

# **A FEW WORDS ABOUT THE EXISTENCE OF CONSTITUTIONAL EUROPEAN ADMINISTRATIVE PROCEDURAL LAW**

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## **Abstract**

Traditionally administrative procedural law consists of two parts: one regulates legal relationships between the state and its citizens (so-called administrative official procedural law), the other arranges legal administrative relations among authorities. Considering the present national administrative systems, the administrative official procedural law is being emphasized. Main tendencies in practice are to constrain the executive power of the state within constitutional frame of law and to guarantee gradually expand the fundamental rights of citizens. In regards of the federal form of the European Union the situation is absolutely different: it was the main aim here to establish and strengthen common administration against the interests of member states. Is it time to shift emphasis on the relationship of EU and its citizens? Does European administrative procedural law exist at all? What forms and levels of standardization can be expected? The main purpose of this study was to prove that administrative procedure requires common EU regulation within the framework of European administration by all means, as this is that special field of law by which the administrative body directly meets the EU citizens. Consequently these cases carry danger that fundamental rights of citizens may be impaired – its occurrence in a constitutional state is undeniably not desirable by any means. Thus a guideline seems indispensable serving parties at either side of the administrative legal relationship. Reflecting these, all we have is hope that this target would be met – by the European Constitution or any other suitable ways.

## **Key Words**

administrative procedural law, european procedural law, administrative procedures, normative principles in european law, Charter of Fundamental Rights of the European Union, European Court, establishing european administrative procedural law, European Code of Good Administrative Behavior

## European procedural law “En Générale”

Procedural law of the EU is essentially related to the law adopted to and executed in its own administration. We can clearly assert that the EU has not attempted yet to introduce a general, comprehensive, written regulation on administrative procedure – it is still a competence of member states, based on the principle of “procedural autonomy of member states”.<sup>1</sup> Thus two methods are to be applied to the enforcement of administrative substantive law. The direct method of execution is that way of law operation when EU laws are enforced directly by institutions of the EU itself. Contrary to this, a legal norm is carried out indirectly when implemented by national administrative bodies of the member state.<sup>2</sup> Concerning any of these two executive processes it becomes obvious that regardless to the special field of law, the EU law will intervene in favor of attaining common aims. As a consequence national interpretator authorities need to know and imply not only the national law but the relevant EU law too. In case of collision between these two, supremacy is provided to the EU law (as stressed in numerous judgments of the European Court).<sup>3</sup> The limits of Union competences are governed by the principle of conferral. Under the principle of conferral, the Union shall act within the limits of the competences conferred upon it by the Member States in the Constitution to attain the objectives set out in the Constitution. Competences not conferred upon the Union in the Constitution remain with the Member States. The use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution.<sup>4</sup>

As stated above, the EU has no competence in regulating administrative procedures of member states – thus the national administrative bodies have to execute EU law in frames of

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<sup>1</sup> Fábíán Adrián: Az EU-jog és a tagállami közigazgatási eljárás kapcsolódási pontjai. Magyar Közigazgatás, 2006/10., p. 616.

<sup>2</sup> C.f. Patyi András (editor): Közigazgatási jog II. Közigazgatási hatósági eljárásjog. Dialóg Campus, Budapest-Pécs, 2007, p. 677.

<sup>3</sup> See in general *Costa v. ENEL* (Case C-6/64); regarding administrative law: *Land Rheinland-Pfalz v. Alcan Deutschland GmbH* (Case C-24/95).

<sup>4</sup> See: Treaty Establishing a Constitution for Europe Art. I-11.

national law (except other dispose from the EU).<sup>5</sup> Accordingly national authorities need to imply the national administrative procedural code not only in case of implementing national law, but when an EU legal norm is required to decide in a case. Now we come to the question if the EU gives a free hand to member states in this process – the answer is plausible: the EU cannot afford to do so. The Preamble of the Treaty Establishing a Constitution for Europe includes the following principle: it is desirable to further strengthen the public life of the EU in a democratic and transparent way. Derived from this, the EU cannot authorize member states with all means of regulation – introducing single minimal standards is indispensable. But what are the requirements relevant to all persons applying law without exception?

### **Normative principles in european law for the european administration**

Yet the Preamble of the Treaty Establishing a Constitution for Europe refers to the rule of law, the principle has an outstanding importance in European law. The second requirement deriving from this principle is the administration being submitted to law – to which three conditions need to be met.<sup>6</sup> Firstly, administrative bodies should only proceed in cases they are entitled to do so (the competences should clearly be defined). Secondly, they cannot proceed at their will even being entitled to the competences in question, the decision has to be made on the basis of the relevant procedural rules. Thirdly, as even the very existence of these rules cannot guarantee a perfect decision, it is desirable that both the administrative decision and the decision-making procedure should be submitted to judicial control or at least provide its possibility. From the spectacle of the present study, the second guarantee is of determinative relevance.

The Constitution of the EU is reticent on the regulation of procedures carried out by common institutions: „Each institution shall act within the limits of the powers conferred on it in the Constitution, and in conformity with the procedures and conditions set out in it. The institutions shall practice mutual sincere cooperation.”<sup>7</sup> So the Constitution is not even capable of creating a conceptual basis for the European administrative procedure as it entitles single bodies to rule their own process. Despite this all, we cannot reject that various principles can be found, through which a coherent and complex set of basic norms could be

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<sup>5</sup> See: Art. 13. par. 4. of Act 2004/CXL on the Rules of the Hungarian Administrative Procedural concerning the scope of the law

<sup>6</sup> See: Nagy Péter: Európai alkotmány – európai közigazgatás. ([www.jogiforum.hu](http://www.jogiforum.hu))

<sup>7</sup> See: Treaty Establishing a Constitution for Europe Art. I-19.

worked out. It is the European Court that defines the pieces of the puzzle through its jurisdiction. According to the Court, two basic requirements have to be fulfilled when member states execute the European law:<sup>8</sup> above all the prohibition of discrimination and the principle of effectiveness. National administrative procedural law can only be implied if it does not mean simultaneously violating the rights of citizens from other member states or discriminating them and does not set back efficient implementation of common law. Besides all mentioned above, authorities have to consider the following norms worked out by the European Court: principles of legality, proportionality, objectivity, and the rights to representation, advise, hearing, access to documents for review, obligation to justify, etc. Yet these criteria are almost fully collected in the Charter of Fundamental Rights of the European Union.

### **The Charter of Fundamental Rights of the European Union**

In the era before the establishment of the Charter, European treaties and other basic documents were reminiscent of an organization for exclusively economical cooperation, as the idea of the EU was led first of all by financial interest. In my opinion it was this document that brought a real qualitative difference to this process.

The foundation of the Charter is tightly connected to the need of intense cooperation between all the European countries including those beyond the Iron Curtain. These new republics had just got the first lessons of democracy, so suspicion arose: there could be many reasons due to which they would change about and lapse back into the past. In order to avoid this, a new requirement was introduced: only those countries could become members of the Community that recognize and respect fundamental rights. But what are these fundamental rights anyway? Can we accept the constitutional traditions and national law of European states as their basis? The answer is evidently not. The situation called out for a document that defines and contains all these fundamental rights – later named the Charter of Fundamental Rights of the European Union.

The Charter defines yet in the preamble its function and conceptual basis by stating: „[...] the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law. It places the

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<sup>8</sup> See: Fábían, p. 616.

individual at the heart of its activities, by establishing the citizenship of the Union and by creating an area of freedom, security and justice.” It is essential that not only institutions, bodies and authorities of the EU belong to its scope of implementation, but in case of executing EU law, member states too. All these institutions are bound to respect the rights and keep themselves to the principles set out in the Charter – in their own competence and within the bounds of competences delegated to the EU by the Constitution.<sup>9</sup>

The document introduces the fundamental rights divided into six chapters, from which the fifth (under the title „Rights Of Citizens”) is of great significance regarding my point of view in this study, especially the part on the „right to good administration”. This law includes the following:

(1) 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.

(2) This right includes:

a) the right of every person to be heard, before any individual measure which would affect him or her adversely is taken,

b) the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy,

c) the obligation of the administration to give reasons for its decisions.

(3) Every person has the right to have the Community make good any damage caused by its institutions or by its servants in the performance of their duties, in accordance with the general principles common to the laws of the Member States.

(4) Every person may write to the institutions of the Union in one of the languages of the Treaties and must have an answer in the same language.<sup>10</sup>

Consequently this right imposes factual obligations on the interpretators but our relief is provisional. Although the first real measures were just taken in order to establish European administrative procedural law, one factor still occurs as an obstacle and is setting the efforts back: at present the Charter is not a binding legal document.

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<sup>9</sup> See: Charter of Fundamental Rights of the European Union Art. 51. Par. 1.

<sup>10</sup> See: Charter of Fundamental Rights of the European Union Art. 41.

The document was approved by the representatives of member states on the Nice Summit in December 2000 but it did not come to force for lack of political support, either became part of the basic contracts – it was simply attached to the Nice Treaty as a political declaration.

The statements above directly lead to the question: How could anyone refer to the rights enumerated in the Charter when the document itself is legally not binding? The answer to this requires optimism with respect to the future: the Charter is part of the European Constitution – it was inserted separately, as the second part of the Constitution. According to its advocates it is this very “attachment” that makes the new Constitution “constitutional” by promoting the cooperation among European states from primarily economic to essentially political – through defining human, political and social rights. Although the Constitution itself is still not a statutory instrument, sooner or later it will certainly become law, expanding this effect on the Charter too. But until then what sources are available to draw of?

### **Alternative ways of establishing european administrative procedural law**

#### *The role of the European Court in development of law*

In case-law of the European Court reference on the Charter can hardly be found as in its judgment the European Court rigidly holds aloof to base a decision upon it. Precedents can apparently be mentioned when the plaintiff in the suit referred to his right to good administration. But the Court declares this legal argumentation consistently inadmissible, reasoning its judgment that the claim does not arise from the contracts and cannot be regarded as having a direct connection with the obligations deriving therefrom, consequently, it does not come within the jurisdiction of the Court.<sup>11</sup>

The arguments presented above lead us to the statement that despite its role as main motivation in developing EU law, the EC has had no effect on this special field of law. Still most theorists recognize that the EC has indisputable role in development of law, especially in cases of legal issues with great importance when European Treaties simply define a norm instead of stating clear instructions.<sup>12</sup> In my point of view getting a foothold on this path could also be useful in this case. The European Constitution committed itself yet in its Preamble to

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<sup>11</sup> See: *The International Institute for the Urban Environment v. Commission of the European Communities* (Case T-74/05) par. 64.

<sup>12</sup> See: *Kecskés*, p. 438.

principles of democracy and the rule of law which is later explained in the article on the values of the EU: “the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law”. Expanding the principle of the rule of law could easily lead to the requirement of fairness and the importance of the substantial elements of the right to good administration – as it can often be seen in the practice of national constitutional courts.

### *The European Code of Good Administrative Behavior*

It was the European Ombudsman who also played an important role in developing the European administrative procedural law. In 1998 carried out an initiative inquiry in different Community institutions in which he pointed out the lack of an uniform procedural regulation and consequently stressed its importance. The inquiry concluded that the main reason for the instances of maladministration is that no clear rules on the principles of good administrative behavior exist at the moment. However it is the norm that Community officials should respect in their relations with the public, therefore Community institutions and bodies should adopt a Code of good administrative behavior. In this view, the European Ombudsman made a draft recommendation to the different Community institutions, bodies and decentralised agencies, to which he attached the Code of good administrative behavior as a guideline.<sup>13</sup> Beyond the substantive and general provisions (e.g. principle of lawfulness, absence of discrimination, principle of objectivity and proportionality, right to fair trial) it also contains many specific procedural rules showing high importance in the practice (e.g. requirement of reasonable time-limits for taking decisions, justification of decisions) and contrary to the traditional codes of procedure the document includes so-called rules of courtesy for the officials (the official shall be service-minded, correct, courteous and accessible in relations with the public, etc). The Ombudsman stated as a requirement that these rules should exclusively deal with the relations between officials and the public, moreover, in order to be efficient and accessible to the citizens, the rules should be adopted in the form of a decision and be published in the Official Journal.<sup>14</sup>

It can clearly be set out that the Code contains a full-scope of guarantees regarding the procedures of Community institutes. In many ways it oversteps conventional regulations of

<sup>13</sup> For the latest text of the Code see: <http://ombudsman.europa.eu/code/hu/default.htm>

<sup>14</sup> More about the inquiry: Draft recommendation of the European Ombudsman in the own initiative inquiry OI/1/98/OV

member states, so it would have been very important to declare it as a general requirement, a kind of guideline for the institutions of the EU. Unfortunately it was only the Parliament among the many bodies that adopted the document.

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