DEVELOPMENT OF ADMINISTRATIVE PROCEDURE IN DOMESTIC AND COMPARATIVE LAW AND ITS SIGNIFICANCE FOR POLICE ACTIVITIES

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Abstract: The establishment and development of the legal state among other things involves subjecting administration to the norms of objective law. This means that the administration has as much power as it is entrusted by the law and that it can exercise its power in accordance with the procedure stipulated by the law.

Faced with the need for rules guiding the administrative proceeding, many countries of the modern world have resorted to codification of such rules. Some of them, although fewer in number, failed to do so. However, if we observe the trends and needs, what one should not rule out is the possibility that codification of administrative procedures will take place in these countries as well in the near future.

As for Serbia, it has an almost century-long tradition of codifying its administrative procedure rules. As a result, a brand-new Law on General Administrative Procedure has been passed as part of a public administration reform, which is expected to assist the administration - and consequently the police, as an administrative body - in the execution of duties and in facing numerous challenges.

Keywords: administration, administrative procedure, legality, administrative dispute, administration control.

INTRODUCTION

The process of subjecting the administration to the norms of objective law, as a condition *sine qua non*, accompanied the establishment and development of the legal state. Gradually, certain areas of social life and the rights of citizens became regulated by legal guidelines, which resulted in better protection

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of the citizens' rights. However, this protection was not complete, given the fact that the said rights could only be achieved through free activities of administrative bodies as there were no pre-defined rules of administrative proceeding. In this way, the free activity of the administration was based on a number of recognized theories, such as 'the theory of Justified Illegality', 'the theory of Extraordinary Circumstances', 'the theory of Unpredictability', 'the War Powers Theory', etc. This prolonged the need for introducing regulatory norms in the administrative proceeding (Langrod, 1960:3-5). In the course of further development of the legal state, judicial control of the management of administration originated from the institute of administrative dispute. This control, in Anglo-Saxon law, was as a rule assigned to courts of general jurisdiction. In the continental countries of Europe, especially in France, special administrative courts were established to control the legality of administrative acts. Thus, the rules of administrative procedure were gradually established through judicial and administrative court practice, but there was still no codified administrative procedure. Opponents of codification justified their position by claiming that predefined rules of administrative proceeding would hamper the creative role of the administration.

Development of administrative proceedings in comparative law

It can be said that there are two approaches to the issue of codification of administrative proceeding in terms of comparative law.

The first approach is characterized by absence of codification of administrative procedure. The states that take this approach have series of scattered regulations on administrative procedure and the rules on administrative procedure derived from administrative and judicial practice, which are increasingly reminiscent of the court proceedings (Braibant, 1974-1975:375). This system is characteristic of the United Kingdom and until recently it was present in France. It should be noted, though, that the administrative tribunals (as quasi-judicial authorities) in the United Kingdom have established certain basic principles of administrative procedure. As far as France is concerned, things have also been changing. After the initial move towards codification of the administrative procedure in France and after the establishment of a commission in the 1990s whose task was to deal with these issues, many rules of French administrative procedure have now been codified (Petrović, Prica, 2013:343). France is the symbol of a country in which the rules on administrative proceeding are contained in the practice of administrative courts, sector laws or laws that apply to all administrative areas, but regulate only certain issues (e.g. the obligation of the administration to elaborate on its decisions or the possibility of accessing the case files, etc.). However, the country has recently embarked upon codification of general administrative procedure. Thus, in 2013 a new law was passed giving the government the authority to codify the rules of general administrative procedure in a decree (Tomić, Milovanović, Cucić, 2017:20).

The other system is characterized by a codification of administrative procedure. Austrian and German theorists of the nineteenth century were the first to think about the problem of establishing the rules on administrative procedure. Yet, Spain was the first country to codify the rules of administrative proceedings in 1899 (Braibant, 1974-1975:376). Austria codified the administrative procedure in 1925, although the draft of this codification had been prepared much earlier, in 1911. The war slowed further activity on this plan, so that it was not until 1925 that several laws, now collectively known as "the laws on the reform of administration", were adopted, thereby codifying the administrative proceeding. These laws include: 1) Administrative Law on Rules of Administrative Procedure (Einführungesgetz zu den Verwaltungsverfah-Rensgesetz-EGVG); 2) Law on General Administrative Procedure (Allgemeines Verwaltungsverfahrensgesetzen-AVG); 3) Law on Misdemeanor Procedure

(Verwaltungsstrafgesetz-VStG); 4) Law on Administrative Execution and Execution Procedure (Verwaltungsvollstreckungsgesetz-VVG), (Adamovich, 1954:205). The rules on administrative procedure imposed by these laws were very similar to the court proceedings. The codification of the administrative procedure in Austria, at that time, had a great impact on the codification of the administrative procedure in other countries: Czechoslovakia (1928), Poland (1928) and Yugoslavia (1930). During this period, the codification of the administrative procedure was performed in some federal units of Germany: Thuringen (1926) and Bremen (1934). In this way, during the period until the Second World War, several states codified rules on administrative procedure, including our country.

Following the Second World War, there was a tendency towards democratization of administration and towards better protection of rights of parties before administrative bodies. In many countries, the necessity and conditions for the codification of administrative proceedings were examined and this issue was the subject of discussion in many international scientific gatherings dedicated to the issues of administrative law study (Wiener, 1981:332-336). In this period, specifically in 1950, Austria introduced minor changes in its administrative procedure. In 1946, the US passed the Federal Administrative Procedure Act. This act did not fully resolve all problems of administrative proceedings, but it was an important step in the struggle to subject administrative activities to regulations (Langrod, 1960:36). In 1958, Spain passed a number of laws aimed at modernizing the administration, and in particular to make the administrative proceedings as efficient as possible (Wiener, 1981:63). Codification of the rules on the administrative procedure was performed in Yugoslavia (1956), Hungary (1957), Poland (1960), Czechoslovakia (1953 and 1960), and Israel (1958).

In 1958, Tribunal and Enquiries Act was passed in the United Kingdom, setting out the rules on administrative procedure, and then the 1966 Tribunal and Enquiries Act, defining the rules on procedures pertaining to public surveys (Boussard, 1969:84-87). As for Switzerland, the codification of administrative procedure took place in some of the cantons: Basel (1958) and Zurich (1959), and the Federal Law on Administrative Procedure was passed in 1968 (Wiener, 1981: 64. 75. 127-139).

After World War II, Romania passed the Law on Administrative Procedure in 1970, Norway in 1967, Bulgaria in 1970 (Wiener, 1981: 353-367).

Sweden completed codification of its administrative procedure in 1971, and Germany achieved codification of administrative procedure by passing the Law on Administrative Procedure in 1976. This act entered into force in 1977.

It should be pointed out that, following the Second World War, a considerable number of states embarked upon codification of the rules on administrative procedure. This was done with the aim of providing a certain guarantee to the parties, in the sense that the administrative authorities would make objective and sensible decisions, but also that the administration would be provided with the optimal conditions for performing its function, in the sense that arbitrariness should be eliminated from its work. It is especially important to emphasize that administrative procedures are required not only because the administration makes decisions, but because it makes a lot of decisions (Wiener, 1981:32).

However, it should be taken into account that the need for codifying the rules on administrative procedure has given rise to conflicting opinions, as there are views that a codified procedure would create too rigid frameworks for the functioning of administration. Opponents of codification consider that it is not necessary in the situation where there is judicial control of the work of administration, and where court decisions also provide certain directives for the work of the administration (Denković, 2010: 266).

Opponents of codification consider that the codification of the administrative procedure hampers the effectiveness of the administration functioning. Conversely, those who advocate codification insist that it is dangerous and unfounded to value effectiveness above legality. France's opponents of the codification of administrative procedure insist that the administrative-court practice has in a way already 'encoded' the entire administrative procedure. However, codification advocates believe that the rules of administrative procedure that derive from administrative-court practice are insufficiently accessible and remain known to a narrow circle only. Judicial control has its limits, because there are more administrative acts that are not subject to judicial control than those that are. In this sense, it has been pointed out that the subsequent judicial control of the administration frequently only proclaims justice (Wiener, 1981:32-35; Braibant, 1974-1975:382-384).

It is not contested that protection of the right of the parties can exist even without codified rules on administrative procedure, especially in the states that cherish such a tradition, but it would be a mistake to claim that the codification in these countries is unnecessary. The codification of the administrative procedure undoubtedly bears upon the work of the entire administration and makes it less dependent on higher authority directives.

It is undisputable that codification of the administrative proceeding is aimed at establishing the methodology that provides general rules for the work of administration. However, this does not rule out the possibility that a certain administrative activity may be regulated by a special law, because specific nature of this activity calls for a specific procedure, in which case the general rules on administrative procedure are of supplementary nature.

From the aspect of comparative law, codifications of administrative procedure are not identical and differ from one another, although they have a shared tendency to formalize the administrative proceeding as much as possible in order to protect the rights of the parties as much as possible and ensure respect for the principle of lawfulness in the work of the administration. Regardless of the differences that exist among the codifications, it may be noted that they contain the rules which regulate the following issues: basic principles; rules on jurisdiction; rules on the procedure; rules on the form and content of an administrative ac; rules on the execution of the administrative act; legal means in the administrative procedure (Braibant, 1974-1975: 382-383).

Development of administrative procedure in Serbian law

As early as 1805, the governing 'soviet' was established in Serbia, serving as a supreme court of a kind, although it was in fact a political body through which the regional elders sought to restrict the power of Karadjordje. However, the 1835 Constitution and 1838 Constitution authorized the State Council to control the activities of the administration and even occasionally addressed appeals of citizens. Such practice of the State Council gradually led to the introduction of the administrative dispute, which was formally introduced by the Constitution of 1869. Detailed rules on the procedure were set out in the Law on Proceedings before the State Council of 1870.

After the end of the First World War in 1918, the Constitution of 1921 and the Law on State Council and Administrative Courts of 1922 retained the administrative dispute, so that the practice of the State Council and administrative courts, together with the legal provisions contained in certain texts of positive law, contributed to increasing definition of certain rules on administrative proceeding through administrative court practice. These rules had to be observed by the administrative bodies given that

their infraction entailed sanctions, i.e. the State Council and administrative courts revoked such administrative acts as unlawful.

Following the example of Austria, the Kingdom of Yugoslavia codified the rules on administrative procedure in 1930. Legal rules on the general administrative procedure of 1930 were observed even after the Second World War on the basis of the Law on Invalidity of Legal Regulations passed before 6 April 1941 and during enemy occupation (*Službeni list SFRJ (*Official Gazette of SFRY*)*, No. 86/1946).

Following the Second World War, our country was among the first states in the region to pass a new Law on General Administrative Procedure in 1956. This law and its provisions significantly contributed to the esteem of our legal system. In the meantime, the Law was amended several times: in 1965, 1976, 1978 and 1986. Its harmonization with the legal system of the Federal Republic of Yugoslavia (FRY Constitution of 1992) was achieved in 1996 (Official Gazette of FRY, No. 55/96) and in 1997 (Official Gazette FRY, No. 33/9731/2001). Following the dissolution of Yugoslavia, the implementation of this law continued until recently as a set of regulations in Serbia, although with minor alterations (Law on General Administrative Procedure, (Official Gazette of FRY, No. 33/97 and 31/2001 and Official Gazette of RS No. 30/2010). It was a rare example of the long-term validity and application in the legal system of Serbia. Undoubtedly, the reason for this lay in the quality of its provisions and an almost century-long tradition in the codification of administrative procedure. Its consistent implementation resulted in legal certainty and a high degree of protection of participants in the procedure.

However, the challenges that our country had to face together with other states demanded improvements to the law (Vasiljević, 2016: 215-223). Thus, Serbia passed the new Law on General Administrative Procedure which entered into force on 9 March 2016, and a projected application date of 1 June 2017, with the exception of provisions of Articles 9, 103, and 207, which were to be applied upon expiry of 90 days of its entry into force, i.e. on 8 June 2016 (Official Gazette RS, No. 18/2016).

The importance of rules on administrative procedure for policing

It is important to point out that one of the basic functions of the bodies that constitute the system of state administration, and thereby the police as part of this system, is the implementation of laws and other regulations and general acts, i.e. enforcing their implementation.

It is of vital importance for the state that the legally regulated system which constitutes the law of interior affairs is applied in the social reality. By implementing this law, the state – through the agency of police – provides protection of life, security of person and property of citizens, prevents and detects criminal offences and their perpetrators, maintains public order and peace and performs other security tasks (Miletić, Jugović, 2019: 49-79). In this regard, the police are authorized to adopt normative acts, administrative acts and to undertake administrative actions and measures in the implementation of internal affairs law. The police act within a legal framework respecting the principle of legality in their work means that they must adopt the specified acts and perform administrative actions and measures in accordance with the appropriate laws that they apply (Vasiljević, 2009:33).

The law of internal affairs, applied by the police, is contained in a large number of laws and bylaws that are – above all – of material law nature. However, it should be noted that the manner in which material law is applied in a specific case has also been legally regulated. Such legal norms are categorized in legal theory as formal legal norms, referred to as actions. Norms governing the rules of conduct

of the actors of administrative functions when deciding in administrative matters are included in the regulations on general and special administrative procedures.

According to domestic Law on General Administrative Procedure, the administrative procedure is a specific set of rules that the state authorities (including the Ministry of Internal Affairs) and organizations, bodies and organizations of autonomous provinces and bodies and organizations of local self-government, institutions, public enterprises, special bodies through which regulatory functions are achieved, and which legal and natural persons entrusted with public powers apply when acting in administrative matters.

General administrative procedure is applied in all administrative areas (even in the field of internal affairs) unless the legal regulations expressly prescribe a special procedure. This means that, in addition to the general administrative procedure, we may have special administrative procedures (foreign exchange, customs, tax, etc.). However, when there is a special administrative procedure, the largest number of rules on the general administrative procedure is also applicable. In this way the general administrative procedure constitutes a basis but also an addition to special administrative procedures. Special administrative procedures are therefore specialized in respect of the general administrative procedure, and the general administrative procedure is of a subsidiary nature in respect of special administrative procedures. This means that the rules of the Law on General Administrative Procedure shall apply to all procedural matters that have not been regulated by a special law. In other words, a special administrative procedure precludes the implementation of the general administrative procedure, and the general procedure complements the rules of the special one (Vasiljević, Vukašinović-Radojičić, 2019:281-285).

Generally speaking, regulating the manner of application of material norms to specific cases (rules on proceeding) is aimed at ensuring legal certainty of natural and legal bodies and at lawful actualization of the legal order.

The existence of and compliance with the rules on the general administrative procedure when implementing the law from the field of internal affairs by the Ministry of Internal Affairs (police) is of multiple significance. First, it should ensure equal treatment of all subjects; second, it should prevent arbitrary and unconscientious actions of authorities in the implementation of regulations; third, it is a firm guarantee that entities will be able to exercise their rights and legal interests based on the law; fourth, it constitutes grounds for using coercion in cases when the subjects to which the legal norms pertain do not want to comply.

Europeanisation of administrative procedure

There are two principal agents of the process of Europeanisation of administrative procedure in Serbian national law. These are the European Union and the Council of Europe.

The European Union operates in several different ways:

1) There are principles and rules that are applied by the European Union institutions within the Union but also in the territory of candidate countries. These principles and rules are the basis and model for all administrative actions.

2) Within the European Union itself there is something that is referred to as "European Administrative Space". It consists of the principles contained in written sources of law, but also of some unwritten

principles. The written sources include the EU Charter of Fundamental Rights adopted in Nice in 2000. Its significance is reflected in the fact that it established the right to good administration. This means that every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time. The European Code of Good Administrative Conduct of the European Ombudsman of 2001 has had an important role in shaping the European Administrative Space. The principles of good governance that make up the European Administrative Space are observed and implemented by the European Union courts. In this way the principles of the European Administrative Space have been shown to be convenient to be taken over by national legislations (Davinić, 2013: Đerđa, 2012: Košutić, Rakić, Milisavljević, 2013:150-152; Schwarze, 2006: Isaac, 1989: Kent, 1992: Weatherill, 1995: Vukadinović, 1995: Rakić, 1997).

3) The Court of Justice has - in its decision - contributed to great importance of respect for the principles of good governance. That is why the Member States have seen the national administrative procedural law approaching to the principles of the European Administrative Space (Vukašinović-Radojičić, 2015: 105-119).

As regards the Council of Europe, its influence is reflected in the creation of administrative standards through recommendations and resolutions, but also through international treaties. The most important documents of this kind include the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Court of Justice implements this Convention in such a way as to protect the fundamental rights as part of European law. However, the main protector of the human rights and freedoms based in this Convention is the European Court of Human Rights, although only after the decisions of the national administrative and other courts, even including constitutional courts.

There is another way in which influence is being exerted on the Europeanisation of national administrative procedure law. It is the activity of Sigma, which is an organizational part of the OECD, financed by the European Commission. It has established a range of administrative procedure principles and developed a detailed list of questions to check the contents of laws on general administrative procedure, thereby influencing the process of accessing the European Union (Vukašinović-Radojičić, 2013:29-49). There is no doubt that the ultimate verification - from the perspective of European standards - awaits the Serbian national administrative procedure law before European courts (Vasiljević, 2019:367-385).

CONCLUSION

The principle of legality is one of the most important principles of administrative actions. This principle means that the administration has as much authority as entrusted by the law and that the powers endowed to it by the law may be executed only in keeping with a procedure prescribed by the law. Thus, governance becomes a form of law implementation. In this sense, the legality of administration is operationalized among other things by means of what is called the administrative procedure.

As pointed out above, a significant number of states in the modern world have codified the rules of administrative procedure. There is a small number of those which have not done so. However, bearing in mind their legal tradition, it would be a huge scientific mistake to claim that there is no protection of the rights of parties to administrative proceedings in these countries. There are certainly rules on proceedings in these countries, yet they have not been codified, but this may easily happen in the near future. There is an increasing tendency and a growing necessity to do so.

As regards Serbia today, at the beginning of the 21st century, following a turbulent history and given its rich legal tradition, it has reverted to the old-new values by adopting the new Constitution in 2006 and a number of systemic administrative law regulations, including the new Law on General Administrative Procedure, and has been working to create important social prerequisites for better quality of administrative procedure law which is implemented in the work of administrative authorities including the Ministry of Internal Affairs (police) as part of the system.

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