Administrative Procedure

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Administrative Procedure

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Synonyms

Administrative process

Definition

Administrative procedure relates to the methods and processes before administrative agencies, as distinguished from judicial procedure, which applies to courts. The administrative procedure can be defined as a succession of acts and operations issued or performed by an administrative body on its own motion or upon request, in order to adjudicate on rights, interests, and obligations of parties of the procedure or decide based on the public interest, according to the laws and other regulations in force. There is no widely recognized definition of the administrative procedure – many General Administrative Procedure Acts (GAPAs) only refer to the term and do not define "administrative procedure" as such (except the German GAPA and the Portuguese GAPA).

Introduction

In all countries that are attentive to the idea that the public administration is bound by the rule of law and needs legitimation by the people, there is an ongoing debate about the importance of administrative procedure (Pierce et al. 2009; Pünder 2013a; Barnes 2010).

The advantages of administrative procedure are well known: protection of rights of parties, information gathering, sound decision-making and thus an increase in the legitimacy of the final decision, and pre-litigation remedies. At disadvantages, we can list the need for resources in terms of time, personnel, and financing for an effective decision-making procedure.

GAPAs were adopted all over the world: most European countries have such a procedural law, and then outside Europe, the GAPAs are to be found in the USA, Japan, South Korea, China, Taiwan, Chile, and Peru, just to name a few. In the formation of GAPAs in the world, we can identify three historical stages: the founding models were established in Spain (1889) and Austria (1925) and the latter then inspiring other European countries. Postwar laws that also influenced other systems were adopted in the USA (1946) and Germany (1976). From the 1990s on, the GAPAs have flourished, sometimes as a response to the need to reform former communist regimes in Eastern Europe.

A. Farazmand (ed.), *Global Encyclopedia of Public Administration, Public Policy, and Governance*,
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Administrative Procedure Versus Court Procedure. Hybrid Procedures: Tribunals

First, we have to distinguish between administrative procedure and the procedure by which courts adjudicate on administrative acts (Auby 2014a). In the first one, administrative bodies are in charge with issuing administrative acts and then reviewing them through administrative appeal, on reasons of legality and/or opportunity (exercise of discretion). In the latter, the courts review administrative acts on legality reasons and only exceptionally on the use of discretion. Generally, the scope of the administrative procedure is wider than that of a court procedure.

In most of the administrative systems, this distinction is strict and easy to understand, but recently there is a development called "tribunalization" which means that administrative procedures become more jurisdictionalized and tribunals that are in charge of such procedures are gaining more and more influence. In countries who experiment with tribunals and also have a GAPA (such as the USA), the GAPA also applies to quasi-judicial bodies (for instance, to administrative law judges in the USA).

A tribunal is an administrative body with quasi-judicial nature, a hybrid that aims at dealing with administrative disputes outside courts of law but still assuring a proper and balanced protection of the rights of parties. Its main function is to adjudicate disputes between citizens and governmental agencies. Although tribunals adjudicate many more administrative disputes than courts, their role as "dispensers of administrative justice" (Cane 2009) receives relatively little scholarly attention. An effective administrative tribunal addresses in the same time the shortcomings of an administrative appeal procedure (lack of independence) and those of court proceedings (length, associated costs, in some cases lack of specialization), providing for independent review and quick redress in (sometimes) less complex matters, which do not need the intervention of a court.

Administrative Procedure: Phases

The stages of administrative procedure follow the usual trajectory of a request from its formulation to its resolution and beyond. Depending on the way in which the administrative procedure laws are drafted, the content of the procedure may vary, but generally the following stages are considered to be part of all administrative procedures:

(a) *Initiation/commencement.* Generally, the administrative procedure is initiated by *petition/request* addressed by an individual or a legal person to an administrative body or ex officio by an administrative body. Sometimes, the obligation to initiate an administrative procedure flows from the law or other legal norms that are binding on the administrative body.

(b) *Parties of procedure.* Rules on how to interpret the notion of "party in the procedure," "administrative body" or "public authority," "legal person," or "individual" are to be observed, if they are enshrined in the GAPA, because the different features of the administrative systems may entail different interpretations. Also, rules about representation of parties during procedure are important, as well as the communication with such parties.

(c) *Incidents of competence/jurisdiction.* The administrative body has to verify its competence to deal with the administrative matter at hand or else to transfer the matter to the competent body. Rules on conflicts of competence and delegation of competence are also laid down in the dedicated sections of the GAPAs.

(d) *Investigations/evidence*. The administrative body carries out investigations in order to establish the facts of the case, if the case is either ex officio or at the request of the parties. The evidence may be comprised of statements from parties or other persons, documents, and site visits. If the administrative body needs an expert opinion on the object of the investigation, such opinions are included in the procedure files. The

burden of proof lies with the party that has initiated the procedure, but the administrative bodies have the obligation to make available to party's information under their possession.

(e) *Consultations* with interested parties or parties that might be affected by the final decision are necessary in order to establish all the facts and legal implications of the case.

(f) *Right to be heard*. Potentially aggrieving decisions are to be adopted only after the parties that might be affected by the decision are heard and their statements recorded in the file. All interested parties must be given access to their files and the possibility to comment on the way the procedure is conducted and on the findings.

(g) *Principles* guiding the discretion exercised by public bodies during administrative procedure and the conduct of procedure itself include legality, transparency, access to information, fairness, impartiality, equal treatment and nondiscrimination, objectivity, confidentiality and protection of personal data, proportionality, informality, control and liability, conflict of interest, and reconciliation of parties.

(h) *Time limits* for the conduct of procedure have to be observed by all parties in procedure. Extension, reinstatement of time limits, and calculation of time limits are incidents in the procedure. Usually, the administrative silence (failure to observe the time limits for answering a request by a public body) means rejection of the request, but sometimes the presumption is reversed, and for expressly identified acts, administrative silence might mean acceptance.

(i) *Administrative acts*. Defining and interpreting the notion of administrative act is important in order to establish the scope of judicial review. *Interim decisions* are necessary if the danger of irreparable damages occurs, and they can be challenged separately on administrative level or in court. *Final administrative acts* are the ones that have legal effects and can be challenged through the administrative appeal or judicial review. The form and content of administrative acts are determined in GAPAs or in other laws or in the case law of the courts when no codification of administrative procedure exists. Acts need to be reasoned in order to justify the solutions envisaged in them and to inform the addressees. Administrative acts might have effect only for the future or even for the past (retroactive effects), under the conditions established by law. They enter into force by publication (rulemaking, general acts) or communication to the beneficiaries/addressees (adjudicating/individual acts).

(j) *Administrative operations.* Sometimes the administrative procedure does not end with the issuance of an administrative act, but with other forms of administrative activity, called generically administrative operations. They are actions that do not have legal effects by themselves, but either serve the issuance of an administrative act or serve as modes of execution of such acts.

(k) *Administrative contracts.* The outcome of an administrative procedure may be also an administrative contract, concluded between a public body and a private person or another public body, for the execution of works and provision of services or goods, financed entirely or partially by public funds, under a public law legal regime – for instance, public procurement and concessions.

(l) *Administrative appeal* is an administrative remedy for unlawfulness or inopportunity of an administrative act or for the refusal (explicit or tacit – administrative silence) to solve a request. Administrative appeals may be mandatory before going to court for judicial review, or optional, with certain benefits for the appellants such as the extension of deadlines for court action. The competence for solving the administrative appeal lies with the issuing body, the superior administrative body, or the control body. The appeal to a tribunal is a hybrid, quasi-judicial procedure, but still different from the court procedure per se. Some GAPAs provide also for alternative means of dispute resolution – arbitration,

mediation, conciliation, or just refer to the possibility to resort to such ADR tools.

(m) *Execution of administrative acts*. After entering into force, acts are executed either voluntary or forcefully, and the rules for forceful execution are provided by the GAPAs or by other laws.

(n) *Suspension of administrative acts* refers to the stay of execution for acts that may produce damages that could be irreparable. Suspension can be decided either by the issuing authority or by the review bodies. In some jurisdictions, the administrative appeal suspends de jure the execution of the act, and the issuing authority may reverse this effect by invoking the public interest in execution. In other systems, the suspension may be granted only upon request and proper reasoning.

(o) *Reopening of the procedure.* Some GAPAs provide for instances where administrative procedures may be reopened – new circumstances entail a different outcome surfaced, court decisions that contradict the solution adopted by the public body are issued, a previously lawful act with continuous execution becomes unlawful, etc.

These are roughly the main phases of an administrative procedure. In identifying the most relevant of them, we looked at the most referred to GAPAs (the USA, Germany, Austria, the Netherlands) and at the more recent ones, developed by SIGMA OECD for countries in Central and Eastern Europe – Croatia (2009) and Albania (2014) – as well as at the Research Network on European Administrative Law (ReNEUAL) Model rules of Administrative Procedure (2014) that will constitute the basis for a codification of the administrative procedure in the EU.

Apart from the stages discussed above, GAPAs usually include also provisions regarding information management and institutional issues (conflict of interests, decision-making by collective bodies).

The Importance of Codifying the Administrative Procedure

Codification can be defined broadly and nontechnical as "the process of repealing a set of acts in one area and replacing them with a single act containing no substantive change to those acts" (Mandelkern Report). However, some codifying processes are also creative and reformatory, in the sense that they change some rules that may be redrafted in a clearer or simpler manner or insert new provisions.

The advantages of codifying administrative procedure rules (Ziller 2011, Mir-Puigpelat 2011) are generally applicable:

(a) *Increased legal clarity and certainty.* Based on the experience of jurisdictions that have codified their procedural administrative law, it is clear that a written code, which summarizes, coordinates, and systematizes the procedural provisions that are spread across secondary legislation, courts judgments, and codes of conduct adopted by institutions, bodies, offices, and agencies, is a significant improvement in terms of legal clarity and certainty and would help to achieve the principles of simplification and accessibility associated with the imperative of quality regulation. Of course codification means that the rules of procedure will be more abstract than they would be in a specific sectoral regulation, but this would also allow its provisions to be applied to all areas in which the administration acts, without the need to adopt any more rules for specific fields. Other advantages include a better knowledge of current law among authorities and citizens which also favors its acceptance and observance by both: the reduction of costs to business for obtaining information on the applicable law and increase of the competitiveness of the respective territory. Greater clarity in legislation also results in less litigation and lower costs for administering the judicial system.

(b) *Standardization of procedural rules and guarantees and coherence of principles* – to the benefit of citizens, who would enjoy

certain uniform procedural guarantees in their relations with the whole administration, boosting the efficiency of the administrative action. As is commonly known, a well-designed administrative procedure not only serves to guarantee the rights and interests of citizens but also, and very importantly, helps to increase the quality of administrative decisions and their acceptance by their intended targets, the uniform application of the law.

(c) *Default procedures to fill gaps in existing laws*. Gaps exist due to sectoral legislation and procedures and also due to the development of the administrative law through case law which addresses specific issues and not the procedure in a uniform manner.

(d) *Opportunity to reform*. Codification that is not limited to summarizing, coordinating, systematizing, and resolving the contradictions in the existing rules and principles, but uses this opportunity to improve the rules, by providing innovative solutions to current challenges and problems, is a drive for reform in public administration.

(e) *Stability of legal rules*. A code is intended to resist a long time, thus giving stability to the legal rules it encompasses. The codification should incorporate the technical elements ensuring that it is resistant to the passage of time and that it can be duly adapted in line with the rapid changes that are currently occurring, in order to thus reduce the risk of petrification and obsolescence. The sectoral legislation cannot be stopped altogether, but it will at least have to take into consideration the general legal framework.

Codification of Administrative Procedure in the USA

The codification of administrative procedure in the USA was finalized in 1946 with the adoption of the Administrative Procedure Act (APA), a federal statute that governs the way in which administrative agencies of the federal government of the USA may propose and establish regulations. The APA also sets up a process for the US federal courts to directly review agency decisions. It is one of the most important pieces of the US administrative law, as it applies to both the federal executive departments and the independent agencies. The text of the APA is included in the US Code at Title 5. Based on APA, a similar Model State Administrative Procedure Act (Model State APA) was drafted, but not all states have adopted the model law.

According to the Attorney General's Manual on the Administrative Procedure Act, drafted after the 1946 enactment of the APA (Attorney General 1947), the basic purposes of the APA are to require agencies to keep the public informed of their organization, procedures, and rules, to provide for public participation in the rulemaking process, to establish uniform standards for the conduct of formal rulemaking and adjudication, and to define the scope of judicial review. The APA's provisions apply to many federal governmental institutions. An "agency" is defined as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," with the exception of several enumerated authorities, including the Congress, federal courts, and governments of territories or possessions of the USA [5 U.S.C. 551(1)]. Courts have also held that the US President is not an agency under the APA [Franklin v. Mass., 505 U.S. 788 (1992)].

Codification of Administrative Procedure in the EU

Many European jurisdictions have administrative procedure acts that regulate the conduct of administrative procedures: Austria, Bulgaria, Croatia, Spain, Germany, Hungary, Luxembourg, Denmark, Sweden, Poland, Italy, Portugal, the Netherlands, Greece, Czech Republic, Lithuania, Slovakia, Estonia, Slovenia, Finland, Norway, Latvia, Switzerland, and recently Albania. They usually follow the content discussed above, with few differences.

In a European comparative perspective, English and French law are well worth mentioning as both countries lack an exhaustive

codification of administrative procedural law – in spite of the tendencies toward codification in other European countries, which to a good part follow the German (or the comparable Austrian) role model. However, the English and French administrative procedural standard is comparable to German and American law (Pünder 2013b). The explanation lies in the fact that in the UK and France, the administrative law is a judge-made law, and judges want to keep the control over vital aspects of administrative law (Auby 2014b).

Codification of EU administrative procedure is a new topic in recent years, as European public law scholars have been debating whether the basic rules and principles of administrative procedure applicable to both the EU administration and the administrations of the member states when implementing EU law should be codified at EU level (Mir-Puigpelat 2011). Such codification would have an evident influence within the various member states through cross-fertilization of standard institutions and procedures, helping in the construction of a European identity and the resulting increase in Union integration. The extension of the codification to national administrations is also an envisaged path in the future (Harlow 1995; Schwarze 1988; Chiti 2004; Mir-Puigpelat 2011), although other scholars consider that there is no legal basis for the EU to attempt this (Vedder 1995; Kahl 1996).

As a result of these debates, the Research Network on European Administrative Law (ReNEUAL) has drafted the Model Rules of Administrative Procedure, which have been presented to the European Parliament who then adopted a resolution (15 January 2013) with recommendations to the Commission on a Law of Administrative Procedure of the European Union.

The ReNEUAL Model Rules of Administrative Procedure are organized in six "books." These books are designed to reinforce general principles of EU law and identify – on the basis of comparative research – best practices in different specific policies of the EU. Book I addresses the general scope of application of the model rules, their relation to sector-specific rules and member state's law, and the definitions of wordings applied in all the books. The Preamble of Book I contains a summary of principles, which guide administrative behavior and the interpretation of all subsequent norms in Books II to VI. The latter books cover more in-depth administrative procedures in the EU that have the potential to directly affect the interests and rights of individuals. The books address nonlegislative implementation of EU law and policies by means of rulemaking (Book II), single-case decision-making (Book III), contracts (Book IV), and, very important for the composite nature of EU administration, procedures of mutual assistance (Book V) and information management (Book VI) (Hofmann et al. 2014).

Conclusion

Administrative procedure is at the core of administrative law, thus the interest in its codification and stability in time. National systems of administrative procedure, traditionally different and largely considered to be incompatible with the process of convergence, are more and more convergent under the pressure of international and regional (European) commonly shared values and principles or under the influence of court decisions (ECHR and CJUE for the EU members states). Thus, the ideal of having convergent administrative procedures globally is not an illusion any more. Different national GAPAs are comparable, and they feature the same principles and institutions of administrative law. The codification touches upon fields that were intangible a few years ago, such as the common European administrative law. Living without GAPAS is also possible, as long as administrative procedures are regulated in different laws and feature the same principles and institutions that are commonly shared by the legal doctrine and offer proper standards of protection for citizen's rights and interests.

Cross-References

▶ Administration Law
▶ Administrative Appeals

► Public Administration and Public Law

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