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Fair and effective public administration

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Abstract

Administrative procedure is classically the area of law where public administration has direct contact with citizens. Consequently, these cases entail a risk of violating the fundamental rights of citizens, which is certainly not desirable in a constitutional state. In today's administrative systems, administrative procedural law is becoming increasingly important. In practice, the main trends are limiting the executive power of the state to constitutional limits, guaranteeing the fundamental rights of citizens, and creating "good public administration".

For many, the question may arise: are good administrative procedures merely a desirable moral objective, without any legal effect, or are there legal elements that make it both binding and effective?

Keywords

good administration, due process, client protection, judicial review

> "*Parallel to the extension of the scope of effective public administration, the increasing need for guarantees of legality appears, and parallel to the increase in the scope of the executive's powers of intervention appears the tendency to develop the organs of public opinion, the organs of general rule-making and the organs of value regulation more effectively, and to subordinate the executive to the values represented by these organs.*" (Bibó, 2016, 128)

1. The importance of client protection

The root of the emergence of procedural principles was the recognition of the importance of client protection (Kirkham, 2004), which is reflected in administrative law at two levels: first, in a negative sense, it prevents public authorities from taking actions that could adversely affect the rights and legitimate interests of clients, and, second, in a positive sense, it requires public authorities to carry out their law enforcement activities in a way that serves the rights and legitimate interests of clients. Client protection must be interpreted in a very broad sense, to include all provisions that relate to the powers or obligations, or even the objectives, of public administrations (Fortsakis, 2005, 208).

European case law fulfils the idea of client protection through a set of basic principles, which are effective means of ensuring that clients are meaningfully protected against the actions of public administrations. As can be seen from the series of recommendations by the Council of

Europe, the idea of good administrative procedure has long been present in the development of European law, but only in a scattered way, without any concrete conclusions being drawn from it or a uniform set of requirements being formulated. Despite the existence of tangible legal documents on the subject, the lack of binding force has meant that these documents have at best had a role only as potential considerations in the process of law-making and, even more marginally, in the application of the law.

Perhaps the biggest issue is that European legal systems have traditionally paid great attention to the system of guarantees of judicial review, which of course serves as an important safeguard, but this pushed other legal instruments and other equally important principles somewhat into the background. Case-law certainly plays an important role in the development process of European law, but, by its very nature, it only provides for case-by-case oversight rather than a complete and comprehensive system of guarantees. Therefore it is necessary to build up additional control mechanisms and safeguards in administrative law, which, while ensuring legality, are capable of making everyday administration both faster and cheaper (Solé, 2002, 1527–1529).

The exclusivity and importance of judicial protection has been the subject of many debates in the literature. Some argue that judicial review is not the only, or even the primary, factor in protecting the legality of public administration (Craig, 2004, 108). Must the courts or other mechanisms play a primary (or even exclusive) role in ensuring good administrative procedure?

The red light theory advocates the idea of a minimalist state, in which the main function of administrative law is to prevent the abuse of state power and to eliminate *ultra vires* through various legal means, mainly judicial review. According to this view, administrative law is nothing more than the law of checks and balances on government power, which limits the executive to a legal framework while at the same time it protects citizens from abuses and the government's ‚running amok' (Beatson et al., 2002, 2). According to the red light theory, the courts are responsible for ensuring good administrative procedure, while the emphasis is on administrative law as a kind of external constraint on government control, through the independence of administrative authorities (Ponce, 2005, 554). According to this concept, the courts and the administrative authorities are warring parties, the former using the weapon of administrative law against the latter in a battle over the abuse of government power. A completely different approach is the so-called "green light theory", which, contrary to its name, does not welcome unrestrictedly free state action. While the proponents of the red light theory favour judicial control over the executive, the followers of the green-light theory tend to put their hope in the political process. They believe that the courts may become a barrier to progress, that their control is unrepresentative and therefore undemocratic, and that their influence must be kept to a minimum. But then, how and by what can good administrative proceedings be ensured (Verebélyi, 2004)? In short, by setting guidelines and accountability. By laying down requirements such as transparent governance, ensuring access to information, and restricting discretion into a clear legal framework. These legal principles immediately bring about internal control in public administration, rather than external control such as judicial review. A further advantage is that while judicial review is retrospective, ruling on a specific decision, the principles of good administrative procedure are forward-looking, in that they define the limits of the procedure and set the course for its conduct.[1]

[1] Of course, the above two theories cannot be separated in such a clear-cut way; in reality, administrative systems recognise and bear in mind both, combining the advantages of both systems. The optimal solution can therefore be captured somewhere between the two, in the framework of a kind of "yellow light" theory, which recognises both the controlling and the reactive nature of administrative law, leaving room for courts and extra-judicial mechanisms to achieve good administrative procedure. See: Beatson et al. (2002, 2–5).

2. Red light theory: the primacy of judicial review

Although traditional administrative law has not always been interested in making good decisions, it has certainly been interested in the judicial review of unlawful decisions. This is an old, somewhat negative approach, in the sense that it argues against arbitrariness rather than in favour of good administration (Harlow & Rawlings, 1997, 29).

The first versions of the constitutional rule of law concept already recognised that violations could occur in the operation of the executive as well as in other social relations, and that therefore "the violated rule of law must be restored in this area as well", thus reinterpreting the classical adjudicative function by subjecting administrative decisions to judicial review (Takács, 1993, 263). Traditional administrative law emphasised the importance of judicial review, but this alone does not guarantee good administrative procedure. This is because of the traditional principle of separation of powers – accepted both in Anglo-Saxon states and on the continent (Solé, 2002, 1506).

Natural persons are entitled to a judicial review of administrative decisions affecting their rights or interests, either directly or by means of an objection. Before going to court, administrative remedies are usually available, which in some cases are complementary. These may relate to the factual basis of the decision or the legality of the decision. Natural persons should not suffer any disadvantage as a result of challenging the decisions of administrative authorities (Petrik, 1991).

It is also essential to bear in mind the means of control and sanction applicable in the event of failure to comply with the due process requirement. In this respect, the instrument of judicial review, which can be used to enforce lawful decisions by the public administration, is of particular importance (Kilényi, 1991). Judicial review can have a prominent role in disciplining administrative action by monitoring compliance with legal requirements during the procedure, thereby facilitating appropriate decision-making. Judicial review can take several forms, but the view that the procedural aspect of the case takes precedence and that, if such errors or deficiencies are found, the court does not review the merits of the decision has become increasingly obsolete. This solution, however, is increasingly resented by citizens, who feel that they cannot expect effective legal protection from the courts, as they feel that the merits of their case are not being advanced by judicial review (Solé, 2002, 1519–1520).

"Where there is an entitlement, there must be a remedy," – the Latin saying goes.[2] The possibility of reviewing administrative decisions and thus holding public administrations accountable is traditionally seen as one of the first and most fundamental steps against the arbitrariness of the executive. Where the law ends, tyranny begins, and judicial review is the most effective defence against oppression. The purpose of judicial review is to force the administration to comply with procedural rules, otherwise the decision will be annulled, and the courts thus indirectly ensure the enforcement of good administrative procedure, with maximum respect for the separation of powers. Judicial protection prevents the administration from acting rashly and hastily by forcing it to comply with fundamental constitutional and other legal requirements (Solé, 2002, 1520).

Looking beyond Europe, it is worth noting the specificity of US administrative law, in that it traditionally allows for judicial review of administrative decisions, both substantive and procedural. The court has the power to annul a specific rule on the grounds that it is substantively

[2] "*Ubi jus ibi remedium*." Quoted by Millett (2002, 309).

wrong, but in most cases this is not the route taken. It is not said that it should be repealed because it is wrong, but that it should be repealed because the decision-making process was not sufficiently open to stakeholders and society or because all relevant facts were not sufficiently examined. According to numerous authors, there are political rather than purely legal considerations behind such thinking. A judge cannot say that a decision made by a friend of the official is fundamentally wrong and therefore invalid, as this would be in open defiance of the government. Instead, he will say that there was a substantive error in the procedure that renders the decision invalid (Shapiro, 1996, 36–38).

3. Green light theory: The principle of due process

In contrast to the above theory, a new perspective has emerged across Europe that focuses on the quality of the decision – in particular discretionary decisions – and emphasises good decision-making and good administrative procedure. Accordingly, public administrations must not only be lawful, but must also make correct, appropriate decisions, because that is simply what people expect of them. That is why it can't do nothing, even if it is empowered to do anything (Solé, 2002, 1506).

The right to a fair trial is itself a category of justice and therefore a value-based concept. The Fundamental Law of Hungary (hereinafter: the Fundamental Law) does not provide for a subjective right to substantive justice in the area of fair trial, nor does it provide for the exclusion of judgments that are contrary to the law. These are the aims and tasks of the rule of law, and, in order to achieve them, it must establish appropriate institutions – primarily those providing procedural guarantees – and guarantee the relevant subjective rights. The Fundamental Law therefore gives entitlement to a procedure that is necessary and, in the majority of cases, appropriate to ensure substantive justice (procedural justice). The main function of the right to a fair trial is to provide a legal framework (a system of guarantees) for the enforceability of other rights. Accepting the jurisprudence of the Hungarian Constitutional Court with regard to the limits to the detectability of the truth, it is not possible to assess solely on the final product of the procedure whether a fair decision has been reached in a specific case, and whether justice has been done. As such, the quality of the proceedings is more reliably measured by procedural justice, i.e. the way in which the decision was reached, in which the judiciary produced the final product (Bárd, 2004, 48–49).

In the absence of procedural principles that follow from the formal rule of law, the doctrine of substantive rule of law cannot be enforced in practice. The principle of due process is derived from the principle of objective, substantive justice and means its enforcement in practice. The parallel enforcement of principles on both the substantive and formal sides of the rule of law is necessary for being able to talk about the rule of law (Szaniszló, 2017, 431). According to the consistent practice of the Constitutional Court, procedural guarantees derive from the principles of the rule of law and legal certainty and are essential for the predictability of the functioning of certain legal institutions.[3] Procedural guarantees for the enforcement of rights and obligations derive from the constitutional principle of legal certainty. In a procedure that operates without adequate procedural guarantees, legal certainty is compromised.[4]

[3] See Decision 11/1992 (V. 5.) AB, ABH 1992, 77, 85.

[4] See Decision 75/1995 (XII. 21.) AB, ABH 1995, 376, 383.

In the series of acts constituting civil transformation, the major procedural codes (Article LIV of 1868 on the Code of Civil Legislative Procedure, Article I of 1911 on the Code of Civil Procedure, Article XXXIII of 1896 on the Code of Criminal Procedure) all guaranteed the right of access to the courts, the impartiality and independence of judges through rules of disqualification and conflict of interest, and the right of appeal. The right to a fair trial, which is currently regulated at the level of the Fundamental Law and principles, was therefore present in elements in the Hungarian legal system before the charter Constitution. Although the Constitution (Act XX of 1949 as amended by Act XXXI of 1989) did not recognise the concept of due process *expressis verbis*, the Constitutional Court derived it from the Constitution by relating procedural guarantees arising from legal certainty to the right to an impartial tribunal. In doing so, the Constitutional Court also took into account the relevant provisions of international conventions, both the International Covenant on Civil and Political Rights (hereinafter the ICCPR) and the relevant provisions of the European Convention on Human Rights (hereinafter the ECHR).[5] The principle of a fair trial is defined by the ICCPR as follows: "*In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*" In the ECHR's words: "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*." On the one hand, the Charter of Fundamental Rights of the European Union includes, in relation to administrative procedure, the right to good administration in Article 41 ("*Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions and bodies of the Union*.") and, on the other hand, the right to a fair trial in Article 47 ("*Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law*.")

The Fundamental Law also refers to the requirement of due process in the National Avowal when it states: "*We hold that democracy is only possible where the State serves its citizens and administers their affairs in an equitable manner, without prejudice or abuse.*" At first sight, the principle appears to be a mere declaration, without binding legal force, but subsequent provisions of the Fundamental Law point in the direction of strengthening its binding force. The most important and classic area of procedural rights is the administration of justice, but the Fundamental Law also includes the most essential guarantees of administrative procedure, unlike the previous Constitution. The principle thus covers all public activities where citizens encounter public bodies as public authorities. One of the major achievements of the Fundamental Law is that the chapter on fundamental rights also devotes specific articles (Articles XXIV and XXVII) to the judicial and administrative aspects of due process.

The starting point for the Constitutional Court in its examination of the right to a fair trial is that the requirement of a fair trial is a quality that can be assessed by taking into account the procedure in its entirety and the circumstances of the case.[6] In its judgments, it has defined the specific criteria implied by a fair trial on a case-by-case basis. The Constitutional Court emphasised that there is no other fundamental right or constitutional objective that can be weighed against the right to a fair trial, because it is itself the result of a balancing exercise.[7] Notwith-

[5] Decision 21/2014 (VII. 15.) AB, ABH 2014, 582.

[6] Decision 6/1998 (III. 11.) AB, ABH 1998, 91.

[7] Decision 14/2002 (III. 20.) AB, ABH 2002, 101, Decision 15/2002 (III. 29.) AB, ABH 2002, 116, Decision 35/2002 (VII. 19.) AB, ABH 2002, 199, Decision 14/2004 (V. 7.) AB, ABH 2004, 241.

standing the absence of details, as well as the observance of all the detailed rules, the procedure may be inequitable, unjust or unfair.[8]

The issue of fairness is amplified in the context of judicial discretion within due process. As has been known since Plato, general rules never fully fit the specific facts for which they were created by the legislator. Perfect justice does not therefore presuppose perfect rules, but may be achieved by perfect discretion, whereby the legislator examines the social situation in question carefully and comprehensively, rather than mechanically applying the law as it stands, without fully examining the situation. Unfortunately, the perfect instrument of discretion is called into question by the imperfections of humans, who apply it in biased, unreasonable and other inappropriate ways. The application of law in general can be described as an area of progression from discretion to written law over time. As social reality poses a new problem, the most appropriate first step would be to create an authority with appropriate discretionary powers, which is flexible and able to react quickly; in short, perfect for emergencies. However, as the flaws of deliberation are revealed, the focus shifts increasingly towards legislation, and the pattern can be described as follows: to do the job quickly through deliberation, and then to create the right rule, protecting citizens from the potential dangers of deliberation (Shapiro, 1996, 31).

According to János Sári, "the inadequacy of normative instruments to perform most of the modern functions of the state can lead to a high degree of vulnerability of the citizen" (Sári, 1995, 156). Hence, a flexible law enforcement attitude may point in the direction of justice in the case of certain unreasonable or fossilised rules, but it is a double-edged sword, since it can easily lead to injustice in the event of inappropriate application. The most sensitive area of discretion is the field of administrative law enforcement, and it is therefore essential that discretionary activity be conducted along certain legal principles.

In some cases, the decision of the administrative authority is clearly predetermined by the law, but in other cases the law gives the authorities a margin of discretion and merely sets limits within which the administration has a degree of discretion. An administrative authority vested with discretionary powers must not only comply with the applicable law, but must generally act in a fair and equitable manner. Discretionary power, in general terms, is when the public administration is empowered by law to choose from a range of legitimate options, and not on the basis of "legislation" (Ponce, 2005, 553). This choice involves balancing public and private interests using non-legislative values in order to establish a general interest that is not defined by law. The choice itself therefore cannot be considered to have legal content, but administrative law must nevertheless ensure legal protection for such choices in order to protect the individual. It is from this latter perspective that the importance of judicial review as a means of protection against arbitrary decisions can be grasped (Solé, 2002, 1504–1505).

If a given institution has a wide margin of discretion, some may already feel that the exercise of the client's rights can only have a limited influence on the decision, and that it is therefore a useless and burdensome obligation for the authority in such cases. At the same time, since it is precisely in this area that judicial control is the weakest, the guarantee role of procedural principles is, in my view, even more pronounced. This view is reinforced by the case-law of the European Court of Justice, which has pointed out in a number of judgments that the wide discretionary power of public authorities must not lead to the erosion of certain procedural principles (*de La Serre*, 2006, 241–242). In any event, the discretionary powers of the public administration must be limited, in accordance with the requirement of good administration deriving

[8] Decision 6/1998 (III. 11.) AB, ABH 1998, 91.

from the common tradition of the rule of law in the European States (Cananea, 2003, 568). In the European Union, the Court of Justice generally grants administrative authorities wide discretionary powers.[9] Since it does not seek to substitute the administrative authority's decision with its own judgement, it only examines whether the procedural rules have been complied with by the acting authority, whether the facts have been properly established and whether there has been no abuse of power. This narrow scope of review makes the role of procedural principles particularly important. This view was confirmed in the *Technische Universität* case, where the Court of Justice explained that, where the public administration has such a power of appraisal, respect for the rights guaranteed by the Community legal order are of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case, the right of the person concerned to make his views known and to have an adequately reasoned decision. Only in this way can the Court verify whether the factual and legal elements upon which the exercise of the power of appraisal depends were present. (Schwarze, 2004, 94–95; Cassese, 2004, 32).

Summary

Alongside judicial review, the issue of administrative procedural safeguards, which is in fact the general way in which the public interest function of the administration is carried out, is a key issue for good administrative procedure (Solé, 2002, 1507). The understanding of administrative procedure and its principles is somewhat ambivalent in the legal literature. According to the instrumental theory, the procedure is merely a means to an end, to reach an appropriate and effective decision, while the gateway theory holds that procedural principles have value in themselves, as they are fundamental to the achievement of substantive rights (Kanska, 2004, 301). The popularity of the principle that public administrations must follow well-defined rules to make the right decision has increased dramatically in recent decades. On the one hand, the principle of the importance of procedural rules is linked to the idea of good governance, and on the other hand, the need to establish the reasons on which a decision is based is proof that the administrative authorities have acted appropriately, weighing all relevant interests and taking all the data collected into account (Solé, 2002, 1507–1508).

The above issue is markedly different in English common law and continental legal systems. In the former, the fairness of an administrative act is matched by the possibility of being subject to a "quasi-judicial" review at the time of its adoption, so that the authority has one eye on the possibility of a subsequent judicial review. This rather procedural approach to rights is closely linked to the institutional practice of administrative courts, which can perform functions that are elsewhere the responsibility of the government (e.g. remedies within the ministry). In the Anglo-Saxon tradition, once a decision becomes final, the right of appeal to the courts becomes more restricted, the legal basis for review is limited and the range of remedies available is reduced. By contrast, in the continental administrative legal system, the fairness of the procedure is guaranteed by the possibility of review by an independent judicial forum. The individual has the possibility to challenge the administrative act, but in most cases this is only possible after the administrative decision (Bignami, 2004, 63).

Attempts to specify the administrative procedure in legal terms must never lose sight of the purpose of the procedure. The first and foremost aim of procedural law must be the realisation of

[9] For more on the problem of administrative discretion in the European Union, see. Ibáñez (2000, 204–237).

substantive law, in our case administrative (or other public) substantive law. Public law, as is well known from the ancient Roman division into private law and public law, is at the service of social welfare and the public interest, and it is this objective that procedural law must ultimately pursue. The protection of individual rights is undoubtedly an essential objective, but it is inherently secondary to the public interest (Kanska, 2004, 323). There is, however, a common intersection; good governance, which ensures both the protection of the rights of individuals and hence the protection of the interests of the social majority. Where do the values of good governance come from and how do they relate to administrative law? Generally speaking, they can be traced back to two main Western traditions of public administration. First, to the classical service model of public administration, dominated by the public interest. Second, to the new organisational principles of administration that swept through European public administrations in the 1990s, when the lean values of economics, such as efficiency, took over from more people-friendly principles (Harlow, 2006, 200).

Administrative law has undergone many changes over the course of the 20th century, with a functional evolution from the maintenance of legal and social order to the emphasis on welfare and legal safeguards through the performance of public functions. Until recently, the administrative system and administrative law have been seen as the last bastion of nationalism and statism, each rooted in the political and social traditions of its own legal system. This perception is being challenged today. It has been shown that this area is also full of borrowed, imported and transplanted institutions that clearly derive from the legal systems and legal solutions of other countries or European organisations, so that the isolated national character is hardly sustainable. Among the latter, the influence of the Council of Europe and the European Union is clearly visible. However, the above change has not overturned the traditional paradigm that administrative action leads to a decision that is essentially different from decisions between private individuals, since it is of a public authority (official) character. A paradigm shift can be observed, however, in the increased attention paid to procedural issues of the actions of public authority, with the growing emphasis on the requirement of due process and its guarantees (Cananea, 2003, 576–577).

As István Bibó has already pointed out, when examining the legality of public administration, one should not start from a static system, but "*constantly rethink, again and again renew the forms in which the legality of public administration has appeared*.[10]" The system of safeguards for the legality of public administration is therefore not a once-and-for-all system, but one that must be rethought and redefined from time to time. "*The correct distribution of social coercion is called order ... the correct distribution of social freedom is called justice ... The ideals of order and justice ... are the absolute measures of correct law ... The increase of objective coercion is valuable as long as it is accompanied by an increase in order and is not at the expense of justice; the increase of objective freedom is valuable as long as it is accompanied by an increase in justice and is not at the expense of order.*" (Bibó, 2011, 32)

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