aside, the reader is offered an authoritative study which describes in detail the development and the shortcomings of the BVerfG's present dogmatic approach towards the principle of legitimate expectations. The author convincingly argues that the BVerfG's case law lacks dogmatic stringency. In fact, it appears that the principle has too often been used as an abstract principle which allowed to resolve pragmatically some particularly problematic cases. This has, however, led to a considerable expansion of the protection of legitimate expectations in case law and legislative acts (see e.g., the Law on Administrative Procedure mentioned before, which is a codification of previous case law). Moreover, it has not promoted the definition of the exact *contours* of the principle and, hence, contributed greatly to legal uncertainty. Schwarz proposes and develops further a new dogmatic foundation for the application of this principle in order to remedy these shortcomings. Taking as a starting point that legitimate protection is in fact a question which has to be decided on an individual basis, he argues for integrating the analysis of the question to which extent the applicant deserves protection of his expectations raised by the legislator or the administration into the classical doctrine of fundamental rights developed by the BVerfG.

[8] The author demonstrates that the new approach he proposes would allow to deal in a consistent manner with the different faces of this principle while establishing a fair balance between maintaining in particular the legislator's freedom of decision, on the one hand, and respecting individuals' legitimate expectations (which tend to be overemphasised by a majority of German scholars), on the other hand. In particular, it should be helpful to redefine the scope of the protection of legitimate expectations in German constitutional law – and consequently to lift some of the "exaggerations" which have grown during the last decades.

[9] In Part Two of the book, it becomes clear that the merits of Schwarz's new conception of the principle of the protection of legitimate expectations in German constitutional law are not limited to the "internal" constitutional doctrine of this Member State. The author demonstrates that his approach allows also narrowing the gap between the (classical) German and the European conception of legitimate expectations. The Community concept developed by the ECJ is less generous than the classical German approach towards individuals' expectations. The ECJ's emphasis is normally laid on the fact that the general interest is also based on the principle of equality which is particularly important in the context of the EC which is based on the very idea of non-discrimination of the different market operators. As already indicated, the ECJ fears also that Member States – which are in general competent for implementation of EC law - may tend to use a broad interpretation of the principle of legitimate protection in order to protect indirectly their own producers at the expense of those located in other Member States.

[10] Schwarz's redefinition of the German concept of the protection of legitimate expectations which allows narrowing the differences between the classical German and the ECJ's approach is to be welcomed if one remembers that some German scholars have tried to construe, after the *Alcan* case of the ECJ (1998), a "structural inconsistency" between these concepts in order to convince the BVerfG to declare the EC concept inapplicable in Germany according to the principles laid down in its famous/infamous "Maastricht-doctrine". It is true that the BVerfG has not admitted to review the *Alcan* case (and, by the way, used this opportunity to considerably "soften" its Maastricht-doctrine) as it saw no incompatibility between the ECJ's and the Basic Law's approach towards respect of legitimate expectations. But it is Schwarz who delivers the dogmatic foundation for the BVerfG's ruling.

[11] In sum - and in spite of some regrets mentioned before - the book under review is an excellent study. It proves that EC law obliges often to re-think long-standing national legal traditions. Schwarz demonstrates that innovations in national law deriving from the primacy of EC law should not always be considered as a danger for national constitutional traditions but as a starting point for a fresh review of such traditions. Applied to his subject this means that German doctrine and jurisprudence should acknowledge that privileges have historically always been revocable. Consequently, the protection of legitimate expectations should again be understood as a principle which applies to exceptional cases, as " *Korrektiv im Ausnahmefall* " (p. 566). The study contributes, thus, greatly to what the interconnection and interaction between different legal orders should ideally amount: a process of mutual learning.