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"An effective remedy in administrative cases: the principle of finality"

Questionnaire: summary of the answers

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SUMMARY

Preamble

I studied 9 reports coming from Austria, Croatia, Czech Republic, France, Greece, Italy, Slovak Republic, Slovenia, and Ukraine. I am going to summarize the answers given by those countries.

The questionnaire is structured in 7 questions.

The first question "Is aiming at conflict resolution a dominant value in your legal system?" is dividesd in two parts:

a) **What is the role of the articles 6 and 13 of the ECHR in that respect?**

b) What is the leading perspective on the relationship between the administration and the administrative judge (separation of powers, checks and balances?)

In fact the question b) is included in the problematic of the articles 6 and 13 of the ECHR. And the principle proclaimed by art 13 about the "Right to an effective remedy" is also included in the Article 6.

About the impact of those articles 6 and 13 of the European Convention of Human Rights (ECHR) on the "Right to a fair trial" and the "Right to an effective remedy"

The text of article 6 of the ECHR: "*1.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. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice*…"

The text of article 13 of the ECHR: "*Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*."

5 principles are written in the article 6 of the ECHR:

First principle: An independent and impartial tribunal established by law (the concepts of jurisdiction and administrative court).

Second principle: The right of access to a court and to effective judicial protection, the right to an effective judicial remedy.

Third principle: The right to an adversarial proceedings and the principle of "equality of arms" between the parties.

Fourth principle: The right to a reasoned decision.

Fifth principle: A judicial decision made within a reasonable time.

This topic is huge, but I will be short, because we studied already those principles during half a day at the conference of the AEAJ in Palermo last November about "Europeanization of public law".

European law is impacting some of the fundamental aspects of public and administrative domestic law of the EU Member States. European law does not make any distinction between public law and private law. Nevertheless, it tends to structure the evolution of all branches of

law, and there is no exception for Public law, although it is perhaps more than other branches of law related strongly to the principle of national sovereignty of each state.

In that context, the impact of the ECHR is also quite big: all the member states of the Convention have to respect this Convention for Administrative courts, although the ECHR does not expressly apply to administrative proceedings.

The principles laid down by articles 6 and 13 of the ECHR are sometimes explicitly recalled in domestic law (eg in Italy in the Code of Administrative Justice, or in Ukraine). New judicial procedures for administrative courts based on these principles are discussed at the moment in the Slovak Republic.

The national reports gave answers only about the first and second principle of the article 6 of the ECHR (also about other principles from France).

First principle: An independent and impartial tribunal established by law: the concepts of jurisdiction and administrative court:

According to this principle "the leading perspective on the relationship between the administration and the administrative judges" is much more the "separation of powers" than a concept of "checks and balances" (*freins et contrepoids*).

Administrative courts are considered to be as a part of the judiciary and the administration belonging to the executive branch (cf see report from Austria, partly at the Supreme administrative court level, Czech Republic, France, Italy, Slovak Republic, Slovenia). The two concepts of "separation of powers" and "checks and balances" are combined in the Ukrainian law.

This principle of "an independent court system" had a great impact especially in Austria. The independent administrative authorities for disputes, at the first instance level, within the administration, below the Supreme Administrative Court, were created from this principle 20 years ago. Those institutions will be transformed into real Courts soon, in 2014, according to Austrian law. The Asylum Court is already a Court since 2008. The Austrian report describes precisely this evolution and gives a presentation of this new organization that distinguishes three categories of courts dealing with Asylum law, Tax law, and other administrative litigations.

Article 6 of the ECHR is also the root for the establishment of administrative courts in Croatia since January 1, 2012 (with two levels: first instance and a Supreme Court).

Second principle: The right of access to a court and to effective judicial protection, the right to an effective judicial remedy:

+ article 13 : the "Right to an effective remedy"

This principle is important because it guarantees the right to appeal against an administrative decision. This right is not purely theoretical because art 6 of the ECHR specifies that it must be "effective". This word "effective" is probably the most difficult to grasp.

In some countries, the possibility of control of Administrative Courts is limited by some exceptions: some categories of administrative decisions can not be controlled. For example: in Austria and Croatia because the jurisdiction of the Courts is defined by enumeration: the non-mentioned decisions are not subject to a review by a Court), there is also a small famous exception in France with the theory of "governmental acts" *actes de gouvernement*).

It is possible to appeal against a silence or inaction of the administration. This possibility was introduced a long time ago in France (in the 19th century), and then in Italy.

2. Is the scope of review limited to the question whether the administrative act has violated subjective rights of the appellant?

Law professors often recall that there are two different legal traditions in Europe on this topic: the French tradition and the German tradition.

The answer is yes according to the German tradition: in Czech Republic, Italy (?), Slovak Republic, Slovenia, Ukraine (?).

No in the French tradition: in France, Croatia, Greece (but with a difference between two kind of claims: application for annulment and application for substantive judicial review).

In Austria : yes at the superior level, Supreme administrative court, no at the first instance level : Asylum court, Independent finance board and Administrative courts of first instance.

It is significant to add that when the scope of review is not limited by this concept, it does not mean that everybody can claim against all administrative decisions. For example in France there is a requirement of admissibility through the notion of "interest to act." And when I'm reading the answer coming from Czech Republic, I think that our systems are quite the same.

Questions 3 to 6:

Those questions refer to "the power of judges" in respect of administrative decisions. I studied the answers on these issues globally through my own classification, because it was not really possible to follow precisely the structure and all distinctions made by the questionnaire on these matters.

3. In your legal system, does an administrative judge have the legal competence to decide the case in a conflict resolving manner? For example, by:

- upholding the legal consequences of an administrative act annulled by the judge;

- replacing the annulled administrative act by a court decision (if this power exists, are there any limits, f.e. an interdiction of "reformatio in peius" by such a decision);
- by giving a declaratory decision;
- do also higher courts/the Supreme (Administrative) Court have this competence?

4. In your administrative legal system does a judge have the formal competence to instruct the administrative body/lower courts how to handle a case after its' original decision was annulled by the (higher/supreme) court?

a) If so, which are the limitations to the exercise of this competence?

b) Does it make a difference in how far the annulled decision is based on a discretionary competence? For example the administrative body:

- has a free choice to use its competence or not;
- or can make an assessment if the conditions for the exercise of the competence have been fulfilled or not.

c) Does it make a difference if the challenged decision is a punitive sanction?

5. If in your legal system the judge has the formal competence to either replace the annulled decision by its own, or to instruct the administrative body how to take the decision that is to replace the annulled decision, what then is the dominant view on actually using such competences?

a) Does the dominant view in your administrative legal system hold that such competences should be exercised?
b) In how far could an individual judge steer the use of such competences?
c) What instruments do the rules of administrative court procedure hold?
d) What is the role and attitude of the parties towards administrative judges exercising those competences?
e) How can the judge see to it that he is informed of what he should know concerning the applicable law, the facts and relevant policies concerning the decision challenged in court?
f) Is the judicial perspective focused on the actual situation (ex nunc) or the situation as it was when the challenged decision was taken (ex tunc)?

6. If, according to the rules defining the competences of the administrative courts, the judge does not have the competence to settle the case by replacing the annulled decision by a decision of the court, what then is the dominant view in your country of what the judge should do?

a) After annulment of the challenged decision, in how far could a judge instruct the administrative body to limit its options in taking a new decision? For example:

- Just annul the decision and refer the case back to the responsible administrative body; or

- instruct the administrative body to the extent that the discretion of the administrative body in taking a new decision is reduced to almost none; or
- something in - between – if so, what?

b) What instruments do the rules of administrative court procedure hold for the court to steer the outcome of the conflict?

c) What is the role and attitude of the parties towards administrative judges exercising those competences?

d) How can the judge see to it that he is informed of what he should know concerning the applicable law, the facts and relevant policies concerning the decision challenged in court?

e) Is the judicial perspective focused on the actual situation (ex nunc) or the situation as it was when the challenged decision was taken (ex tunc)?

Answers :

The power of administrative judges varies among European countries and in different situations. Judges do not generally have the freedom to modulate the exercise of their powers, because their skills are usually very clearly defined by legislation (eg in France, Czech Republic, Greece) or also by case law (Austria).

a) In all European countries the Administrative judges have the power to cancel, to quash an illegal administrative decision, without being able to go beyond (for example in Austria in administrative criminal cases or at the Supreme court level, Czech Republic, Greece in the application for annulment, Ukraine).

This is the minimum standart for administrative judges to solve a conflict. The traditional doctrine, for example in France, considers that the judges could not go beyond because this would violate the principle of separation of powers.

It is important in Austria to make a distinction at the Supreme Administrative Court level between the power of cancellation and the possibility sometimes to rule also on the merits of the case. But such distinction is in fact very difficult to understand in some other countries, for example for a French administrative judge, because those two possibilities are completely combined in the same concept. It is possible to understand after reminding that the decision quashed by the Supreme administrative Court is in fact a decision coming from the first instance, that is to say not really the original administrative decision.

When the administration was using a discretionary power, the control is limited (for example in Croatia and Czech Republic: only the jurisdiction and the purpose of the decision).

The judges have sometimes no possibility to rule “on the merits” (Austria) or on the content of the decision when there is an inadmissibility (France).

The concept of illegality, when an administrative decision may be canceled, is not the same everywhere. It possible to distinguish between the extensive approach (eg France) and the restrictive approach (through the concept of "violation of subjective rights" of the claimant).

It is also important to distinguish between two situations: when the administration has a discretionary power or not. The control made by judges is minimum over discretionary decisions. They have to study whether the administration has not exceeded the limits of its discretionary jurisdiction (Czech Republic).

The elements controlled in France and Greece are the same (competence, infringement of essential procedural requirement, infringement of the substantive law, abuse of power).

b) In a limited number of European countries, the administrative judge may correct or replace directly the decision cancelled by a Court.

This is the quickest (see report from Austria) and the most effective solution for the applicant.

The judges can do that in Tax Matters (in France), election (France, Italy), administrative sanctions (Czech Republic, Italy, only to reduce the penalty, Slovak Republic), for IPPC cases (France), in Slovenia (in all areas?).

In Greece when a Court is dealing with an "application for substantive judicial review", the judges can replace the cancelled decision, except when all the criteria that the law provides were taken into account by the administration, or when the opinion of an expert (doctor) is needed.

The Austrian system and its evolution provide another example. This possibility is implemented only for administrative sanctions (administrative criminal cases), but not at the Supreme Administrative Court level. The judge can quash the administrative decision, but has to refer the case back to the administration in order to issue a new decision. At first instance level, the current independent judicial authorities may always substitute their judgment for that of the administration (because they are in fact administrative bodies). In some situations; not often, they can require the administration to take a new decision. The judge is free to choose between these two options.

c) In many countries the administrative judges may require the review of the case by the administration in order to create a new administrative decision, indirectly or directly:

The new administrative decision must take into account of new laws and relevant facts (cf Austria).

Indirectly: The concept of declaratory decision:

Judgments are motivated. This is sometimes the only instrument (Czech Republic) available to judges to implement their decisions by the administration. In Greece a judge does not have the competence to instruct the administration, only indirectly by the reasoning of the judgment. In fact everywhere the administrative authority is bound by the legal view of the administrative court decision (see Croatia, Czech Republic, France). Administrative authority is compelled to enforce the judgments and therefore rectify the flawed administrative decision with the reasons of the judgment of the Court.

It seems that Administrative Courts may adopt a special declaratory decision in Slovenia and Ukraine (?).

Directly through the power of injunction:

Definition: when a judge can adopt appropriate measures or order the administration to deliver a new decision with a presentation of the main characteristics of the content of this new decision (the "Verpflichtungsklage" procedure in Germany, the "power of injunction "in France since 1995, the “giudizio di ottemperanza” in Italy since last year 2012).

This power is exercised directly into the judgment of cancellation (eg France) or after the judgment (*a posteriori*) as part of a special enforcement proceeding (eg Italy).

The award of this injunction power is seen as to improve the enforcement of decisions of administrative courts, their respect by the administration (eg Greece). The judge may designate an auxiliary of justice in Italy in charge for taking all necessary measures to enforce the judgment (this system appears to exist only in Italy).

The exercise of this power of injunction is generally limited especially when the administration can use a discretionary power, or when further investigations are necessary. In such situation the judge can not choose the content of the decision and make a new decision instead of the administration (France, Italy).

Sometimes the administration has to respect a deadline for adopting a new decision after cancellation (within 30 days in Croatia).

d) The special application for execution:

The applicant may appeal to the Administrative Court when the administration did not execute the court decision. The Court has to take a decision on the execution (Croatia, Greece, Ukraine).

e) Administrative judges sometimes have the ability to control subsequently compliance by the administration of cancellations.

For example in Greece after the amendment of the 2002 Act. A committee of the Council of State since 2002, and all Administrative Courts since 2012 (?) can use a special procedure ("procedure of the panel") in order to ask the administration to take appropriate measures ("appropriate measures ") to comply with the judgment. This procedure seems to be criticized.

f) The powers of judges in respect of administrative acts are sometimes supplemented by the possibility of giving compensation for damages through a special proceeding before Administrative courts (France, Greece, Italy) or Ordinary courts.

About differences between courts :

There are important differences in Austria between the Supreme administrative court and the first instance level, or in Greece between the Council of State with the "application for annulment" and the Ordinary administrative courts with the "application for substantive judicial review".

No differences in : Czech Republic, France, Italy, Slovak Republic, Slovenia.

… regardless of course the competence of Higher courts (mainly Supreme Courts with the control of cassation) over Lower courts decisions. In France (and in Greece since 2011) the Administrative courts may ask a question to the Council of State about law. This procedure is criticized in Greece because it is considered as undermining the independence of First instance administrative courts.

7. What consequences does the above have for internal case management and information exchange between the court and the parties, especially concerning:

a) the intake of the case. Is there any form of a priory assessment of the case in order to determine if it is fit for mediation?
b) pre-trial communications between the court and the administrative body that took the challenged decision (requesting the file, other requests for information by the court); requests to the administrative body to send a representative with a negotiation mandate?;
c) setting and enforcing time limits on the parties to deliver documents or announce witnesses?

The reports are very brief and incomplete on this point ...

Mediation by administrative judges

Yes: in Austria (only in taxation cases) and Croatia (at the initiative of the judge).

No in France, Greece, Italy, Slovak Republic, Slovenia, Ukraine.

The referral to the courts are sometimes subject in these countries to a filter: an obligation of administrative remedy before bringing a case to a Court.

Investigation of cases:

There is no formal exchanges between the administration and Courts in Austria. The parties may at any time submit new documents, announce witnesses and present new arguments.

In France, Italy or Greece, the judge may order the administration to produce evidence (documents ...).

Oral hearings

In Austria administrative judges decide whether or not to hold an hearing. The hearings are rare (except before independent tribunals). An hearing is held if it is useful to supplement the evidences.