

*Judicial Control of Administrative Authorities in Europe: Toward a Common Model**

*Jean-Marie Woehrling***

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The paper analyses the most fundamental aspects of the judicial control of administrative authorities in the different European countries. Behind the diversity of philosophical backgrounds and organisational models, there are common references and similar tendencies in the evolution of judicial review on public administrations, revealing a growing europeanisation of this issue. The choice of giving judicial review of public bodies to specialized administrative courts

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** Jean-Marie Woehrling, Secretary General of the Central Commission for the Navigation on the Rhine, fellow of the Ecole Nationale d'Administration and former president of the Administrative Court in Strasbourg, France (glavni tajnik Središnje komisije za plovidbu Rajnom, nastavnik Državne škole za upravu i bivši predsjednik Upravnog suda u Strasbourg, Francuska)

or leaving it by ordinary courts appears to be of secondary importance. What is really decisive to assess the quality of administrative justice is how to combine the protection of »subjective rights« and the promotion of »objective legality« and how regulate the conditions of admissibility to the courts (standing), define the scope of the control (acts and actions that can be submitted) and guarantee the intensity of verification (the issue of »discretionary powers«). Everywhere in Europe, there is an extension of the concept of legality, which enlarges the framework of judicial control, a growing influence of the European Court of Human Rights and the European Court of Justice and an increasing process of exchange between judges and lawyers of different countries. All these exchanges have contributed to the emergence of a set of major principles of European administrative law and to the emergence of a common European model of judicial review in the field of administrative action.

Key words: judicial control of administration, common European model, European administrative law, good governance, legality, specialised and independent administrative judges

A state based on the rule of law implies the capacity of citizens to submit administrative actions to judicial control. Moreover, judicial control appears to be an indispensable instrument to enhance the quality of administrative action and ensure good governance. It is also fundamental for international economic exchanges, since security of trade and investment depends on public decision-making bodies being subject to effective means of oversight and redress.

All European countries have now accepted this fundamental idea, which has resulted in a reinforcement of the role of the courts in controlling public administration throughout Europe.

Even if this development is based on different traditions, an increasingly solid framework of common principles is emerging. If there remains a legitimate diversity in the foundations and models inspiring

the national systems of administrative justice in European states, a significant convergence can be ascertained and major tendencies in the development of forms of control are largely similar in the whole of Europe.

To illustrate this evolution, three aspects of this question will be presented:

- The foundations of judicial control of the administration,
- The main models in the organization of control of administration by the courts,
- Major tendencies in the development of judicial review of public authorities.

I) Foundations of Judicial Control of the Administration

Judicial control of administrative authorities is based on different conceptions and traditions concerning:

- the objectives,
- the position,
- the philosophy

of this kind of control in relation to administrative action.

1) Two Objectives of Judicial Control of the Administration

Europe has historically been divided between two conceptions of control of the administration by the courts:

- a »subjective« conception: Courts are responsible for establishing the *subjective rights* of individuals who have been wronged by the administration. This is the idea of *Rechtsschutz*: developed especially in Germanic countries and in Central Europe where the role of the courts is to ensure judicial protection of individuals against the administration.

– an »objective« conception: The courts control the administration's respect for legality. The subject of appeal is the *objective legality* and the regular legal functioning of the administration. This idea of judicial control of administrative actions follows the French tradition (including Belgium, Portugal, Greece, etc.).¹

In the context of objective legality, the administration's obligations and constraints are first defined in order to then deduce the rights of individuals. Focusing on subjective rights, the starting point is the citizen and the definition of his/ her rights, so as to then deduce the consequences imposed on the administration.²

These two conceptions result in different rules of admissibility (*locus standi*), rules of procedure and scope of control.³ However, nowadays there is an ever increasing sensitivity to the complementary nature of these two approaches, and the most evolved judicial systems attempt to combine them.

2) Position of Judicial Control in the Administrative Process

Administrative justice has been placed within one of two judicial systems, depending on the historical context:

– Administrative justice as a branch of the general judicial system: Administrative courts are above all courts, with all of the corresponding characteristics (independence, impartiality, adversarial procedure, legal expertise, decision-making based on law). This approach emphasizes the organic and functional separation between administrative ac-

¹ To cite a Portuguese jurist, Maria da Gloria Dias Garcia: »Administrative justice is not limited to the guarantee of citizens' rights. Its justification also lies in the necessity to defend the public interest and to guarantee a balance between individual rights and the general interest.«

² A third approach could perhaps be set apart, which characterises English law: The starting point is the judge, with his/ her rules of procedure, powers and constraints, thereby defining the rules of a fair process where each party has a chance.

³ In particular, under the »subjective« conception, the claimant must be able to invoke a subjective right that has been violated. Respect for this right is itself subject to control by the court. This control will be complete, however. In the objective system, simply being able to justify a legitimate interest suffices to claim the violation of a rule that does not affect a subjective right. However, the control will be less thorough.

tions and judicial control. This dimension of administrative justice has been rigorously upheld by the precedent set by article 6 of the European Convention on Human Rights.

– Administrative justice as a phase in the decision-making process of the administration and as an instrument for justifying administrative actions: According to a famous phrase of a French lawyer in the 19th century,⁴ »judging the administration is still part of the process of administrating«. The objective sought is the best administrative decision. Administrative procedure determines criteria and behaviour, and the judicial procedure is the extension of this procedure. In the event that the administrative decision is annulled, a new administrative procedure generally follows, with a view of correcting the error pointed out by the court. No complete separation therefore exists between the administrative phase and the judicial phase: The two combined produce »right decisions«.

3) Philosophy of Law: Two Systems

Across Europe two tendencies can be seen in the system of judicial control of the administration:

– A »substantialist« tendency: The role of the judge is to find the »right solution« corresponding to a »legal truth« and to guarantee its application. This approach concentrates control over the content of the contested decision. If the decision conforms to the right solution, it must prevail, even if it is impaired by procedural flaws.⁵

– A »procedural« tendency: As neither the judge nor the administration really knows the right solution, it is necessary to simply verify that the decision taken was »fair«; in other words, that it was made following an equitable procedure that permitted each party to voice its opinion. This could be referred to as »procedural truth«.⁶

⁴ Henrion de Pansey (1742–1829).

⁵ This tendency is perceived especially in Germany.

⁶ This approach is typical of the United Kingdom.

II) Different Options in the Organisation of Control of the Administration by the Courts

Judicial review of administrative decisions is organized in different ways in European countries. To describe these various options, four dimensions can be mentioned:

- institutional choices
- requirements concerning the capacity to take action
- extent and intensity of control
- procedural rules

1) Institutional Choices

The traditional choice which opposed the European countries was between an administrative jurisdiction that is autonomous and one that is integrated into the judicial system: States that have set up a specialised administrative jurisdiction have been placed in opposition to those having maintained control of the administration through the competency of common courts.

Developments over the past 20 years have shown that this opposition did not necessarily correspond to an essential difference.

There are in fact two conceptions of specialised administrative jurisdiction:

- Specialisation of certain courts within the judicial system in judicial control of the administration; these courts nevertheless remain subject to the same statutes and principles as the rest of the judicial system. This conception is therefore one of a simple functional jurisdiction.
- Creation of an administrative jurisdiction that is fundamentally different in nature and organisation from judicial jurisdiction.

Besides, it is increasingly rare – even in countries maintaining the unity of jurisdiction – not to have, in one form or another, specialised judges responsible for administrative litigation (specialised chambers in common law courts, special administrative appeals commissions with ju-

dicial functions,⁷ or other types of bodies specialised in administrative litigations).

The need for the specialisation of judges in certain fields of public law has been recognised nearly everywhere in the face of public law that is increasingly detailed and complex. The practical details of this specialisation may vary from country to country.

The solution of specialised chambers within ordinary jurisdictions is developing more and more (Netherlands, countries of Eastern Europe, Spain, etc.). It should be noted, however, that the existence of a separate administrative jurisdiction remains the best means of promoting the development of a jurisprudence that is specifically adapted to control the administration.

However, in countries where these separate administrative jurisdictions exist, a process of rapprochement with ordinary jurisdictions has taken place. These courts are expected to provide the same guarantees of impartiality and independence: Administrative judges must be authentic judges and not civil servants examining more or less formal administrative complaints.

Finally, in no country all of the litigations concerning public administration have been brought before specialised jurisdictions. Most often, economic or patrimonial activities of the administration come under ordinary jurisdictions. The definition of public law litigations is just as varied. In particular, depending on the country, measures relating to social assistance or social security come under either administrative litigation or private litigation. In recent years, the civil service has sometimes been transferred from administrative jurisdictions to either civil or labour jurisdictions.

In summary, the necessity of having judges specialized in the control of the administration is becoming more and more apparent, but they must remain real judges.

It is this quality of genuine jurisdiction, which is characterized by completely independent judges that must be emphasized today.

⁷ For example, in the United Kingdom, which for a long time had been against the idea of autonomous administrative law, there are a large number of »administrative tribunals«, quasi-judiciary commissions responsible for settling administrative litigations, and now also an »administrative court« within the High Court.

An independent and impartial court, according to the criteria of the European Court of Human Rights, signifies:

- »objective« impartiality: The administration must have no means of exerting influence on administrative judges; individuals and the administration must be on completely equal terms;
- »subjective« impartiality: Even if the administration in effect exerts no influence on judges, any appearance of a lack of neutrality constitutes in itself an infringement of impartiality.

Moreover, to guarantee the independence of administrative judges, special precautions must be taken concerning their nomination, promotion, or any possible disciplinary sanctions they may be subject to. In numerous European states, special bodies, independent of executive power, have been created to assume responsibility for taking these kinds of decisions. These »Superior Councils of Administrative Jurisdiction« are usually composed of judges, members of parliament, representatives of supreme jurisdictions and of the Ministry of Justice, and specially qualified persons (such as academics).

2) Paving the Way for Judicial Remedies: Wide or Narrow Conditions of Admissibility

Besides the rules of admissibility of secondary importance (delays for appeal, types of remedies, required assistance of a lawyer, exhaustion of preliminary administrative appeals, etc.), the different European systems of judicial control of the administration can be distinguished in terms of the requirements concerning the capacity to take action (standing).

- Some countries limit the right of appeal solely to those individuals who are directly affected by the challenged decision or for whom the contested public action infringes a personal right protected by law;⁸
- Other countries allow all individuals having a legitimate interest to take action against an administrative decision, as this interest can at

⁸ Germanic states and countries of Central Europe.

times be very faint.⁹ It can be legal or purely factual, economic or only moral, etc.

The latter approach is rather clearly gaining ground. A restrictive conception of the right of appeal increases the duty of control of admissibility by the courts, without reducing considerably the number of appeals. It does significantly reduce the possibility of appeal by groups representing collective interests (associations for the protection of the environment, unions, etc.), which constitute precious allies in the effective control of certain decisions.

In practice, in terms of quantity, most appeals are made by individuals who have been directly wronged. However, appeals submitted by individuals who cannot put forward a personal right infringed (in particular appeals by associations) are often those which most help to improve the scope of judicial control of the administration and to best promote the development of case law.

3) Scope of judicial control of administrative action: Extent and intensity

Another fundamental aspect concerning the organisation of judicial control of administrative authorities concerns the scope of this control: What is controlled and how far is the control going?

a) Extent of Control: Actions and Behaviour of the Administration that can be submitted to the Courts

The simple establishment of a system of judicial control of administrative action does not suffice. The system must also effectively cover the scope of activity of the administration and not include any significant gaps.

Even if all European states have a system of judicial control of the administration, many have maintained »no-control zones«, which must be reduced. In fact, if the rule of law is to be promoted, it is not acceptable that in certain sectors the state can violate its own law with impunity. Depending on the field, the law can undoubtedly be more

⁹ States influenced by French law.

or less demanding and the judge's control more or less complete, but respect for the law must be ensured, and the right of appeal before a court must exist for all public actions.

Developments in recent years have made it possible in most European countries to reinforce the extent of judicial control in the following areas:

– »Government Acts«: Some administrative decisions have remained excluded from judicial control because of their »political« content or because they concern the most important public powers of the state. This reason for exclusion of judicial control is increasingly being challenged¹⁰ once these decisions have an impact on legal situations.

– »Internal Measures of Order«: As opposed to government acts, in some countries certain decisions on the internal management of the administration do not come under the scrutiny of the courts as they are judged to be too unimportant. However, once these decisions have an effect on a third party, they must be subject to judicial control. This concerns in particular decisions concerning prisoners or military personnel.

– Regulatory measures or statutory instruments: These kinds of administrative actions rather frequently undergo specific appeals processes, but it would be incoherent to exclude them from judicial control when these actions serve as a basis for individual decisions, which in turn are subject to judicial control.

– Contractual actions, in particular public tenders: In some national systems, on the pretext that these actions come under private law and interest only the parties to the contract, they have often been excluded from judicial control, even in states that aim to place the administration completely under the law.¹¹ Thanks to EU law, these actions have been incorporated in a system of judicial control, whether they are litigations related to the conclusion or to the implementation of contractual actions.

¹⁰ See, for example, the Spanish law of 1 July 1998.

¹¹ This was the case until recently for public tenders carried out by the German administration.

*b) Intensity of Control: Judicial Control of the Power of Assessment
accorded to the Administration (the issue of »discretionary power«)*

Apart from cases where the law sets out in detail the conditions of administrative activity (»bound competence«), the law often leaves the administration a more or less wide margin of opportunity. In all judicial systems it constitutes a complex issue of knowing the extent of control by the courts over the use of this power to exercise discretion. It is a delicate issue, as it requires the combination of two contradictory concerns:

- reinforcing control over the use of this power, which can be a source of arbitrary action;
- maintaining the scope of manoeuvrability and expediency that the law intended to grant the administration so as to ensure sufficient flexibility.

To respond to this difficulty, diverse judicial systems have developed varied but similar arguments.

First of all, in each administrative situation it is necessary to define the limits of discretionary power. A legal analysis reveals that discretion does not involve an interpretation of the law but only an assessment of the facts. Even if the law uses »indeterminate legal concepts«, such as »public security« or »immorality«, it is up to the judge to verify if the interpretation given to these concepts by the administration is correct; the interpretation of legal concepts is a question of legality and not of opportunity.

– Moreover, the exercise of discretion has to be analysed as an assessment power; this power is set in the framework of a number of general principles that limit its scope of application: the principles of equality, proportionality, legitimate expectation, etc.

– Second, the evaluation of facts corresponding to the exercise of discretion must respect certain rules: The administrative authority must be sure to gather all pertinent facts and to disregard any that are irrelevant. These facts must be brought to the attention of the parties concerned, who can then discuss them (giving the reasons for the decision envisaged, fair hearing procedure). Finally, the different factual elements of assessment must be weighed, with a view of respecting their relative importance, as fixed by law.

– The administration must also be sure to take into consideration the objectives and proper purposes set by the authority that has granted it the power of assessment. This power is to be used only to reach

the goals for which it has been established and no other; otherwise it would constitute a »misuse of power«.

– The administration must also make a real and complete use of its power of assessment. It cannot maintain a position of principle or a priori without examining the particular circumstances of each case.

– Finally, if while respecting the above rules the administration is in a position to make an assessment of the facts, it is up to the judge to correct this assessment if it appears to be obviously excessive or unreasonable.

These rules concerning the exercise of discretion, which are shared by most European administrative jurisdictions, are more or less strictly applied depending on the circumstances and the country. They allow for a rigorous control of the administration without depriving it of the authority and scope of action it requires.

4) Rules of Judicial Procedure

The methods of examination of remedies or appeals presented to the administrative judge are based on certain common general principles, but also reflect divergent traditions:

– Common principles: These principles guarantee: the equality of the parties¹² in having the possibility of advancing their respective arguments; the adversarial nature of the procedure (by which all parties must be informed of all elements under debate and in particular the arguments of the adversary); the possibility of responding to any objections that the court may raise without consultation; and the neutrality of the jurisdiction in handling the case.

– Divergent traditions: The role of the judge in handling the case is understood in various ways. In some countries, the judge is asked to take an active part in seeking the truth. He/she must direct the debates, seek possible irregularities that may affect the action in question or, on the contrary, seek arguments for justifying the validity of the action

¹² The European Court mentions the idea of »*égalité des armes*«.

(this kind of procedure is sometimes called »inquisitorial« or procedure under the direction of the court).

Another conception consists of considering the judge as only a passive arbitrator, who listens to the arguments of the parties without taking an active part in the search for pertinent elements (procedure referred to as adversarial, leaving the parties to determine the conduct of the procedure).

Each of these methods has its advantages and disadvantages. The inquisitorial procedure is very demanding on the judge and risks making him/her appear as lacking impartiality. The adversarial procedure results in the trial being won by the most skilful party and not necessarily by the one who is in the right. Such a procedure places the judge in a situation where he/she is incapable of pointing out the irregularity that he/she alone has noticed. An active intervention of the judge may be necessary to counterbalance the inequality between the public administration and a private claimant.

5) Appeal or revision of judgments of administrative courts

There are different forms of appeal within the judicial system of control of administrative authorities. No general rule exists in this field. Several countries had in the past only one instance of judicial control of the administration. But this situation has become exceptional. In most of the European countries, the number of instances has been increased to two instances and often three, one instance of appeal from the first judicial decision and one instance of revision from the decision taken on appeal level. Sometimes, very important claims interesting the whole country go directly to the highest administrative court, but most decisions are subject to several instances.

The experience of most European countries is that this solution is the best to deal efficiently with an increasing number of complaints and to grant the best quality of judicial control.

III) Tendencies in the Development of Judicial Control of the Administration

1) Extension of the Concept of Legality

In its original conception, the principle of legality signified the respect of the administration (as a branch of the executive) for the law (passed by parliament). The concept of legality, in its different national conceptions (rule of law – *Gesetzesvorbehalt*), was therefore limited to the compliance of the executive authority with the legislative framework. This conception has since long ago revealed its limitations, especially when the same political majority controls executive actions and holds legislative power.

Nowadays, in most European countries, the principle of legality has a much larger scope. It signifies not only the administration's respect for the directions given by the legislator but also its observation of the constitutional framework and respect for international (especially European) norms. In this context, the administrative judge is not only the guarantor of the administration's respect for legislative rules but also the judge of the legislator's respect for constitutional rules and of the compliance of national norms with EU law and international law.

It is therefore not uncommon for an administrative judge of a European state to sanction the administration for having faithfully applied a law that is itself contrary to European law.¹³ This »paradigmatic change« is no longer really contested, but its scope has not yet been totally integrated into a number of national judicial systems of control of the administration.

In a larger framework, the control of legality also signifies control of a set of superior principles. Administrative judges have often set down general principles of administrative actions that are frequently given supra-legislative value: the principles of impartiality, non-discrimination, proportionality, legitimate expectation (i.e. respect for the justifiable expectations of individuals), etc.¹⁴ At the same time, administrative

¹³ This applies equally to the administrative judge with regard to respect for the European Convention on Human Rights.

¹⁴ These principles are discussed below.

courts have developed legal instruments that oblige the administration to respect its own rules, norms, and instructions.

The respect for the legality of administrative activity ensured by the judge is therefore not limited to respect for legislative acts alone but now includes conformity with a complex hierarchy of norms and a set of fundamental values.

2) Europeanisation of Judicial Control of the Administration

Previously, judicial control of the administration constituted one of the legal sectors that was most affected by national political history and least sensitive to trends in comparative law. Today, this sector has also become an »open sector« for several reasons:

– International economic exchanges require – for the security of investments and trade – that the behaviour of public decision-making bodies be subject to effective means of redress through appeal. If the decisions of administrative authorities do not respect a minimum standard of legality, predictability and accountability, no state whatsoever can hope to attract external entrepreneurs, who want to be given sufficient legal guarantees.

– The body of European legal principles concerning judicial control of public administrations has taken on an important role:

- The jurisprudence of the European Court of Human Rights has assumed a very important role in the definition of minimum standards for judicial control of the administration (resulting from a wide interpretation of article 6 of the European Convention on Human Rights with regard to penal matters and civil and political rights, the application of article 13 on the right to effective remedy, as well as the application of the principle of proportionality in the control of limitations on liberties, etc.). The Convention and the jurisprudence interpreting it are – as a general rule¹⁵ – applied directly by national jurisdictions.

- The jurisprudence of the European Court of Justice has also had a positive influence on the rapprochement of national traditions of

¹⁵ Sometimes with specific special clauses, as in the United Kingdom, where a special law has been adopted.

judicial control. It has a direct influence on EU Member States, and an indirect influence on candidate countries. Admittedly, national administrative and judicial bodies serve as instruments in the application of EU law in accordance with their own procedures. This procedural autonomy is nevertheless limited by two factors: Effective implementation of EU law and equivalent conditions of implementation. EU jurisprudence, in taking its inspiration from national laws, has borrowed certain concepts or principles of national laws and applied them on the EU level (principle of legitimate expectation, etc.). Several contentious techniques applied by the Court of Justice (legal notion of liability, control of discretionary power, etc.) result from a synthesis of different national traditions. In addition, there are some extraordinary cases of alignment of internal law with solutions adopted by EU law.

- Various European institutions – Council of Europe, OECD (SIGMA), etc. – have played a role on the »doctrinal« level. These institutions develop recommendations and at times special conventions, as well as diffuse numerous information documents or studies, defining »good practices«, common standards, recommended techniques, etc.¹⁶ concerning the judicial control of administrative authorities.

– The process of exchange and influence between European countries has played a particularly important role in the reorganization of the countries in Central and Eastern Europe following the political changes at the end of the 1980s. Nowadays, it is no longer rare for a national jurisdiction of a European state, when examining a delicate case, to refer to the law or the jurisprudence of other European states. To adapt their legislation and construct a system of judicial control of the administration adapted to the current conception of a state based on the rule of law, these countries have borrowed considerably from the laws and doctrines of other European countries, thereby reinforcing the process of intra-European rapprochement concerning the legal framework for judicial control of the administration.

¹⁶ Numerous European professional institutions of magistrates have been set up and serve as a framework for exchanges, studies, training and comparison: European Association of Supreme Administrative Jurisdictions, European Union of Associations of Magistrates, European Academy of Magistrates of Trier (Germany), etc.

3) Emergence of a Set of Major Principles of European Administrative Law

Beyond the special rules of implementation at national level, judicial control of the administration in Europe has set down a number of major principles that convey in concrete terms the notion of a state based on the rule of law. These principles constitute basic references for all European administrative law.

a) Pre-eminence of the rule of superior rank

This principle requires that each rule or decision applied by the administration must be compatible with the rules of a superior value. In the event of its incompatibility with these superior rules, the administrative authority must not apply it, and jurisdictions must sanction it. The application of this principle, by recognizing the most important rules, guarantees their stability and protection with regard to political changes.

b) Subordination of individual decisions to general rules

This principle guarantees the predictability and absence of arbitrary power in administrative actions, as well as the conformity of its actions with defined and known objectives. This does not exclude, however, adaptation for special cases. The general rules guiding individual administrative actions must be fixed by parliament whenever they concern rights and liberties.

c) Idea of legal security constitutes a special example of the preceding principle

This idea results especially in the ban on applying rules or decisions retroactively other than in the case of necessity in the general interest, as declared by the legislator.

d) Principle of legitimate expectation

An extension of judicial security, this principle requires the administration to respect its commitments or promises, but also takes into account the justifiable expectations¹⁷ that the administration has given

¹⁷ UK case law refers to »legitimate expectation«.

to the general public or to individuals. The consequence of this rule is that the administration must in principle follow its own instructions. Another result is the principle of respect of acquired rights and situations established under legitimate conditions.

e) Principle of equality

This principle must in fact be understood as a rule of non-discrimination for unjustifiable reasons, but also as an obligation for special treatment in cases where it is necessary in order to guarantee genuine equality.

The different treatment of similar situations therefore constitutes discrimination, but also the equal treatment of different situations. The administration must avoid arbitrary power and unjustified differences in the exercise of its power of assessment.

f) Principle of impartiality

Impartiality constitutes an extension of the principle of equality. However, it also signifies that public authorities must show themselves to be neutral with regard to special interests and only seek to serve the public interest.

g) Principle of proportionality

This principle constitutes the legal translation of the idea of equity and appropriateness:

– Public measures must be likely to ensure that the expected result will be obtained. An obviously inappropriate measure taken to reach the desired goal cannot be legal.

– A weighing of advantages and disadvantages of the measure must be carried out. A measure that would have serious disadvantages and reduced advantages cannot be justified. The idea of weighing¹⁸ the consequences of a project is central to all planning law.¹⁹

– The administration must seek to minimize infringements of individual interests that its action could entail. Unnecessary infringements

¹⁸ *Abwägung* in German.

¹⁹ On the judicial level, this idea is applied in its negative aspect: courts sanction the absence of any weighing process or an obvious disequilibrium in the balance between advantages and disadvantages of an action.

must be avoided. In particular, in the case of police measures, it is necessary to give priority to actions that permit the attainment of the objective and are least strict for the individuals concerned.

h) Principle of accountability/liability

The administration is accountable for its actions and liable for the prejudicial consequences they could have. It is therefore obliged to compensate the victims of a prejudicial action if this prejudice:

- results from faulty behaviour of the administration;
- results from a violation of a rule or law; or
- adversely affects an individual or a small group of persons, whereas the prejudicial action profits general interest.

The principle of public liability is therefore a consequence of the principle of the equality of citizens in the face of public power.

i) Principle of fairness

This principle implies respect for the adversarial nature of the procedure and for the right of a fair hearing: Draft decisions that could infringe the interests of an individual must be brought to the attention of the interested parties – except for special reasons – so that they can make their observations known.

j) Rule of transparency:

Following the preceding principle, the administration must disseminate appropriate information on the decisions it will take or has taken and ensure public access to administrative documents that are not covered by legitimate secrecy.

4) Integration of the objective of good governance in the mechanisms of judicial review of administrative action

In many aspects, the control performed by the courts is not adversarial to the strength of administrative action. On the contrary, it can help to increase the efficiency of public administration:

- Judicial review strengthens the quality of administrative decisions.

The rule of law is not only a guaranty for the citizen; it is also a good guideline for rational, upright, and efficient work of the administrative bodies. The effectiveness of a review by independent courts commits public servants to take decisions based on legal grounds that can be justified before judges. If an illegal decision is set aside, it must not be seen as a defeat for the public authority but as a desirable correction of its action.

– Judicial review improves the legitimacy of public decisions.

Courts and administrative bodies are not adversaries. A lawsuit can help public authorities to justify unpopular decisions. Proceedings before the courts may be an opportunity to explain the grounds of a contested decision.

– Judicial review can help to regularize illegal decisions.

The sole abolition of an administrative action is often insufficient as it creates a legal void that is then difficult to fill. The judge can help to overcome this void by indicating to the administration the path to follow and the laws to be respected, and then by ordering the actions to be taken. Thus in several countries, the powers of declaration and injunction have been developed for the benefit of administrative courts. These powers permit them to go beyond the annulment of illegal decisions and to re-establish administrative legality by indicating to the administration how to draw the consequences of an abolition.

Another tendency aims to permit a judge to correct on his/her own the established irregularity. Following this logic, administrative courts have developed procedures aimed not only at establishing legal irregularities concerning administrative actions but also at rectifying the situation as much as possible instead of purely and simply annulling these actions. Several techniques have been developed for this purpose:

- The judge can accept or even invoke a substitution of reasons or legal basis for an action that includes an irregularity in this respect. In other words, in the course of the procedure he/she accepts the modification of the factual or legal elements forming the basis of the decision under attack.
- He/she can decide or order the correction of certain procedural errors, for example by setting up complementary legal measures of instruction that could compensate for the established irregularities.

• The judge can be called on to intervene even before a decision is definitively adopted to correct an ongoing procedure if there is a doubt about its regularity.²⁰

An other method consists of adjusting the effects over time of the judicial quashing of an administrative decision (this concerns especially regulatory actions). Instead of proceeding with a total abolition, it is pronounced for the future – and even on a conditional basis if within the prescribed time limit the administration does not take any corrective action.²¹

– Judicial review can cope with time constraints.

It is fundamental to adapt the speed of judicial control to the request of celerity which is today imposed to administrative and economic life. To this aim, it is necessary to develop effective procedures of interim relief and of interlocutory injunctions. Especially courts must be able to decide with a large discretion on the suspensive effect of the claim. Moreover, in several countries, courts have been able to develop several models of »fast track« procedures and caseload management in view to regulate properly the flow of cases and to reduce delays in the processing. The time taken to obtain a decision and the possibility to get an interim protection before the final decision are decisive elements to evaluate the effectiveness of justice. Procedural instruments allowing an early intervention of courts in the process of administrative decision can help the administrative authorities to achieve better decisions.

²⁰ This kind of urgent procedure exists in France in the area of public procurement and is called »référé précontractuel«.

²¹ Such techniques are applied by the EU judge, the German constitutional judge, and more recently by the French State Council (*Conseil d'Etat*).

SUDSKA KONTROLA UPRAVE U EUROPI: PREMA ZAJEDNIČKOM MODELU

Sažetak

Sudska kontrola uprave pokazuje veliku raznovrsnost u različitim europskim zemljama. Ipak, iza te raznovrsnosti stoje zajednička ishodišta i ograničen broj organizacijskih modela. Glavnu tendenciju u razvoju sudskog nadzora javne uprave predstavlja europeizacija.

Mogu se razlikovati dvije svrhe sudske kontrole uprave, zaštita subjektivnih prava i zastupanje objektivne zakonitosti. Te su dvije svrhe u vezi s dva različita koncepta upravnog sudovanja, kao dijela pravosudnog sustava ili kao faze (i dijela) upravnog odlučivanja. Oni bi se mogli povezati i s dva različita pogleda na ulogu sudova, »supstancijalističko« traženje pravog rješenja ili proceduralni pristup koji ide za nepristranim ispitivanjem suprotnog stajališta.

Organizacijske varijante, od povjeravanja sudske kontrole djelovanja javno-pravnih tijela specijaliziranim upravnim sudovima do njezina dodjeljivanja redovitim sudovima, manje su važne, u usporedbi s tim temeljnim orijentacijama. Gotovo se posvuda uvida potreba za specijaliziranim i nezavisnim upravnim sucima, čak i ako se praktični detalji te specijalizacije razlikuju od zemlje do zemlje. Ono što je stvarno odlučujuće u ocjeni kvalitete upravnog sudovanja tiče se uvjeta pristupa sudu, širine nadzora (akti i akcije koje se mogu poduzeti) te intenziteta provjeravanja (pitanje širine ovlasti odlučivanja). Ako se u različitim europskim zemljama na ta pitanja još uvijek daju različiti odgovori, način njihova postavljanja je isti.

U čitavoj je Europi primjetna opća tendencija prema daljnjem razvoju sudske kontrole uprave. Prvo, posvuda se širi koncept zakonitosti, što širi i sudsku kontrolu uprave. Nadalje, jaka je tendencija europeizacije te kontrole zbog rastućeg utjecaja Europskog suda za ljudska prava i Europskog suda pravde, ali i zbog kontakata i razmjene među sucima i pravnicima širom Europe. Svi ti kontakti pridonijeli su pojavi niza temeljnih načela europskog upravnog prava, kao što su načelo razmjernosti ili načelo legitimnih očekivanja. Na kraju, može se primijetiti opći trend integriranja svrbe dobre vladavine i uprave u mehanizme sudskog nadzora upravnih aktivnosti. Sudska kontrola nije neprijateljska u odnosu na snagu javne uprave nego je baš može povećati.

Ključne riječi: sudska kontrola uprave, zajednički europski model, europsko upravno pravo, dobra vladavina i uprava, zakonitost, specijalizirani i nezavisni upravni suci