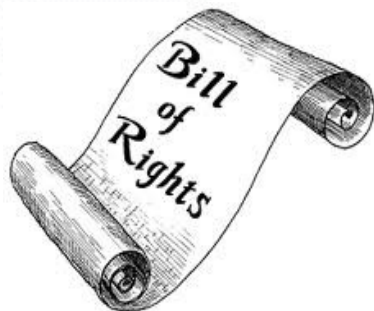




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Europeanization of Legal Protection in (Individual) Administrative Matters

Conference

**Measures of Protection of Individual Rights in Public
Administration, Their System and Effectiveness**

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MASARYK UNIVERSITY
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A. Administrative matters from European perspective

1. **Administrative law:** **public** prerogatives vs. individual subjects, exercising public powers/authority – **regardless of**
 - ✓ **status** of PA or other branch of power or private body; or
 - supra- or sub- or a national **level of power?**
2. Interdependence of administrative **procedures & adm. justice** under a principle of the **division of powers**
3. **Scope** of administrative **procedures:**
 - In **individual**/single-case & **authoritative** decision making & ?
 - In adm. decision making or also (*mutatis mutandis*) in adm. sanctions, civil service, etc.
4. **Aims** of administrative procedures: role of prevailing tradition ?



B. Europeanization in national & EU adm. matters

Legacy / legal traditions:

- administration-centered (F)
- individual-c. (UK)
- **legislator-c. *Rechtstaat*** (D/A, CEE)
- ombudsman-c. (Scandinavia)

Broader **changes in society & PA**: complexity, globalization, privatization, delegations ...

PA reforms/strategies:
national & EU driven

1. Council of Europe
Europeanization of national law & EU adm. law

2. EU



ECHR & CoE Recommendations

Case law of ECtHR & CJEU

Treaty of Lisbon (Art. 298, 51, 197, 352...)

Charter on fundamental rights (2010, Art. 41, 42, 43, 47...)

EU Ombudsman Code (2001-)

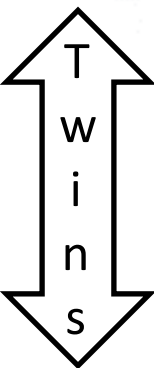
EP Resolution on EU APA (2013)/ReNEUAL

Good Administration
(open, efficient, independent & accountable ...)

Key impacts of Europeanization in adm. matters and legal protection: EU & national levels

1. Redefined **ratio (aims)** of administrative procedures
2. Broadened **scope** of administrative procedures
3. **Codification** and its **modernization** of (general) adm. procedure = **Administrative Procedure Act (APA)**; with
 - **Holistic** approach = all adm. activities, acts, fields ...
 - **Generalization** = principles!;
 - **Simplification** = removal of administrative barriers.
4. Interconnectivity between **adm. procedures & justice**
& ... **non legal impacts** (e.g. on organization of PA, IT), etc.

1. Ratio of CoE/EU driven administrative procedures



- **Human rights' protection = AP's value *per se***
- **Public policy/interest's effective implementation = AP as a mean for substantive (laws) goals**



Traditional

Administrative law in terms of „**Good Administration**“:

- 1. prevents from arbitrary** public authority & protects HR
- 2. guarantees authority** to implement **public interest**

& new

- 3. Dialogue, economic progress ... = service-mindedness**
- 4. European standardization & cooperation**



2. Scope of CoE/EU driven administrative procedures

- ✓ **Individual/single case & authoritative** decision making & ?
 - ? **General** (rule making) administrative decision making
 - ? **Contractual** administrative relations/acts

- ✓ **Administrative & authoritative** decision making – **BUT?**
 - **Administrative v. civil** law: ? **Real acts & services** of general interest? Concessions ... ? **Civil** service, etc.
 - **Administrative v. criminal** law: ? **Adm. sanctions**, ? Misdemeanors, ? Taxes, ? Inspections...

ECTHR case law does NOT follow the national regulation!

3.I EU codification – EU law & CJEU case law

 **EU law**, e.g. **Directive 2006/123/EC** on services in the internal market

 **Case law:**

▪ **General:** C-453/00 Kühne & Heitz (2004)...

▪ **On legal remedies in AP:**

Audi alteram partem

i. *C-76 Hoffmann-La Roche v. Commission (79) & C-222/84 Johnston v. Chief Constable of the Royal Ulster Constabulary (86)* = **effective!**

ii. *C-234/04 Kapferer (16.3.06)* = no EU interference

national

iii. *C-199/05 Lucchini (18.7.07)* = primacy of EU over national

EU!

iv. *C-507/08 EC v. Slovakia (22.12.10)* = EU primacy only if before finality and if equivalence & effectiveness affected

EU conditionally

v. *C-603/10 Pelati v. Slovenia (18.10.12)* = as long as EU effectively ...

EU equivalence & effectiveness

principles & **national autonomy**

Res iudicata

3.II Fundamental principles in European adm. law

(Galetta, Hofmann, Mir, Ziller, 2015)

1 **Rule of law**, clarity, legality, l.certinty, legitimate expectations

2 Equal treatment and non-discrimination

3 Public interest protection

4 Proportionality

5 **Good administration**, duty of care

6 **Impartiality**, fairness

7 **Participative democracy**, fair **hearing**

8 **Access to the file, information, transparency**

9 Data quality & protection

10 **Reason** giving

11 **Timeliness**

12 **Effective remedy**

The right is enshrined in Art. 47 of the Charter, in Art. 6 & 13 ECHR and recognised as a general principle of EU law is a key component to a legal system under the **rule of law**. According to this principle, neither the EU nor MS can render virtually impossible or excessively difficult the exercise of rights conferred by EU law, are obliged to guarantee **real & effective judicial protection** (C14/83) and are barred from applying any rule or applying any procedure which might prevent, even temporarily, **EU rules from having full force & effect** (C-213/89).

3.III EU APA draft (2015-6) on remedies (ReNEUAL)

Art. 23 Rectification/withdrawal of adm.acts/**adversely** affect party

1. The competent authority shall rectify or withdraw, on its **own initiative or following a request** by the party concerned,

- an **unlawful** adm. act which adversely affects a party = **retroactive** effect;
- a **lawful** adm. act which adversely affects a party **if** the reasons that lead to the decision no longer exist; = **not have retroactive** effect.

3. Rectification or withdrawal shall take effect upon **notification** to the party. 4.

Where an administrative act adversely affects a party and at the same time is beneficial to other parties, an assessment of the possible impact ...

Art. 24 Rectification or withdrawal/**beneficial** to a party

- The competent authority shall, on its **own initiative or following a request** by **another** party, rectify or withdraw an **unlawful** adm. act which is beneficial to a party. 2. Due account shall be taken of the **consequences** of the rectification or withdrawal on parties who legitimately could expect the act to be lawful... 3.

retroactive effect only if done within a reasonable time. ...

- **Lawful** adm. act which is beneficial to a party ... **if** the reasons that lead to the specific act no longer exist. Due account shall be taken of **legitimate expectations of other parties.**

4. Interdependence of adm. procedures & justice

- Interdependence in terms of **legal protection**:
 1. If AP mainly for win-win public & ind. interests' realization = judicial review takes over **more subjective protection** of rights
 2. Less remedies, grounds, timing etc. for their use in AP = **broader scope** by courts: **two-tiered, adversary & full/merit** jurisdiction... (cassation only for adm. silence or discretionary powers)
 3. If AP scope broadened = judicial protection of **all administrative / likewise acts** = incl. general, sanctions, etc. **by Adm. Court**



Key novelties in new or modernized APAs

- ☞ Converging ratio: public interest & citizens'/economy leg. interests
- ☞ Scope: also general, in services (real acts, SGI) & adm. contracts

- ☞ Rights of defence, **participation & transparency**
- ☞ Proportionality, *ex officio*, enforcement

- ☞ E-government, one stop shops ...
- ☞ Time limits
- ☞ ADR (mediation, etc.)
- ☞ **Reduction of AP remedies** /reason but *pro actione*
& adm. justice

Principles

Simplify/

enforce

certainty &

compliance

Conclusions and discussion



- ☞ However, **convergence** does not mean **harmonization**, hence = still a lot of room for national values, goals and specifics!
- ☞ On the other hand,
 - One must follow **EU law and ECHR** &
 - Do not be blind for exchange of **good practices**.
- ☞ It is not sufficient to change law but to **assess impacts, train the people and monitor** results (regulatory feed back)
- ☞ Any systemic change needs **systemic approach and time!**

*Kapieren,
nicht kopieren!*

Festina lente!

