

THE INSTITUTION OF GOOD ADMINISTRATION IN THE COUNCIL OF EUROPE

DR. VÁCZI PÉTER

SZE DF ÁJK

“The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress.”¹ “Greater unity between its members” – the aim of the Council of Europe may be furthered in a range of different ways. Article 1 of the Statute of the Organization makes specific reference to the Council of Europe's mission in maintaining and promoting human rights and fundamental freedoms as a way of achieving this “greater unity”. Administrative procedure requires common European regulation by all means, as this is that special field of law by which the administrative body directly meets the 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. 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, establishing the “good administration”. Regarding the European administrative law, does European administrative procedural law exist at all? What forms and levels of standardization can be expected? The answer can be given through the documents of the Council of Europe achieved in this field of law.

Before turning our attention to this process, we have to clarify the meaning of good administration. The expression has become somewhat fashionable and appears in various instruments both in European and in national level, but different authors give different definitions. According to Theodor Fortsakis, “the principle of good administration is at once a long-standing idea and a ground-breaking one. Its specific content has gradually been nurtured within the framework of the long-established concept of user protection and this principle, enshrined and elaborated on in various instruments and European case-law, now

¹ Statute of the Council of Europe, Chapter I, Article 1.

stands as one of the cornerstones of modern administrative law.”² Good administration (some call as useful administration) means that “administrative bodies have a duty to exercise the powers and responsibilities vested in them by existing laws and regulations, by drawing on the prevailing concept of law, in such a way as to avoid an overly rigid application of the statutory provisions. In other words, not only must they avoid any unfair doctrinal approach but they must also endeavor to adapt the legal rules to social and economical realities.”³ The principle has an ambivalent function, “on the one hand, it acts as an umbrella, under which separate rules are clustered together around a common, guiding idea, namely the idea of good administration; [...] on the other hand, it can itself serve as a springboard for specific new rules relating to the same idea.”⁴ The first interpretation is affirmed by Klara Kanska, who says that “the notion ‘good administration’ developed as an umbrella principle, comprising an open-ended source of rights and obligations”.⁵

The way to good administration

The Council of Europe started its work in the sphere of administrative law quite early, in 1977 when its first resolution on protection of the individual in relation to the acts of administrative authorities was issued.⁶ The ideological basis of the document was the ever-increasing importance of public administrative activities. Public authorities, in addition to their traditional task of safeguarding law and order, have been increasingly engaged in a vast variety of actions aimed at ensuring the well-being of the citizens and promoting the social and physical conditions of society. This development resulted in the individual being more frequently affected by administrative procedures. Consequently, efforts were undertaken in the various states to improve the individual's procedural position vis-à-vis the administration with a view to adopting rules which would ensure fairness in the relations between the citizen and the administrative authorities.

For this reason, in its resolution the Council of Europe worked out five principles: right to be heard, access to information, assistance and representation, statement of reasons and

² Theodore Fortsakis: Principles governing good administration. *European Public Law*, Volume 11, Issue 2. Kluwer Law International, 2005. p. 207.

³ Fortsakis, p. 209.

⁴ Fortsakis, p. 211.

⁵ Klara Kanska: Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights. *European Law Journal*, Vol. 10. No. 3. Blackwell Publishing Ltd. 2004. p. 305.

⁶ Resolution (77) 31 on protection of the individual in relation to the acts of administrative authorities (Adopted by the Committee of Ministers on 28 September 1977 at the 275th meeting of the Ministers' Deputies)

indication of remedies. These five principles can be considered as the very first step towards good administration which means a part of the protection of the individual's fundamental rights and freedoms, which is one of the principal tasks conferred on the Council of Europe by its Statute. The resolution was later followed by many other resolutions and recommendations by the Council of Europe defining more and more substantial requirements regarding administration and administrative law, but the result of the systematic work was not gathered into one document.⁷

In 2003, Parliamentary Assembly carried out a recommendation⁸ in which it urged the member states to create the institution of ombudsman at national level where it does not already exist. In this document the Parliamentary Assembly stated that the governments of Council of Europe member states should adopt at constitutional level an individual right to good administration following the drafting of a model text by the Committee of Ministers and they also should adopt and implement fully a code of good administration, to be effectively publicized so as to inform the public of their rights and legitimate expectations. The Assembly further recommended that the Committee of Ministers draft a model text for a basic individual right to good administration as well as draft a single, comprehensive, consolidated model code of good administration, deriving in particular from Committee of Ministers Recommendation No. R (80) 2 and Resolution (77) 31 and the European Code of Good Administrative Behaviour, with the involvement of the appropriate organs of the Council of Europe – in particular the Commissioner for Human Rights and the European Commission for Democracy through Law, as well as the Assembly – and in consultation with the European Ombudsman, thus providing elaboration of the basic right to good administration so as to facilitate its effective implementation in practice.

⁷ See for example:

- Recommendation No. R (80) 2 concerning the exercise of discretionary powers by administrative authorities (Adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies)
- Recommendation No. R (84) 15 of the Committee of Ministers to member states relating to public liability (Adopted by the Committee of Ministers on 18 September 1984 at the 375th meeting of the Ministers' Deputies)
- Recommendation Rec (2003) 16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law (Adopted by the Committee of Ministers on 9 September 2003 at the 851st meeting of the Ministers' Deputies)
- Recommendation Rec (2004) 20 of the Committee of Ministers to member states on judicial review of administrative acts (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies)

⁸ Recommendation 1615 (2003) The institution of ombudsman

The Committee of Ministers fortunately took this advice and began to draft a model code of good administration. Finally, in 2007 this process led to a substantive document declaring the necessity of the institution of good administration and ruling its regulations. In the foreword the document refers to all the other recommendations made by the Council of Europe on the field of European administrative law mentioned above, and not only mentioned them but successfully incorporated their achievements as well.

The recommendation on good administration⁹

In its preamble the Recommendation underlines the facts that the administration exercises its prerogative of public power to carry out the tasks required of it; these powers might however, if used in an inappropriate or excessive manner, infringe the rights of private persons. That is why it is desirable to combine the various recognized rights with regard to the public authorities into a right to good administration and to clarify its content, following the example of the Charter of Fundamental Rights of the European Union. Good administration must be ensured by the quality of legislation, which must be appropriate and consistent, clear, easily understood and accessible. On this basis, the Council of Europe recommends that the governments of the member states promote good administration within the framework of the principles of the rule of law and democracy and through the organisation and functioning of public authorities ensuring efficiency, effectiveness and value for money. The Assembly considered that the requirements of a right to good administration may be reinforced by a general legal instrument; that these requirements stem from the fundamental principles of the rule of law. For this reason, an appendix was attached to the Recommendation, called the Code of good administration which contains a number of important principles. Now, turn our attention to the principles listed in the Recommendation! The Code is divided into three sections as seen in the followings.

Section I – Principles of good administration

In this section, the Recommendation deals with the very basic principles of law, such as lawfulness, equality before the law, impartiality, proportionality, legal certainty, reasonable

⁹ Recommendation CM/Rec (2007) 7 of the Committee of Ministers to member states on good administration (Adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers' Deputies) (hereafter referred as "Recommendation")

time, participation, respect for privacy and transparency. According to the Recommendation, public authorities shall act *in accordance with the law*. Public authorities shall act in accordance with rules defining their powers and procedures laid down in their governing rules and exercise their powers only if the established facts and the applicable law entitle them to do so and solely for the purpose for which they have been conferred. The Recommendation declares that public authorities shall act in accordance with the *principle of equality*. They shall treat private persons who are in the same situation in the same way and not discriminate between private persons on grounds such as sex, ethnic origin, religious belief or other conviction. Any difference in treatment shall be objectively justified. Public authorities shall act in accordance with the principle of *impartiality*. They shall act objectively, having regard to relevant matters only and not act in a biased manner. They also shall ensure that their public officials carry out their duties in an impartial manner, irrespective of their personal beliefs and interests. According to the Recommendation, public authorities shall act in accordance with the principle of *proportionality*. They shall impose measures affecting the rights or interests of private persons only where necessary and to the extent required to achieve the aim pursued. When exercising their discretion, they shall maintain a proper balance between any adverse effects which their decision has on the rights or interests of private persons and the purpose they pursue. Any measures taken by them shall not be excessive. Public authorities shall act in accordance with the principle of *legal certainty*. They may not take any retroactive measures except in legally justified circumstances and shall not interfere with vested rights and final legal situations except where it is imperatively necessary in the public interest. It may be necessary in certain cases, in particular where new obligations are imposed, to provide for transitional provisions or to allow a reasonable time for the entry into force of these obligations.

Public authorities shall act and perform their duties within a *reasonable time*. Unless action needs to be taken urgently, public authorities shall provide private persons with the opportunity through appropriate means to *participate* in the preparation and implementation of administrative decisions which affect their rights or interests. The Recommendation states that public authorities shall have *respect for privacy*, particularly when processing personal data. When public authorities are authorized to process personal data or files, particularly by electronic means, they shall take all necessary measures to guarantee privacy. The Recommendation declares that public authorities shall act in accordance with the principle of *transparency*. They shall ensure that private persons are informed, by appropriate means, of

their actions and decisions which may include the publication of official documents; they shall respect the rights of access to official documents according to the rules relating to personal data protection. The principle of transparency does not prejudice secrets protected by law.

Section II – Rules governing administrative decisions

In this section, we can find principles relating only to administrative law and administrative decisions, as right to be heard, form and publication of administrative decisions or execution of administrative decisions. As for the Recommendation, administrative decisions can be taken by public authorities either on their own initiative or upon *request* from private persons. Private persons have the right to request public authorities to *take individual decisions* which lie within their competence. When such a request is made to an authority lacking the relevant competence, the recipient shall forward it to the competent authority where possible and advise the applicant that it has done so. All requests for individual decisions made to public authorities shall be acknowledged with an indication of the expected time within which the decision will be taken, and of the legal remedies that exist if the decision is not taken. If a public authority intends to take an individual decision that will directly and adversely affect the rights of private persons, and provided that an opportunity to express their views has not been given, such persons shall, unless this is manifestly unnecessary, have an *opportunity to express their views* within a reasonable time and in the manner provided for by national law, and if necessary with the assistance of a person of their choice. If a public authority proposes to take a non-regulatory decision that may affect an indeterminate number of people, it shall set out procedures allowing for their *participation in the decision-making process*, such as written observations, hearings, representation in an advisory body of the competent authority, consultations and public enquiries. Those concerned in these procedures shall be clearly informed of the proposals in question and given the opportunity to express their views fully.

According to the Recommendation, administrative decisions shall be *phrased* in a simple, clear and understandable manner. Appropriate reasons shall be given for any individual decision taken, stating the legal and factual grounds on which the decision was taken, at least in cases where they affect individual rights. Administrative decisions shall be *published* in order to allow those concerned by these decisions to have an exact and comprehensive knowledge of them. Publication may be through personal notification or it may be general in

nature. Those concerned by individual decisions shall be personally notified except in exceptional circumstances where only general publication methods are possible. In all cases, appeal procedures including time limits shall be indicated. Administrative decisions *shall not take effect retroactively* with regard to a date prior to their adoption or publication, except in legally justified circumstances. Except in urgent cases, administrative decisions shall not be operative until they have been appropriately published. Public authorities shall be responsible for the *execution of administrative decisions* falling within their competence. Public authorities shall allow private persons a reasonable time to perform the obligations imposed on them, except in urgent cases where they shall duly state the reasons for this. Enforced execution by public authorities shall be expressly prescribed by law. Private persons subject to the execution of a decision are informed of the procedure and of the reasons for it. Enforced execution measures shall be proportionate.

Section III – Appeals

Private persons shall be entitled to seek, directly or by way of exception, a *judicial review* of an administrative decision which directly affects their rights and interests. Administrative appeals, prior to a judicial review, shall, in principle, be possible. They may, in certain cases, be compulsory. They may concern an appeal on merits or an appeal on the legality of an administrative decision. Private persons shall not suffer any prejudice from public authorities for appealing against an administrative decision. Public authorities shall provide a remedy to private persons who suffer damages through unlawful administrative decisions or negligence on the part of the administration or its officials. Before bringing actions for *compensation* against public authorities in the courts, private persons may first be required to submit their case to the authorities concerned. Court orders against public authorities to provide compensation for damages suffered shall be executed within a reasonable time. It shall be possible, where appropriate, for public authorities or private persons adversely affected to issue legal proceedings against public officials in their personal capacity.

Conclusions

Having subscribed to the European Convention on Human Rights, Council of Europe member states have agreed to respect certain principles which therefore govern the relationship of their authorities with private persons, including in the branch of administrative law. Those

principles have been further refined in several conventions and various recommendations and resolutions which were adopted unanimously by the Council of Europe Committee of Ministers and which, thus, reflect the standards applicable in member states in pursuance of their devotion to the Rule of Law as expressed in the Statute of the Organisation. As regards the significance and practical impact of Council of Europe Recommendations and Resolutions, it is important to observe the following: contrary to conventions which states may have ratified, recommendations and resolutions have no legally binding effect on the states and governments. They do have, however, a moral and political effect on them. This effect stems from two facts: first of all, it is difficult, albeit possible, for a government to totally ignore for a long period of time certain standards to which all or most of the other democratic states of the region pledge commitment; moreover, there can be an obvious problem with a government's good faith in case a government itself is among those who have not only participated in the negotiations of a text, but also voted for its adaptation in the form of a recommendation, if such government later on refuses to conform to its own appeal.¹⁰

Fortunately, it seems so that the European legislator now focuses “not just on specific administrative acts, but also on the administrative procedures themselves. In other words, there has been a shift in emphasis from the outcome of administrative action (result) to the administrative behavior (functioning).”¹¹ And at the end of this process, “the principle of good administration could be to administrative law what ‘good governance’ and ‘good legislation’ are to international law.”¹²

Bibliography

- [1] Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons. A Handbook. Directorate of Legal Affairs. Strasbourg, 1996.
- [2] Theodore Fortsakis: Principles governing good administration. European Public Law, Volume 11, Issue 2. Kluwer Law International, 2005.

¹⁰ Principles of Administrative Law Concerning the Relations Between Administrative Authorities and Private Persons. A Handbook (hereafter referred as “Handbook”). Directorate of Legal Affairs. Strasbourg, 1996., p. 6.

¹¹ Fortsakis, p. 217.

¹² Fortsakis, p. 211.

[3] Klara Kanska: Towards Administrative Human Rights in the EU. Impact of the Charter of Fundamental Rights. European Law Journal, Vol. 10. No. 3. Blackwell Publishing Ltd. 2004.

[4] Jürgen Schwarze: The convergence of the administrative laws of the EU Member States. European Public Law, Vol. 4. Issue 2. Kluwer Law International Ltd. 1998.

Contact-email: *vaczip@freemail.hu*