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## **FOREWORD**

**GANZORIG DAMDIN**

*Chief Justice of the Supreme Court of Mongolia*

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Article 48.1 of the Constitution of Mongolia provides that “The judicial system shall consist of the Supreme Court, the aimag and the capital city courts, soum (county) or inter-soum (inter-county), and district courts, and the court may be established by circumferential principle. The specialized courts, such as criminal, civil and administrative by types of adjudication, may be established. The activities and decisions of these specialized courts shall not be outside the oversight or jurisdiction by the Supreme Court” thereby providing legal basis for the establishment of the Administrative Court in Mongolia.

Subsequently, the Law on Administrative Case Proceedings and the Law on the Establishment of the Administrative Courts were adopted on 23 December 2002 by the Parliament of Mongolia and became effective and enforced as of 1 June 2004. First-instance administrative courts began its operation on 4 June 2004.

Countries globally have been establishing constitutional and rule of law states, separating legislative, executive, and judicial powers, and creating legal frameworks to ensure checks and balances in their efforts to protect human rights.

As quoted by Charles de Montesquieu “there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression”, the establishment of the Administrative Court created conditions for an independent and autonomous institution to oversee the executive branch and ensure the principle of balance in the separation of state powers.

During a socialist system, the prevailing tendency was that illegal decisions of the executive branch should be resolved “internally” by higher-level administrative bodies, rather than through judicial procedures. Although a ‘Democratic Constitution’ was adopted in Mongolia in 1992, there was no understanding on whether citizens and legal entities could file lawsuits against administrative organizations and officials. Only certain types of disputes specified in the law and further disputes involving public law subjects, were resolved in court in accordance with the Civil Procedure Law,



and the citizen filing the complaint was responsible for proving the administrative organization's wrongdoing.

However, with the establishment of the Administrative Court in 2004, conditions were created to limit the arbitrariness of administrative bodies and officials, protecting the legitimate rights and interests of citizens and legal entities violated - due to their illegal actions or inactions, and restore and compensate for violation rights. In addition, the principle of judicial proof was implemented in the judicial process, and the participation of the administration, citizens, and legal entities was equalized, and the principle of debate was provided, thereby guaranteeing the protection of the rights inclusive of the interests of citizens and legal entities and strengthening the foundation for the judicial power to control the executive power.

In connection with the 20th anniversary of the Administrative Court in 2024, the Administrative Chamber of the Supreme Court has planned and implemented many activities to publicize the activities of the Administrative Court, ameliorating public trust in the courts, advancing the transparency of judicial activities, refining the adjudication of administrative cases in courts, and therefore, optimizing legislation by types of dispute.

Within the framework of the aforementioned activities, an international academic conference titled "Administrative Law Codification and Application: Interdependence" was held in Ulaanbaatar in June 2024. This event brought together scholars and judges specializing in administrative law from Mongolia, Japan, Germany, the Republic of Korea, Canada, Singapore, and Turkey. Participants presented papers on both theoretical and practical issues, engaging in a meaningful exchange of experiences.

A total of 12 papers were delivered during the conference, addressing key topics essential for defining and understanding the current codification of administrative law. These papers have been compiled in this publication for your reference.

I would like to extend my best wishes to the distinguished speakers who shared their insights and facilitated thoughtful discussions during the conference. Additionally, I commend all scholars in the field for their valuable contributions to the development of administrative law. On this occasion, I warmly congratulate everyone on the 20th anniversary of the establishment of the Administrative Court in Mongolia.



## **INTRODUCTION: BRIEF INTRODUCTION TO THE CONFERENCE TOPIC, THE COHERENCE OF THE PRESENTATIONS, AND THE CONTENT**

***TSOGT TSEND***

*Doctor of Law /LL.D./*

*Justice of the Supreme Court of Mongolia.*

The Administrative Chamber of the Supreme Court organized an academic conference on the topic - Administrative Law Codification and Application: Interdependence - to commemorate the 20th anniversary of the establishment and operation of administrative courts in Mongolia.

In Mongolia, the development of national administrative law can be traced back to the time of Professor B. Chimid's "White Book" (as early as 1973). However, it would not be 'missing the point' to say that the development of modern administrative law in Mongolia originated with the adoption of the Law on the Establishment of Administrative Courts (2002) and the Law on Administrative Case Procedures (2002). With the establishment of administrative courts in 2004, this development became more practical and effective. With the adoption and implementation of the General Administrative Law, the Mongolian Administrative Law system and codification (at least in terms of format) have become complete, and it is particularly important as it forms and creates a subject of substantive law, and it will undoubtedly have a positive impact on the development of the special class of administrative law and procedural law in the future.

Codification of administrative law is generally the result of parliamentary work. The importance of "well-ordered administrative law" has long been recognized by countries, and also, there is a view that attributing codification as the work of the legislator is a tendency to abstractly construct administrative law. Indeed, shortcomings are inevitable when codifying norms that have neither been applied nor tested in real-world situations, especially without thoroughly studying court-decided cases. Codification [based on legislators] is not merely a mechanical codification of administrative law norms; rather, it is a law and its unified application, resulting from a careful combination of these elements while considering the basic theory, application, and criteria of legal [judicial] control to ensure consistency.

There is a need to define the scope of codification, identify participants and determine the extent of their involvement. The theme of the academic conference and content were aimed at finding an answer to this question. However, it may be helpful for the reader to briefly introduce the general theme of the conference, the content of the sections, their connections, and the presentations in advance in this



Introduction. We decided to include an introduction and conclusion because we felt that compiling papers without them would not fully convey our goal of reflecting on the progress and results of the past 20 years, while also wishing in furthering the development for the next 20 years. By dividing the presentations to be discussed into four interconnected groups and focusing on a common goal, we aimed to draw conclusions on the implementation, challenges, and solutions of the constitutional principles of protecting human rights and upholding the rule of law in decisions of state bodies in Mongolia as a result of administrative court decisions and actions over the past two decades.

First, it is important to note that Justice D. Munkhtuya, presiding justice of the specialized chamber, delivered the keynote speech, discussing the 20-year development, growth, and future activities of the Administrative Court. This presentation will address issues related to the general theme of the conference, touch on all topics that will be discussed further within the framework of the topic, and, while addressing the basic issues of the discussion, will describe the general outlook of the Administrative Court, its development, and operations. Also, in this section, Prof. Dr. Jürgen Harbich (DSc) Ts. Sarantuya shared insightful and meaningful reflections spanning the past twenty years, including valuable information and greetings that will hold significance for the future. They also reminded us that “the administrative court is an important pillar in the development of a democratic constitutional or rule of law state” and that “great energy is required to fulfill this

heavy responsibility.”

Firstly, the norms of general and special classes of administrative law, the functions, processes, decisions of administrative courts, and ultimately the protection provided by administrative law depend largely on the legal system of a given country, the choice of fundamental theories, its development and transformation trends, and the state of their study, which is the beginning of the codification of administrative law. Therefore, three papers were discussed in the first section “Theoretical Issues: Theory, Current Status, Trends, and International Experience in Codification of Administrative Law”.

This section begins with a paper by Prof. Dr. P. Odgerel on the current situation of the codification of national administrative law theory. It can be seen that the paper mainly discusses the issue of codification of special classes as described in the paper topic. Based on the experience of codification of the general class of administrative law in Mongolia [Research before the development of the General Administrative Law, the approved law, its implementation, and application], the need for codification of special classes was identified, and the codification will: 1) eliminate conflicts, duplications, and inconsistencies between laws, 2) transfer the regulation of normative acts to the law, and 3) remove the parts of the laws of the special class of administrative law that determine the sanctions or legal consequences [sanctions do not mean only punishments and penalty] from the law, thereby correcting the loss of integrity and unified application of the law. Since you



will read Professor P.Odgerel's paper in native language, there is no further need for delineation.

In addition, in this section, German and Canadian researchers representing the continental and common Law families, Prof. Dr. Rainer Grote and Prof. Dr. Paul Daly, have contributed to the topics covered in this section. Prof. Grote is a person with a special role in the development of our administrative law. As a senior researcher for constitutional law, comparative public law and human rights at the Max Planck Institute for Comparative Public Law and International Public Law in Germany and a professor at the University of Heidelberg, he advised on the drafting of the first attempt to draft a General Administrative Law in 2006-2007.<sup>1</sup> Dr. Rainer Grote's reflections on the development of a draft law on administrative procedures in Mongolia<sup>2</sup> were divided into two parts, of which Part 2, Section 2.1, discussed the principles and potential content of codifying the general law of administrative procedures in Mongolia, Section 2.2, what would be the significance of administrative reforms already carried out in Mongolia when codifying, and Section 2.3, what the regulation of the Mongolian Administrative Procedure Law could be. For more information on this, you can see the article cited in the reference.<sup>3</sup>

Therefore, based on his experience, Prof. Dr. Grote was invited to deliver a presentation, and in this presentation, he presented examples of European countries, including France, England, and Germany, in the direction of codification of administrative law, or the creation of a unified and coherent system of norms. In France, which is considered the birthplace of modern legal codification, the Supreme Administrative Court (Conseil d'État) has been the setter of general administrative norms and many other legal principles, rather than parliament, and in 1970 and 2016, the legislator aimed to increase legal clarity by issuing general codes. Another feature of France is the Codification Commission, which is responsible for codifying legislation and, under its leadership, the Administrative Law Working Group is primarily composed of judges from the Supreme Administrative Court.

He describes the codification of France as "with the support of administrative judges" and the English one as not very different. Although many specific areas of administrative law, such as immigration, tendering, town and country planning and the environment, have been codified, the substantive principles of the general class have remained outside the scope of legislative codification. Codifications undertaken since the second half of the 1970s have primarily focused on procedural norms, while the issue of parliamentary legislation concerning substantive administrative law norms has only recently started to attract attention in public policy, professional circles, and public debate.

Development Stages, Concepts, Implementation, and Expected Importance" (2019), available on Legaldata: <https://legaldata.mn/b/652>

<sup>1</sup> Prof. Dr. Rainer Grote [http://www.heidelberg-center.uni-hd.de/download/cv\\_grote.pdf](http://www.heidelberg-center.uni-hd.de/download/cv_grote.pdf) His biography on the Heidelberg University website includes the following information: "2003 – 2008 Expert on a project on the reform of the administration and of general administrative law on request of the Parliament of Mongolia".

<sup>2</sup> Dr. Rainer Grote, Überlegungen zur Kodifikation des mongolischen Verwaltungsverfahrenrechts - Diskussions- und Eckpunkte-Papier –(16 pages in German)

<sup>3</sup> Ts. Tsogt, "General Administrative Law:



The paper emphasizes that one of the reasons why codification was more successful in Germany than in the countries selected for study is the significant contribution of researchers, starting with Otto Mayer, to defining the general principles and codification of administrative law. Thus, the codification of administrative law in the country is not only a system based on the arrangement of principles and concepts derived from cases decided by the courts, but is based on the theories of scholars of that era. In other words, the German example shows that academic research and theoretical development are the basis for successful codification. Finally, he noted that the court will play a key role in the further development and effectiveness of Mongolia's own administrative law.

Prof. Daly also has been connecting with our administrative law researchers and has presented a paper titled "The Legal Status of State-Owned Enterprises, a Comparison Study" at the International Conference on Fundamental Issues of Constitutional and Administrative Law organized by the School of Law of the National University of Mongolia. His paper, like Prof. Grote's was particularly relevant to the theme and content of our conference, making a valuable contribution. In this paper, he presented the distinctive features of Canadian administrative law, which is based on common law but is influenced by the continental legal system in the province of Quebec. In doing so, the aim is to show the difference between the Quebec administrative law norms and their codification, in which the legislator establishes the basic principles of the operation of administrative bodies

and imposes certain obligations on the administration in order to ensure procedural fairness, and the Anglo-Canadian system, which "gives administrative authority and choice in decision-making relatively freely, but exercises legal control through judicial review based on the claims of those affected by its actions." Consequently, it is concluded that the continental legal codification method provides a relatively coherent understanding of administrative law norms compared to the common law system.

He also explained the impact of the taxonomy tendency on the judicial review of administrative decisions in the continental legal system, highlighting that administrative law is a system of multifaceted and nuanced orders and classifications of principles, standards, and concepts. The common law system has developed without the active and constant participation and recognition of the legislator in determining the principles and regulations of administrative law, as in continental law, but rather by focusing on the legal "protection" that courts can provide to claimants through administrative law, and it can be said that the legislator had no role in determining the hierarchy and classification of administrative law norms. Prof. Daly illustrated this distinction based on specific case decisions. The presentation clearly highlights the differences in the administrative law systems of countries with continental law and common law systems, and notes that over the past 60 years, the Canadian common law system has been undergoing convergence, moving from general principles, the codification method used mostly in continental law, to





entities violated due to illegal administrative decisions and actions, will help us to view the development of our country's regulatory legal sector from an objective perspective.

Professor Takahashi's presentation demonstrates that the country's highest court "corrects and compensates" for legal errors, shortcomings, and mistakes by interpreting legal regulations in alignment with the purpose, concept, and direction of human rights protection in its rulings. Additionally, the legislator refines legal regulations based on the case law established by the court.

The last speaker of the section, Ferhat Eker, presented the entire substantive and procedural aspects of Turkish administrative law in a comprehensive manner, of which we hope will be of great value to researchers who are interested in conducting comparative research. In his speech, he mentioned that Turkey, although a country that developed its administrative law based on the French model of the continental legal system, has not codified administrative law in general. In Turkey, administrative law is considered a philosophical and dynamic branch of law, not codified due to its impermanent, constantly changing and evolving nature. That is why the interpretation of the law through court decisions plays an important role, and the speaker's statement that "the principles applied in decisions will become part of legal studies over the years and will be reflected in general legal regulations such as statutes and secondary sources" is emphasized here.

From these three presentations presented in the second part of the

conference, you can see the common feature that countries belonging to the continental legal family adopt a general administrative law or a general law on administrative decision-making and systematize other administrative law legislation in accordance with it. In this codification, certain principles are followed to ensure coherence between general laws, basic sectoral laws, and detailed sectoral laws, and to avoid duplication and gaps. Also, the common practice of legislators improving legislation based on the case law set by courts adjudicating administrative cases can be clearly seen in the presentations of the Japanese and Turkish speakers, as it is impossible to foresee and legislate all issues through law.

The third section focuses on the general topic of the codification of administrative law in the implementation of laws by the executive authority. The first paper was presented by Dr. D. Sunjid, who, based on the research and data, stated that the implementation of the General Administrative Law is insufficient, indicating that the executive branch is unable to adequately exercise its fundamental authority to implement state laws as stipulated in the Constitution. Dr. Sunjid presented in her presentation that the challenges faced by the executive branch in implementing the General Administrative Law are largely due to the duplication, inconsistency, and conflict of laws, as well as the overlapping and incoherent functions of executive branches and the skills of civil servants.

The last speaker of the section, Prof. Eun-sang Rhee from Korea, presented a



comparative paper illustrating Mongolia, and Korea have adopted the substantive law on administrative law; later, in 2021, and it was then initiated by the executive branch. He mentioned that the General Law on Public Administration was adopted to address the problem of inconsistent application of laws and violations regarding citizens' rights and interests due to the lack of a general substantive law on administrative law, thereby introducing the process of its adoption, its importance, and the main content of the law. The professor emphasized that although it is impossible to objectively assess the implementation of the General Law on Public Administration since it has been in force for only 3 years, the norms of conduct for civil servants established by the law, are having a positive impact on the executive branch.

The two papers presented in this section cite the executive branch's failure to adequately implement administrative law is related to the fact that administrative law and the principles it enshrines limit the executive branch's actions and behavior. On the other hand, the presentations in the third section show that codified administrative legislation has positive consequences that make it easier, clearer, and more transparent for the executive branch to implement.

The last section, "Within the Judiciary: The Application of Codification of Administrative Law Legislation in the Process of Administrative Dispute Resolution," is an explanation of the general theme of this conference. Because the ability of legislation to regulate specific relationships is ultimately revealed and tested only when

the court applies the law and resolves the case. Therefore, the effectiveness of legal codification can be seen from here and future policies can be formulated. This section aims to show how the application of administrative law to other parts of the system (theory, legislation, and law enforcement) interacts with or conflicts with the system: How does codification affect adjudication? In turn, the question of how adjudication itself affects administrative law theory, legislation, and law enforcement is answered.

In this context, three papers were discussed, the first of which was the topic of the Administrative chamber's Justice M. Batsuuri and Research Assistant A. Bodbileg. The paper discussed the possibilities and ways for the court to overcome the shortcomings of the system by considering whether there are cases where the court has applied principles that are not directly mentioned in the law and are described as hidden in cases with unclear legal conditions, and if so, how these principles have been defined, explained and applied. In doing so, the court discussed the legal application issues that arise during the course of deciding cases by citing specific cases and laws and considering the legal principles applied to them. In this regard, it introduced how the ideas of the Constitution of Mongolia as well as legal principles that have already been established in the international legal system, such as "protecting previously established interests", "citizens are permitted unless prohibited by law, and officials are prohibited except for what is permitted", "not retroactively applying a law that improves the legal situation or one



that worsens it”, “refraining from deciding political questions”, “not imposing double responsibility”, “the right to protection must be lawful and fair, “not worsening the legal situation of the complainant”, and “accepting minor errors in administrative procedures”, are applied. Subsequently, conclusions were drawn on the issue of establishing the scope and limits of the fundamental principles that govern judicial law, which are relevant to the codification of administrative law norms.

The next presentation was presented by Mechthild Klein, a representative of German administrative judges with extensive experience in administrative law and codification. The paper noted that laws, including administrative law norms, are not something “immutable, like carved in stone,” and that their content and principles are newly discovered and revealed during the process of application, and that they must undergo constant changes and developments as a result of codification. In this context, he emphasized that since the German Administrative Procedure Act (APA) came into force in 1960, or over the past 65 years, legislators have made significant changes to many parts of the law on numerous occasions, continually adapting the law to meet the evolving needs of society. He specifically discussed how the recent codification of the Judicial Procedure Law, which was carried out with the aim of “expediting the resolution of cases by the courts”, affects the implementation of the principle of “effective protection of civil rights” in the courts.

The last presentation in this section was given by Prof. Eugene Tan, who was invited by the Singapore Judicial College, which has an active partnership with the Judicial Academy of Mongolia, on the topic of “How (not why) but the application of the law to its full potential in judicial review in Singapore’s administrative law”. This paper outlines the contribution of Singapore’s judicial review to good governance: recognizing the complexity of the executive branch’s organization, operations, and functions, and fostering inter-branch coordination, and emphasizes that executive decisions and actions must meet the criteria of legality, legitimacy, and the rule of law that underpin good governance. Although the court is not a higher administrative body, it is considered that strict compliance with the “form and content” requirements set by law for administrative decisions as a criterion for human rights is a key factor in determining the function of judicial review. He introduced and discussed the competing theories and judicial precedents on determining the legality of administrative decisions and actions by fully utilizing the power of law. He concluded that the scope of judicial review—its determination, expansion, or restriction—is ultimately governed and stabilized through the codification of administrative law norms. This process establishes a well-organized “virtuous circle” founded on the coordination and mutual trust of the parties involved.

In conclusion to the fourth part, although the court, within the scope of its powers to resolve disputes by applying the law, attempts to resolve inconsistencies in



the construction and codification of the law, there are often codification issues that go beyond the scope of the right to “interpret the law” and cannot be resolved through legal interpretation. For example, it is very difficult to overcome the contradictions between “tax laws and investment laws”, or “mineral laws and land laws”, “competition laws and infringement laws” by means of legal interpretation. As mentioned earlier, one of the reasons for the failure of codification in this field is the codification of norms without taking into account cases decided by the courts (case law).

Finally, it should be noted that the basis for successful codification is that Parliament considers legal principles and solutions that are based on the achievements of administrative law theory, tested in administrative and judicial practice, and developed by defining these norms when enacting laws. When reading the papers included in this compilation, it may be more helpful to consider the general theme mentioned above, the content related to it, the way they are grouped into four sections, and the connection between those sections. By defining the general theme of this academic conference and the relationship between its sections in this way, the aim was to illustrate the state of the codification of administrative law, including theoretical and academic research, legislative processes, law enforcement practices, and finally the role of the courts in interpreting and applying administrative law norms to real cases. It is also clear that the interrelationship of the functions of these four institutions and the creative use of each other's work

results in the development and codification of administrative law are important for making the entire system a “well-ordered administrative law.”<sup>5</sup> For 20 years, the Administrative Court has not only been conducting adjudication proceedings by “applying” sectoral law, but also has been a “creator and developer” of administrative law, a path that has been proven by international practice.

The papers written in Mongolian were translated into English by Z. Gerelmaa, foreign relations officer of the Supreme Court and J. Battsetseg, translator, and this English interpretation was subsequently verified by Dr. Antony D. Miller (Associate Professor in the Department of International Relations & Journalism at Otgontenger University), while the speech of Judge Mekhtild Klein was translated from German by S. Munkhjargal, an employee of the Hanns-Seidel Foundation. Researchers of the Judicial Academy Dr. B. Dulguun, S. Tserendolgor, N. Khulan, O. Tenkhlun, R. Anuurad, and B. Mungunshagai translated the speeches in English into Mongolian, and we would like to express our gratitude for the assistance of our chamber Justice P. Soyol-Erdene, who checked the Mongolian version of the translation.

We extend our heartfelt gratitude to all the speakers who generously dedicated their time and expertise to the academic conference commemorating the 20th anniversary of the establishment of the Administrative Court in Mongolia. We also express our sincere appreciation to the justices of the Administrative Chamber, as

<sup>5</sup> Otto Mayer: The well-ordered administrative law is the very essence of the rule of law. On page 56 of this publication.



well as other judges, and staff for their vital roles in preparing and organizing the conference. In particular, we acknowledge Justices D. Munkhtuya and G. Banzragch for their efforts in leading the organization. Additionally, we commend the staff of the Secretariat and the Judicial Academy for their valuable contributions to organizing the event and producing this compilation.

I would like to extend my heartfelt gratitude to Dr. B. Dulguun, Director of the Research Center of the Judicial Academy, for her invaluable cooperation throughout the entire process—from shaping the topic and content of the conference to completing the compilation and finalizing the main work.



## WELCOMING REMARKS

**SARANTUYA TSERENBALTAV**

*Prof., Science doctor of law /Sc.D./  
Honored lawyer of Mongolia*

To all the distinguished ladies and gentlemen participating in the international academic conference on “Administrative Law Codification and Application”, as well as to all the judges of the Supreme Court of Mongolia and the Administrative Court, and to the distinguished guests from home and abroad, I would like to extend my greetings on the 20th anniversary of the establishment of the Administrative Court in Mongolia.

According to Article 48, Clause 1 of the 1992 Constitution of Mongolia, the legal basis for the establishment of an administrative court in our country was first laid. This was a major step that contributed to the protection of citizens from an uncontrolled administration and the developing of a lawful state. Opening the door to the establishment of an administrative court is one of the invaluable achievements of our first democratic Constitution of 1992.

The newly established Administrative Court differs from courts of general jurisdiction in the types of claims it handled, the specifics of its proceedings, and its principles of operation. It was important to establish the new court from the beginning in accordance with the law, and to ensure

that it was fully consistent with its nature and purpose. There was a need to preserve the legacy of administrative law, while also modernizing it, thus, establishing a new form of court that would independently resolve disputes between the administration and citizens, which necessitated the study of the experiences of other countries with administrative courts. In 1997, while working as an advisor to the Parliament, renowned Mongolian lawyer and scholar Byaraa Chimid, first proposed the establishment of an administrative court to the Hanns-Seidel Foundation’s Mongolian office, marking the beginning of years of close collaboration. It is believed that the proposal to cooperate in this direction at that time was made to the Hanns-Seidel Foundation which was influenced by the fact that the administrative court - established in the 19th century in Germany, has been operating with high prestige in the country until the present day within this 21st century. The administrative court system was established in 1863 in the German Grand Duchy of Baden, followed by Prussia in 1875, Württemberg in 1876, and Bavaria in 1879.

By 1998, the first working group to draft the Mongolian Administrative Procedure



Law arrived in Wildbad Kreuth, a training center of the Hanns-Seidel Foundation in Bavaria, Germany. Since then, Mongolian judges have visited Germany, and German judges, administrative officials, and scholars have visited our country on a regular basis to exchange views. Judges, including the then Chief Justice of the Supreme Court, Ch. Ganbat, actively participated in the drafting of the law and many other related activities.

Soon thereafter, work began on providing citizens with an initial understanding of the administrative courts, and in the same instance, training lawyers in the legal relations of the newly emerging administrative process. Providing citizens with an understanding of the administrative courts was implemented in several ways, one of which was the broadcasting of a short television advertisement pertaining the administrative court.

As you know, at that time, television commercials were made exclusively for commercial purposes, and mostly featured professional actors. At that time, the Hanns-Seidel Foundation in Mongolia launched the first non-commercial series of commercials about the purpose of the administrative court and the issues it was responsible for, initially made of clay, then into animated drawings and followed by being broadcasted to the public on a regular basis. The topic of the campaign was mainly based on numerous cases and examples relating to the daily interactions between administrative bodies, officials, citizens, and businesses. During this campaign, we received many phone calls and personal inquiries from citizens

asking if an administrative court had been established, and whether they could file a lawsuit, or request advice.

In addition, in anticipation of the implementation of the Law on Administrative Procedure and the start of court proceedings, several educational television series were produced and made available to the public in order to provide the public with coherent understanding and to disseminate new knowledge. The participation of scholar B. Chimid was also of the utmost importance in carrying out this work. All this work, conducted in cooperation with relevant organizations and based on their own efforts, to understand and make people comprehend the significance of the administrative court, insofar as gradually achieving tangible results, and a basic understanding of the new court began to reach the public, as was evident during a series of training courses to improve the legal education of citizens in Ulaanbaatar and rural areas.

On December 26, 2002, just before lunchtime, as I was waiting at a traffic lights near the intersection by the National Legal Institute and the road northwest of the State Palace, Prof. B. Chimid called me on my cell phone. He briefly informed me that the Law on Administrative Procedure had been passed, laying the legal foundation for establishing a new type of court in our country. He mentioned that the President had been excluded from the law's jurisdiction, while everything else remained unchanged from the draft. This was the success and result of the work of many people. In the period leading up to the adoption of this law, international



symposiums were organized on several topics, including “Enhancing the Capacity of the Court”, “Judicial Power - a New Century”, “Administrative Courts”, and additional opinions were exchanged on the specifics of the administrative process involved.

Preparations for the establishment of the Administrative Court continued until mid-2004. The composition was multifaceted, and one of the most important aspects of our work was to provide lawyers with new knowledge and information, which was carried out in cooperation with the Ministry of Justice and Internal Affairs. At this stage, regular training of administrative officials was carried out, and simultaneously, the training of lawyers for the new court was carried out. At that time, the World Bank announced an international tender to train trainers for administrative judges, and for the Hanns Seidel Foundation, in partnership with the “Legal Education” The Academy was located and selected to train the trainers. Many judges, administrative officials, academics, and researchers from the Federal Republic of Germany and of our country, attended the training sessions. I do not recall exactly what MIAT, Mongolian airline’s operations were like at that time, but I remember clearly that new researchers arrived from Germany almost every night, and some of these researchers returned nightly, with the training of the trainers and the teachers was generally carried out under a very heavy workload. The international tender was supervised by Rodney Batstone, a lawyer from the United Kingdom, who obtained the CBE, MA, LLB (Canterbury), and Barrister-at-Law (Inner Temple) degrees, and the

German teachers who attended the course included Prof. Dr. Johann Wittmann, Dr. Philipp Stiel, Dr. Daniel-Erasmus Khan, Dr. Juergen Harbich, Dr. Peter Lehmann, Dr. Stefan Strassmair, and Dr. Wolfgang Durner. Among the people responsible for and coordinating all these activities at the Hanns-Seidel Foundation headquarters in Munich, it is worth mentioning Dr. Rainer Gepperth, Prof. Juergen Wilke and Dr. Willi Lange. In addition to training trainers, the work of disseminating new information to all lawyers continued uninterrupted until mid-2004. This involved law enforcement officers and civil servants in public administration who were initially responsible for promoting the law. At the end of 2003, an international symposium on administrative courts was held, marking the culmination of the extensive work carried out by the Hanns-Seidel Foundation in Mongolia, along with judges, lawyers, and administrative officials in our country, ultimately leading to the establishment of a new court.

On June 1, 2004, the Administrative Court was established, and initially the Administrative Court performed both the functions of an appeal and a review court. On June 24-25, a discussion on “Preliminary Resolution of Administrative Cases” was held at the State Palace, with the participation of judges of the Supreme Court, other lawyers, and researchers. During the aforementioned period, additionally to the continuous training of judges, our judges visited the Federal Republic of Germany to familiarize themselves with the characteristics of the courts of that country and to exchange information, as before.



In 2004, a monograph entitled “Administrative Court Reform in Mongolia, Cases of World Countries” was published in both Mongolian and German. Scholars from Mongolia, Germany, and the United States participated in the work as authors, sharing topics. Prof. B. Chimid wrote in his memoirs that the work was a “memorial monument for sharing fate with the experts of the HSS foundation.”<sup>1</sup>

Since 2008, a new training program has been conducted in collaboration with the Supreme Court. The first manual for administrative judges was published in 2009-2012. A study on the development of the Administrative Court was conducted in 2009-2010, and as a result of this study, the first independent Administrative Court of Appeal was established. The Hanns Seidel Foundation also collaborated with partner organizations in the development of the revised Administrative Procedure Act and the first draft of the General Administrative Law from 2013 to 2015. Subsequently, it also conducted a series of three studies in reference to the consequences of the implementation of the General Administrative Law.

Although the information presented to you cannot fully reflect the content of the creative cooperation established by the administrative courts in Mongolia, One hopes that it will leave a small impression over the previous years. All of this contributes to the development of a people-centred, law-abiding society in our country, and is an example of how trusting cooperation, mutual understanding between nations and colleagues, and active

efforts can lead to great success. All of this seems recent, but from today's perspective, it is a 26-year history, in fact, 20 years since the establishment of the Administrative Court. It is impossible to mention here all the people, both domestic and foreign, who participated in the laying of the cornerstone of this court, expressed their opinions, organized, taught, implemented, and shared their hearts, but I would like to express my gratitude to all of them.

I also wish all administrative judges and court staff a bright future, and that every decision made by the administrative court, be legally sound and beneficial to the public.

<sup>1</sup> Hanns Seidel Foundation in Mongolia, 1995-2005, “Khiimori” Publishing House, (UB.2005), 30.



## WELCOMING REMARKS

### **DR. JÜRGEN HARBICH**

*Project Specialist in Mongolia; Former Board Member,  
Bavarian School of Administration, Doctor of Law /Ph.D./*

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I have the utmost respect for the contribution to the administration of justice to this day. We all, as lawyers in both Mongolia and Germany, know that the administrative court is a crucial pillar in the formation of a constitutional democracy and the rule of law. A judicial independence is an essential guarantee of civil liberties, as even the executive branch of a constitutional democracy needs oversight. But this oversight often creates a conflict between the judiciary and the executive. However, this conflict is normal. Most importantly, both the judiciary and the executive should be patient about it. Sometimes administrative court decisions can have political consequences, such as overturning bans on demonstrations or an annulment of tax notices.

Although the decisions of the Administrative Court may affect political activities, in any case, the court decisions should not be made in the form of active discussion of political issues. The language of the judge must be the language of the law. We all know that this principle is not being followed in all countries. Courts trying to justify their political decisions on illegal grounds can be seen in Europe and other countries. But I think that this will not happen in our countries to this extent. I wish that Mongolian administrative judges will have the strength they need to fulfill their responsibility of making future decisions. I wish you all the best in your efforts to protect and strengthen the rule of law in Mongolia, and I hope that you will continue to contribute to this work in the future. I wish all our Mongolian friends all the best.





# KEYNOTE SPEECH



## **20 YEARS OF THE ADMINISTRATIVE COURT: DEVELOPMENT AND MATURITY OF THE ADMINISTRATIVE COURT – VISION FOR THE FUTURE**

**Munkhtuya Dashdorj<sup>1</sup>**

- I. Development of the Administrative Court: 2004-2014
- II. Development and Maturity of the Administrative Court: 2015-2024
- III. Administrative Court - Vision: 2024-2033

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<sup>1</sup> Presiding Justice, Chamber for Administrative Cases, Supreme Court of Mongolia



## 20 YEARS OF THE ADMINISTRATIVE COURT: DEVELOPMENT AND MATURITY OF THE ADMINISTRATIVE COURT – VISION FOR THE FUTURE

**MUNKHTUYA DASHDORJ,**

*Presiding Justice, Chamber for Administrative Cases,  
Supreme Court of Mongolia*

### Esteemed Guests,

The core ideology of the 1992 democratic and new Constitution of Mongolia emphasizes the principle of “rule of law in state operations” and the objective that “the state must create economic, social, legal, and other guarantees that ensure human rights and freedoms, combat the violations of these rights, and be accountable to its citizens for the restoration of violated rights.” This policy and goal were reflected in the Legal Reform Program of Mongolia, which was approved by the State Great Khural (Parliament of Mongolia) in 1998. At the same time, the theory and concepts of judicial oversight over executive power were studied, and scholars such as Honourable Teacher B. Chimid and Doctor of Law Ts. Sarantuya, with the support of the Hanns Seidel Foundation’s Representative Office in Mongolia, initiated the creation of a new system, laying the groundwork for the establishment of a specialized administrative court in Mongolia.

After the Government submitted the draft law on establishing a specialized administrative court, the State Great Khural (Parliament) discussed and approved it on December 26, 2002. Consequently, under

this law, *commenced June 4, 2004*, the administrative courts of first instance began operating in all 21 provinces and the capital city, marking the start of a new legal development stage and significantly contributing to the establishment and growth of a democratic state.

Thus, for the past 20 years, the specialized administrative court system has been functioning, ensuring judicial protection for citizens and legal entities whose rights and legitimate interests were violated due to unlawful decisions and actions of administrative bodies and official.

While preparing the keynote speech for today’s academic conference, I reviewed scholarly papers, articles, and research written 10 years ago. I would like to share with you how rapidly, successfully, and positively the administrative courts have developed and evolved into their current state.

The establishment of the administrative courts was a significant step in ensuring human rights and freedoms by restoring violated rights, implementing judicial oversight over executive power, and reinforcing the rule of law in state operations, thereby strengthening and



protecting the constitutional system.

The vision and objectives of the law to establish the administrative courts, which was initiated by the government and fully supported by the State Great Khural, have proven to be correct and well-founded, as evidenced by the development and evolution of the administrative courts, the impact on Mongolia's legal system and society, and the outcomes of the judicial process. When reviewing the development of the administrative courts over 10-year intervals, the following can be observed:

### **I. Development of the Administrative Court: 2004–2014**

1. In the first decade since the establishment of the administrative courts, special attention was given to correctly forming the administrative judicial system, understanding which decisions could be reviewed and on what criteria, and incorporating the experiences of other countries, particularly Germany's administrative courts. The Law on Administrative Procedures (LAP) was passed in 2002 and came into effect in 2004. It correctly defined key concepts such as "administrative body or official," "administrative act," "inaction of an administrative body or official," and "complaint" at a theoretical level, using universally accepted meanings, which played an essential role in successfully developing this new system.

a) There was much debate and uncertainty among scholars, researchers, and lawyers in the early stages about which decisions administrative courts should review and how to determine this clearly. Extensive discussions were held on

the relationship and authority between the executive power and the court.<sup>1</sup>

The Law on Administrative Procedures, passed by the State Great Khural in 2002 and effective from July 1, 2004, defined an "administrative body" as a public entity that makes decisions for public interest and implements executive power at the national and local levels, that are subject to public law, including certain non-governmental organizations performing government functions, administrative bodies of schools, hospitals, telecommunications, and energy suppliers organizations that provide public services and issue administrative decisions on the basis of laws and public legal agreements, as well as local self-governing organizations and religious institutions<sup>2</sup>, and specified organizations and officials whose administrative acts can be to review by the administrative courts. However, key issues included whether the decision issued by the specified administrative organizations and officials was an "administrative act," how to interpret the legal content of such terms as "regulating a particular situation within the scope of public law," "issuing a directive with immediate legal consequences," and "a one-time act of issuance," all of which became subjects of dispute between the parties involved.

<sup>1</sup> For example, in the 2005 Conclusion No. 02 of the Constitutional Court of Mongolia, it is stated, "... The term 'decision of the Government' includes both resolutions and decrees, and decisions of the Government are not subject to review by the Administrative Court ..., /however/ ...the Prime Minister, in addition to decrees, may also issue administrative acts orally or in writing, ...or take other non-decretive actions /acts or omissions/ that directly create legal consequences, as stipulated by law." Therefore, decisions made by the Prime Minister may be subject to review by the Administrative Court.

<sup>2</sup> Law on Administrative Procedures (2002), art. 3.1.





reviewed whether decisions by lower bodies were in accordance with the law, invalidating unlawful decisions without further consequences, the notion that a regular citizen or legal entity could challenge decisions made by “large” organizations such as the Government or the Bank of Mongolia in court, and that the court could even nullify those decisions, was unprecedented. Furthermore, the idea that courts could invalidate decisions made by collective governance bodies such as the Citizens' Representatives Khural, or mandate the issuance of a new act, raised many doubts, concerns, and misunderstandings, which have now become part of history.

b) Law on Administrative Procedures which took effect in 2004, included provisions for both the process of resolving complaints through administrative procedures and for the procedures of reviewing cases in court.

Six years after it came into force, significant amendments were made to the law in 2010 to correct initial gaps, inconsistencies, or improper regulations in the original legislation.

For example, the law was revised to address the fact that, while it had previously stipulated the time limit for filing a complaint with an administrative body to seek preliminary resolution, it had not specified the time limit for filing a claim in court if the decision was unsatisfactory.<sup>9</sup> Additionally, the process for resolving jurisdictional disputes between courts regarding the administrative court's authority was introduced. The rights and obligations of plaintiffs and defendants

<sup>9</sup> Addendum to the Law on Administrative Procedures (2010), art. 1.2.

in the judicial proceedings were clarified, and the role of third parties was further defined<sup>10</sup>.

The regulations concerning the representation and defense of individuals and legal entities in the case proceedings, as well as the requirements for filing claims and completing the necessary documentation, were also clarified. The grounds for refusing to accept claims were specified, and the provision that allowed for the transfer of claims to another court was abolished, among other revisions.

I did not aim to provide a detailed analysis of the changes made to the Law on Administrative Procedures in 2010, but rather to point out that these were progressive amendments made to address deficiencies and errors identified in court decisions and practices between 2004 and 2010. For instance, between 2004 and 2007, out of the 3,056 complaints and claims filed with the newly established Administrative Courts of First Instance, 1,154 or 38% were rejected and returned<sup>11</sup>. However, in 2014, out of the 2,437 complaints and claims filed, only 648 or 26.5% were rejected and returned<sup>12</sup>. This shows that the introduction of clear and understandable regulations regarding the submission and documentation of claims has resulted in citizens and legal entities gaining a better understanding of what issues they can bring to administrative courts, while the procedural regulations for reviewing cases have improved and become more effective.

<sup>10</sup> Addendum to the Law on Administrative Procedures (2010), art. 3. 7.

<sup>11</sup> Supreme Court of Mongolia, Administrative Case in Court Review: Resolved Case Review (2004-2014).

<sup>12</sup> Supreme Court of Mongolia, supra note 11.



The Law on Administrative Procedures had incorporated approximately 80 provisions from the Law on Civil Procedure to be applied as supplementary regulations. However, some of these referenced regulations were not suitable for the specific characteristics of administrative case proceedings. For instance, certain principles of civil proceedings, such as the "adversarial proceedings principle" and provisions concerning the suspension of proceedings, the collection and evaluation of evidence, were not fully compatible with the nature of administrative proceedings. Nonetheless, the administrative courts had applied these provisions through appropriate interpretation in line with general principles. The law, having served its purpose sufficiently over the course of more than 10 years, was replaced by a new law for administrative courts in 2016.

c) By Resolution No. 17 of November 25, 2004, the Supreme Court of Mongolia established the Administrative Chamber with the duty to "... oversee and guide the review and resolution of cases and disputes related to administrative proceedings." The Supreme Court thus began fulfilling the functions of both the appellate and supervisory instances for administrative cases. On December 31, 2010, the State Great Khural passed the law to establish the Administrative Appellate Court. With the establishment of this court, a complete independent system was formed, with specialized judges handling cases arising within the realm of public law, reviewing disputes in first-instance, appellate, and supervisory courts.

d) The development of the administrative court is inseparably linked to

the efforts and dedication of its specialized and capable judges and administrative staff, as well as to sound policies for human resource development.

When the administrative court system was first established, there were no pre-trained judges specifically for administrative proceedings. Judges who had previously handled civil and criminal cases were appointed to the newly formed administrative courts. The initial judges had to learn afresh the content and practical application of the principle of "judicial fact-finding," as well as methods for correctly applying new concepts such as "gathering evidence in court" and "suspending the enforcement of administrative acts" in administrative case procedures. Theoretical and practical training in these areas was crucial. The specialization and training of administrative judges were initially supported by the Germany's Hanns Seidel Foundation, through its representative office in Mongolia, which also founded the Legal Education Academy, in collaboration with the World Bank. From 2002 to 2014, the HSF consistently worked with the administrative court system to provide training, retraining, and specialization for judges. German scholars in administrative law and judges from the German administrative courts shared their knowledge and experience with Mongolian administrative judges on an annual basis, providing them with both theoretical and practical knowledge, and opportunities to exchange experiences.

2. During the first 10 years of the operation of the Administrative Court, many other changes occurred, positively impacting the development of a democratic



state governed by the rule of law.

a) Before the establishment of the Administrative Court, there was no clear understanding among the public and administrative officials on whether citizens and legal entities could file complaints and claims against administrative bodies in court, or whether it was possible to challenge and dispute the decisions of executive authorities and officials. /In rare cases, complaints against such decisions were filed in civil courts, where the cases were resolved under the "adversarial principle." The newly established administrative courts faced many obstacles.

Local self-governing and administrative bodies did not readily accept the operation of the administrative courts. They were uncertain about how to proceed when their decisions were "annulled." For example, they would not attend court hearings, would refuse to submit explanations, or would fail to comply with court decisions. In one case, the Presidium of a local Citizens' Representatives Council even passed a resolution declaring it impossible to comply with an administrative court's decision.

It cannot be denied that, in the newly established system, there were misunderstandings about the principles of legal regulation. For instance, administrative officials misunderstood that they had the "freedom to choose" within the scope of the law when making decisions, or that in certain cases there were no specific legal criteria for making decisions, or that some decisions were reviewed only from a procedural perspective. Such issues arose because these concepts were not clearly defined in the legal framework at the time.

b) In cases where public administrative authority was involved in regulating social relations, and where a decision affected the rights and legitimate interests of citizens and legal entities, they had the opportunity to approach the administrative court to seek the restoration of their violated rights. As a result, awareness and educational campaigns were conducted to inform the public about these rights, and training sessions were held for administrative officials.

As a result of these efforts, the administrative courts reviewed and resolved 145 cases in their first year of operation in 2004. In their second year, they resolved 431 cases. Starting from the fifth year, the number of cases handled at the first instance level increased significantly, and by 2014, the courts were reviewing around 900 to 1,100 cases per year.<sup>13</sup>

The administrative courts brought about significant changes to the development and formation of a lawful state:

- The operation of the courts provided a practical means for individuals and legal entities whose rights had been violated by illegal administrative actions to restore their rights through the judicial process. This helped protect citizens from the arbitrary actions of the administration. The "culture" of filing complaints and claims in court against illegal administrative actions took root, as citizens and legal entities increasingly approached the courts to challenge decisions that violated their rights or the law. This instilled a belief that state bodies were subject to the rule of law, and that if human rights or legitimate interests

<sup>13</sup> Supreme Court of Mongolia, supra note 11.



were violated, the courts would annul those decisions<sup>14</sup>;

- By clarifying in their rulings why a particular act was deemed “illegal” or in compliance with the law, administrative courts contributed to improving the content, form, and legal basis, rationale of future administrative decisions;

- A large number of new concepts, approaches and studies of the general and special parts of administrative law have emerged, leading to the development of administrative procedural law. This progress was reflected in legislation, one example being the adoption of the Law on General Administrative Law in 2015 and the Law on Administrative Procedure in 2016 by the State Great Khural.

## II. Development and Maturity of the Administrative Court: 2015–2024

1. Based on the practical experience of judicial proceedings in administrative courts and the real demands and conditions of the previous 10 years, defined the requirements for updating the General Administrative Law (GAL) in 2015, and the Law on Procedure for Administrative Case (LPAC) in 2016<sup>15</sup>, and upon the adoption of these laws were by the State Great Khural, both came into force on July 1, 2016.

The GAL redefined “administrative body” by eliminating the previously exhaustive “closed list” approach under the LAP and instead identifying administrative bodies based on their essential characteristics. This approach resolved many disputes, such as

“whether a body is an administrative body if it is not specifically named in the law”, or “whether certain decisions made by bodies named in the law are subject to review by administrative court”. This prevented the emergence of unclear situations where decisions by newly established, restructured, or dissolved administrative bodies or officials might escape the oversight of the administrative courts, thus avoiding arbitrary decisions that infringe on human rights, freedoms, and interests.<sup>16</sup>

Under the GAL, administrative bodies are defined by the criteria applied to their decisions rather than by the subject issuing the administrative act. The law specifically stipulates that disputes related to decisions and actions of the Government are not subject to administrative court review unless otherwise provided in the law. Article 5.1.1 of the GAL stipulates that all central and local executive bodies exercising state executive power fall under this definition. This allowed administrative courts to resume accepting complaints from individuals and legal entities regarding government resolutions and to begin adjudicating these cases.<sup>17</sup>

As previously mentioned, following the 2005 and 2006 rulings of the Constitutional Court and the invalidation of Article 4.1.1 of the LAP, which referenced the “Government,” there was no legal basis for the administrative courts to review complaints regarding government decisions between 2005 and 2015. During this period, such complaints were heard

<sup>14</sup> The Concept of the Draft Bill on General Administrative Law, 2015.

<sup>15</sup> 5 judges of the administrative court participated in the law bill drafting working committee appointed by the resolutions 32, 05/05, 09/07 of 2015 of the Standing Committee of the Parliament.

<sup>16</sup> The Concept of the Draft Bill on the Law on Administrative Procedures, 2016.

<sup>17</sup> “In 2016-2021, 50 cases were considered and decided at the hearing of the administrative review stage of the Supreme Court” (Electronic database of court decisions, <https://shuukh.mn>).



by the civil courts. Over these 10 years, a total of 34 cases were reviewed by the Civil Chamber of the Supreme Court, 10 of which resulted in full or partial satisfaction of the complaints.<sup>18</sup> No constitutional disputes or cases have arisen in the Constitutional Court during this period regarding whether judicial review of government decisions violated the Constitution.

On December 23, 2022, the Parliament added amendments to the LPAC, establishing a special procedure for the Administrative Appellate Court to hear disputes related to decisions made by the Government and the Bank of Mongolia as a court of first instance. This clarified and resolved the issue of whether such disputes fall within the scope of administrative judicial review.

Additionally, the revised law specifies state decisions and activities that are exempt from the scope of the GAL, including naming the bodies responsible for making those decisions. In all other cases, the law applies to decisions issued by public legal entities that express the public interest, specifically decisions issued orally or in writing that are directed outward in the public legal sphere, have direct legal consequences, and regulate specific instances. These include administrative contracts and normative acts. By doing so, the law unified the previously fragmented regulations governing the activities of various administrative bodies and established uniform principles and standards. This had a significant impact on administrative judicial review, the reasoning of court decisions, and the implementation

of judicial oversight.

For instance, principles such as ensuring that administrative decisions are feasible in practice, are well-founded, "protect the legitimate expectations" of affected parties, properly apply discretionary powers, and notify and hear individuals whose rights are being affected before decisions are made are now consistently applied in court practice and protocols when reviewing whether an administrative act is lawful.

2. With the Parliament's adoption of the revised Law on Administrative Procedure, the

provisions of the Civil Procedure Code will no longer apply to administrative cases, allowing for the independent development of procedural law.

Under the 2002 Law on Administrative Procedure, there was relative consistency in the application of legal standards regarding subjective rights disputes, such as the right of individuals and legal entities to file complaints, the requirements for claims, and the criteria for justifying them. The 2015 law introduced a legal framework for objective rights disputes, allowing for claims to be filed on behalf of public interests. Non-governmental organizations (NGOs) now have the legal right to file lawsuits to protect and restore public interests when violated, marking a new chapter in Mongolia's administrative law and advancing the development of administrative procedural law.

Furthermore, the law formally introduced the process of preliminary court hearings for the first time, clarified the procedures for filing appeals against first-instance court rulings and orders (other

<sup>18</sup> Electronic database of court decisions, <https://shuukh.mn/>.



than on the main case), and shortened the duration of legal proceedings. This helped ensure the right of parties to participate in court sessions in person and reduced the frequent postponement of hearings, thus minimizing the inconvenience caused to case participants.

3. The Judicial General Council of the Supreme Court conducted various studies o

court decisions and practices, in collaboration with the Judicial Training, Research, and Information Academy, focusing on the need to ensure consistency in the application of laws in administrative proceedings. Proposals were submitted to the Supreme Court's general judges' meeting, and four official explanations were issued in 2022-2024 through resolutions on the correct application of the Law on Administrative Procedure. These official clarifications have made it easier for participants in administrative judicial proceedings to interpret and apply the law uniformly.

4. The openness and transparency of court operations, as well as the clarity and

comprehensibility of court decisions, are of special importance in increasing public trust in the judiciary. To enhance the clarity and transparency of court decisions, the Supreme Court has initiated efforts to explain and disseminate court decisions in an easily understandable manner to the public. This initiative has been implemented across all levels of courts, and the practice of regularly summarizing and explaining court decisions in a timely and accessible way to the public has been well established in the administrative courts of both the first-instance and appellate levels.

The number of individuals and legal entities turning to the administrative courts has been steadily increasing. In 2015, 2,775 claims were filed with the first-instance courts, and this number rose to 3,277 in 2023. The quality and justification of decisions made by the first-instance and appellate courts have been improving year by year.

Under the 2021 Law on the Judiciary of Mongolia, the procedure for appealing cases to the supervisory level has been revised. Over the past three years: appeals were lodged against 32.4% of the appellate court's rulings in 2021, 24% in 2022, and 23.6% in 2023. Of the appeals submitted for supervisory review, 29.4% were brought before the court in 2021, 19.4% in 2022, and 25.2% in 2023.

Thus, the administrative courts are now entering their second decade of development, building upon the experiences, achievements, and operational foundations of the previous decade.

### III. Administrative Court - Vision: 2024-2033

What do we need to do in the next 10 years to improve the effectiveness of case adjudication?

In April 2024, the State Great Khural approved a policy document on the development of the judiciary. This document outlines many initiatives aimed at ensuring civil rights guarantees, increasing transparency and openness in court operations, ensuring judicial independence, developing a responsible judiciary, improving the quality and accessibility of judicial services, and developing the infrastructure of judicial services.



The long-term development policy of Mongolia, "Vision 2050," approved by the State Great Khural in 2020, designates the period of 2021-2030 as the first phase: "Strengthening the national system for ensuring human rights, improving the legal environment, and developing multilateral partnerships aimed at ensuring human rights."

We believe that the direction of our near future goals is clearly visible from the content of this international academic conference and the presentations.

a) - First and foremost, special attention must be paid to the systematic development of administrative law. Without progress in substantive law, it is impossible to discuss the development of procedural law. The systematic classification of the special branch of administrative law needs to be thoroughly examined based on theoretical grounds and scientific methodology.

There is an urgent need for proper systematization and coherent regulation of laws governing legal relations between civil and administrative law, such as land ownership, the use of natural resources, concession agreements, other administrative contracts, and the national registration of ownership and other rights.

Moreover, it is necessary to revisit the theoretical and foundational principles of administrative offense law, aligning it with legal theory. If not, re-legislating the content, relationships, and methods of regulation under the Law on Offenses will be necessary. Currently, civil-like offenses and criminal-like offenses are adjudicated under the same procedural framework, which creates complications for the

administrative courts in handling such cases, and this issue needs to be addressed.

The participation of judges is crucial for the proper systematization of law, and it would be appropriate for the judiciary and the legislative power to establish an official legal relationship to collaborate on this matter.

b) - It would be appropriate to conduct a large-scale study on the application and implementation of the Law on Administrative Procedure, which has been in effect since 2016, and plan for its revision in conjunction with the systematic development of administrative law. In the future, specializing procedural law based on the types of disputes will significantly contribute to increasing the effectiveness and accessibility of case adjudication.

For instance, the Administrative General Law has now legislated that administrative courts adjudicate objective rights disputes, and administrative courts have been handling such cases for seven years. Objective rights disputes differ from subjective rights disputes in terms of content, purpose, the requirements for claims, the collection and evaluation of evidence, and the impact of court decisions. The adjudication process for objective rights disputes should be distinct and aligned with the nature of these disputes, as this is crucial for ensuring the effective judicial protection of objective rights.

Additionally, there is a goal to further develop the types of decisions issued by the courts, making them more relevant to the circumstances, thereby advancing one step toward providing effective legal protection.

c) - It has become common for



lawmakers to introduce sudden changes or add/remove provisions to procedural laws without sufficient research or consideration when passing other laws. Case adjudication is an intricate process with interconnected components, and any changes to procedural laws should require consultation with the courts. This is a common practice in other countries.

The Law on Administrative Procedure of 2015 initially established the jurisdiction for certain cases, whereby appellate courts adjudicate specific cases at the first instance level, and higher courts review these cases on appeal. However, this regulation's purpose and rationale have partially been lost, and there is an increasing tendency to arbitrarily "specialize" jurisdiction by having appellate courts handle more types of cases at the first instance level without clear justification. This issue warrants attention.

d) - By introducing digital processes into the courts, administrative courts will lead efforts to streamline case adjudication, save time, reduce workloads, and make judicial services less burdensome for case participants.

The Supreme Court's Administrative Chamber has proposed live-streaming administrative court hearings to the public. This proposal has been supported by the plenary session of the judges, and necessary preparations are underway. Administrative courts play a particularly important role in ensuring transparency and openness in court operations by resolving disputes in the public law domain.

e) - The mission of the judiciary is to protect human rights and freedoms, restore violated rights, and strengthen

justice in society. This cannot be separated from an independent judiciary and skilled, well-prepared judges.

Special attention will be paid to the professional development of administrative judges through a phased, regular training program that is appropriately designed in both content and format, in collaboration with the Judicial Training, Research, and Information Academy. To improve the theoretical knowledge of administrative judges, enhance their expertise in scientific research methodology, and encourage academic work, the Administrative Chamber is already working with the Judicial Training, Research, and Information Academy on specific initiatives.

These objectives are fully aligned with state policies and the judicial development policy and planning. Administrative courts will continue to be leaders in the Mongolian judiciary, contributing to upholding the rule of law in government operations, strengthening justice in society, and reinforcing and safeguarding constitutional order in Mongolia. We are confident that our contributions will only grow in the future.

Thank you for your attention.



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**THEORETICAL  
PERSPECTIVE:  
CURRENT DOMESTIC  
TREND, POSITIONS,  
COMPARATIVE  
PRACTICE AND  
THEORIES ABOUT  
ADMINISTRATIVE  
LAW CODIFICATION**



## THEORETICAL ISSUES IN THE SYSTEMATIZATION OF A SPECIAL PART OF ADMINISTRATIVE LEGISLATION

**Odgerel Purevdolgor<sup>1</sup>**

- I. Introduction
- II. The issue to be solved
  - 1. Elimination of Conflicts, Duplications, and Gaps Between Laws
  - 2. Incorporating Administrative Normative Acts or Regulations into Relevant Laws
  - 3. Making Our Laws Complete Again
- III. Ways for solutions
- IV. Theoretical Issues in the Systematization of Laws

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<sup>1</sup> President, Mongolian Bar Association, (Ph.D.).



## THEORETICAL ISSUES IN THE SYSTEMATIZATION OF A SPECIAL PART OF ADMINISTRATIVE LEGISLATION

**ODGEREL PUREVDOLGOR,**  
*President, Mongolian Bar Association, (Ph.D.).*

### I. Introduction

Firstly, I would like to introduce my research on the systematization of a special part of administrative law. Over the past two decades, I have focused on studying the Mongolian administrative legal system and its theoretical aspects, publishing textbooks such as General Part of Administrative Law (2003), General Part of Tax Law (2016), and Tax Law (2021). It took 13 years to complete the research on the general part of administrative law, which culminated in the successful localization of the General Administrative Law in 2015. Meanwhile, I spent 6 years studying tax law, the most challenging part of the administrative law's special part. In writing General Part of Tax Law, I analyzed the relationship between General Administrative Law and General Tax Law, using the structure of Germany's General Tax Code (Abgabenordnung) as a reference. For Tax Law, I examined the interrelationships among specialized laws such as General Tax Law, Personal Income Tax Law, and Corporate Income Tax Law, drawing upon German tax laws and relevant textbooks. Representing an independent branch of the legal system *Tax Law* illustrates the systematization of 15 laws and over 30 regulations, which are the

sources of Mongolian tax law framework. From the experience of writing a textbook on tax law, the following points should be considered in the legal system of the special part of management law. From the experience of writing a textbook on tax law, the following points should be considered in the legal system of the special part of management law. From the experience of writing a textbook on tax law, the following points should be considered in the legal system of the special part of management law. Based on the experience of writing a textbook on tax law, the following points should be considered when developing the legal framework for the special part of administrative law:

- Systematization is a time-consuming task.
- It requires comprehensive knowledge of general administrative law.
- A deep understanding of the relevant field (e.g., accounting) is essential.
- Each chapter of the General Administrative Law must be detailed and clarified and involves:
  - Analyzing each element of the decision-making process,



- Understanding each type and stage of decision-making.
- Arriving at a concept from a concept.
- Ensuring a step-by-step logical sequence.
- Revealing the coordination between general and specialized laws.

Reflecting on my work, I have developed a vision for the structure of the special part of administrative law and the systematization of sectoral laws. My ultimate goal is to contribute to creating a Mongolian legal system that is compact, tailored to Mongolia's special context, effectively regulated, and guarantees justice. In this 20-minute presentation, I will briefly outline my views on which pressing issues can be solved by systematizing the laws of a special part of administrative law, how to address those issues, and the theoretical basis behind those solutions.

## II. The issue to be solved

As a researcher, it is crucial to understand and convey to others the significance of systematizing laws and the specific problems it aims to resolve. Currently, Mongolia has 437 laws and 2,357 regulations in force. This new legal framework was established within the last 30 years. A number of foreign and domestic researchers, along with working groups formed by orders from the Ministry of Justice and Home Affairs of Mongolia (MJHAM), have studied, as per specific research method, Mongolia's legal reform process, respectively in 1995 - 2003<sup>1</sup>,

2003 - 2008<sup>2</sup>, 2008 – 2016<sup>3</sup> based on the request by the MJHAM and offered specific recommendations. Since 2003, these recommendations consistently emphasized the need for systematization of the laws in Mongolia's special part of administrative. Three following 3 key problems we face today can be addressed by systematizing laws.

### 1. Elimination of Conflicts, Duplications, and Gaps Between Laws

In terms of the structure of the national legal system, in 2003 Germany's Professor Philip Kunig recommended systematizing the science of administrative law and legalizing the decision-making procedures for each branch<sup>4</sup>, while Professor B. Chimid wrote in 2008 "*There is a troubling trend where laws are crafted through lobbying the Parliament members as they develop and submit drafts, which seem to be driven by the narrow interest such as elevating their privileges, reducing their obligations and improving their benefits. This seems to be due to the fact that **creating frameworks scientific (systematization) of the law is neglected, rather a series of laws are being produced incessantly to suit the immediate interests of different ministries and politicians.***"<sup>5</sup> This conclusion

<sup>2</sup> Ministry of Justice and Internal Affairs, *Monitoring and evaluation of legal reform programme of Mongolia, Report*, 2008.

<sup>3</sup> Ministry of Justice and Internal Affairs, *Supporting the development of legal reform policy documents, Research Report*, 2016.

<sup>4</sup> Professor Philip Kunig, "There is a Need to Further Systematize the Science of Administrative Law in Mongolia. Particularly, it is necessary to distinguish between general administrative law and special administrative law...Specifically, it is appropriate to establish a procedure for passing laws by parliament in each sphere of life and economy"; *Ministry of Justice and Internal Affairs, supra* note 2.

<sup>5</sup> Chimid.B., Amarsanaa.J., *State and Party, Critical Issues of Legal Reform*, 2008, 42.

<sup>1</sup> Ministry of Justice and Internal Affairs, *Legal Reform of Mongolia: 8 Years (1995–2003)*. 2003.



addresses the main issue that needs to be solved in the Mongolian administrative law today. Also, Professor B. Chimid, back in 2008, advised "For this reason, we suggest the government to review all state laws at the scientific framework level and work towards quality improvements and advancements."<sup>6</sup> The 2016 working group highlighted the importance of the adoption of the General Administrative Law and the Law on Legislation in creating a unified system.<sup>7</sup>

The most recent study "Research on the analysis of elimination of redundancies, violations, and abuses of environmental laws, and drafting of a bill for amendments to the sectoral laws", was commissioned by the Ministry of Environment and Tourism of Mongolia, in 2023, researching 33 laws, 234 regulations, and methods. It is identified<sup>8</sup>:

- 96 duplications
- 164 conflicts
- 335 gaps/
- 65 of the 234 normative acts had not been issued

The researchers have concluded with the following recommendations: This underscores the necessity of using **legal systematization techniques** to eliminate violations. **Legislation of the sector should**

**be considered comprehensively.** Enact the Environmental Protection Law of 1995 as amended. It is necessary to immediately submit the draft environmental set of laws to the Parliament for discussion during the spring plenary session of 2023.

Additionally, as per the concept of the revision of the Law on Minerals, it was approved in 2006 with 11 chapters and 66 articles and has undergone about 300 amendments over 17 years since its implementation. This illustrates how excessive amendments can erode the law's original intent, causing regulatory failures and deterring investment. An analysis (Working Group) of 10 laws that are being effective in the mining and mineral resources sector reveals:

- 267 duplications
- 150 conflicts
- 150 gaps

These findings demonstrate that Mongolia has yet to establish a "unified national legal system." Systematizing sectoral laws is essential to eliminating contradictions, redundancies, and gaps between laws as suggested by foreign and local researchers. So far, we have not been able to properly systematize any branch of law. That is why inconsistencies, contradictions and overlaps between laws are becoming more widespread, undermining legal stability, stalling foreign and domestic investments and adversely affecting the country's development.

## 2. Incorporating Administrative Normative Acts or Regulations into Relevant Laws

This task involves correcting mistakes stemming from unique Mongolian

<sup>6</sup> Chimid.B., Amarsanaa.J., *supra* note 6. 41.

<sup>7</sup> "The formation of a unified legal system and the newly approved General Administrative Law and Law on Legislation is important for the establishment of unified standards of legal norms and the improvement of a unified legal system." Oilt Research Center, *Supporting the Development of Legal Reform Policy Documents: Research Report*, 2016, 19.

<sup>8</sup> Ministry of Environment and Tourism, "Research on the analysis of elimination of duplications, conflicts, and gaps of environmental laws, and drafting of a bill for amendments to the sectoral laws", 2023, 1098.



characteristics. It means changing the existing law in terms of its content and structure, in other words, fundamentally reforming existing laws by changing the ideology, methods, and attitudes of lawmakers. First, let's review some specific conclusions and recommendations to remind ourselves of what the researchers have stated and cautioned regarding legal reforms. In 2003, Professor Philip Kunig from Germany have long emphasized the need to regulate the decision-making process of administrative organizations by law<sup>9</sup>, while in an 2008 report, the working group underlined that the law was devalued as procedures for implementing the law is being omitted<sup>10</sup>. In 2016, the working group urged to pay attention on the lack of mechanism required for the implementation of the law<sup>11</sup>. Citing recent studies, in 2023, the articles 10.1.1-38 of the bill on Law on Minerals have legislated 38 procedures necessary for the implementation of the law, transferring the authority to approve these procedures.

Based on a series of studies conducted over the past two decades since 2003, it has been criticized that the decision-making process is inadequately addressed in the law, and recommended to incorporate

and regulate the decision-making process within the legal framework." However, we failed to implement this guidance, on the contrary we have been regulating the decision-making process, which should be a part of the law, through separate procedures. According to the study on the Administrative Norms Act, 2357 procedures have been approved to implement 315 laws, with 850 still pending. On average, 7 regulations are needed to implement one law. These regulations, approved at various authority and skills levels, by ministers, agency heads, governors, and People's Representatives' Meetings, lack coherence and consistency. Considering that the red line has been crossed due to problems arising from this, the government at the cabinet meeting on November 29, 2023<sup>12</sup> gave instructions to reduce the number of regulations by two times and established a working group<sup>13</sup>. Of course, if many of these regulations are repealed, the delegated laws will become unenforceable. Therefore, it can be considered that the Government's decision essentially has a notion of creating a "new law" by calling for the incorporation of existing regulations into law. Undoubtedly, today's reality demands the reform of this law.

I would like to give you an example that was decided by the court.<sup>14</sup> "Procedures for the selection of projects for long-term concessional loans from the Small and Medium Enterprise Development Fund" was newly approved by the Minister of

<sup>9</sup> Professor, Dr. Philip Kunig, "A clearer regulation of decision-making authority is missing.", Ministry of Justice and Internal Affairs, *supra* note 2. 23.

<sup>10</sup> "It has become common practice to overgeneralize legal regulations, omitting the procedures for implementation from the law itself, and instead allowing the government, ministries, and agencies to issue detailed regulations. This approach undermines the integrity of the law, enabling arbitrary changes to its principles and meaning through legal acts, thereby promoting a culture of adhering to the orders, decisions, and procedures of the prime minister over the law.", Ministry of Justice and Internal Affairs, *supra* note 2. 148.

<sup>11</sup> Ministry of Justice and Internal Affairs, *supra* note 4. 32.

<sup>12</sup> Government of Mongolia, "Minutes No. 48 of the Cabinet Meeting." (November 29, 2023), <https://cabinet.gov.mn/government-meeting>.

<sup>13</sup> Prime Minister of Mongolia, *Prime Minister's Order No. 191*. May 12, 2023.

<sup>14</sup> *Decisions of the Court of Appeals in Administrative Cases*, No. 221\ШШШ2019\0008, June 10, 2019.



Agriculture and Rural Development, by order A-76 dated June 14, 2017. When the Minister amended the Procedure by the order A-01 "Revoking the procedural articles" dated January 03, 2018, it affected 21 citizens, who were eligible and signed contracts in 2017, as they could not get 7,927,200,000 MNT for the financing of their enterprise projects. Instead, it funded projects of newly selected 125 citizens and enterprises. When those affected 21 citizens and enterprises filed a lawsuit in court after being denied funding, the Minister revoked the changes in the regulations and issued the order A-119 "Renewing the Regulations" dated April 19, 2019. This is the infamous case of misuse of the SME Development Fund. As the minister has the right to approve the procedures, amending and revoking those are at the Minister's disposal, illustrating the risks of unregulated procedures. However, behind the scene, citizens and enterprises are being violated, corruption is rampant, and the minister is not taking any responsibility. Such risks prevail behind every unregulated procedure.

Judging from this, it is clear that the root cause of "corruption" and "violation of human rights" dragging the Mongolian society into the mud is "the law without decision-making process". In other words: Corruption occurs only in the process of exercising (decision-making) an official's rights granted by law. If we want to fight corruption, we must eliminate the conditions that cause it. Once a bribe has been taken, it is not optimal to make them fear by adding punishment against bribing. Human rights are violated only in the course of law enforcement activities

by authorities. To combat corruption and protect human rights, it is essential to eliminate the conditions that give rise to these issues by clearly legislating decision-making processes and ensuring transparency in the activities of officials.

If we try to simply comprehend the government's decisions and the recommendations of researchers, it merely means incorporating the existing regulations into the current law. Yes, this is the correct approach and the work of qualified researchers. But why do we continue to draft laws without procedures or decision-making processes? As Professor B. Chimid wrote, 'A law without procedural rules becomes an empty slogan, which is then distorted by replacing the gaps with resolutions and instructions-this was a weakness of the law during the socialist era.'<sup>15</sup> Some researchers oppose the legalization of decision-making processes<sup>16</sup> and actively promote this stance, thereby hindering social development. We have spent 32 years attempting to regulate the relationship between the rule of law and the market with laws based on a socialist legal model. There is now an urgent need to develop a 'correct law' that meets the demands of today's market society and the rule of law.

### 3. Making Our Laws Complete Again

Another essential task towards legal reform is to make the mutilated laws complete again. This is a pressing issue that must be addressed. In Mongolia, 50% of

<sup>15</sup> Chimid.B., Amarsanaa.J., *supra* note 6. 43.

<sup>16</sup> Lundendorj N., "It seems that it is time to recognize that the increase in procedural norms in laws can have the negative effect of tilting the nature of the state regime towards a more police-like state.", Ministry of Justice and Internal Affairs, *supra* note 2. 463.



the 437 laws currently in force have been mutilated. Over 220 laws have had their warning and penalty provisions mechanically cut out and incorporated into the Law on Violations. Additionally, the licensing provisions of more than 100 laws have been removed and incorporated into the Law on Licensing. This fragmentation has made these laws nearly incomprehensible, even to professionals, leading to a loss of coherence between the purpose of the laws and their provisions, as well as undermining their unified application.

Before the Law on Violations was enacted, each of the 220 sectoral laws had penalty provisions that served as **"warnings"**, cautioning citizens on what to be mindful of. However, after these provisions were consolidated into the Law on Violations, administrative fines became **"punishments"** intended for enforcement rather than guidance. Over time, they have morphed into a form of **"tax"** collected to meet budgetary targets. Fragmenting various laws and combining them in this way is fundamentally wrong; laws are not a game. Administrative law comprises hundreds of laws and thousands of regulations, which is why codification is not typically used in this field. The general part of administrative law is a standalone law, and legal systems for specific sectors, such as tax law (15 laws) and environmental law (45 laws), are developed as independent legal frameworks that reflect the peculiarities of each sector.

For example, a citizen engaged in construction should be able to read the relevant laws, rules, and regulations to understand what can be built, where it can

be built, how to build it, what is prohibited, who to obtain permits from, and what to be cautious of (when the penalties are applied). In other words, they should not need to refer to the Law on Violations or the Law on Licensing. However, since the provisions regarding penalties and permits have been removed from the construction laws and combined into separate legislation, citizens can no longer obtain comprehensive information from construction-related laws, thus leading to confusion. Laws are now written for civil servants rather than for citizens.

Alarmingly, the entire national legal system has been mutilated. If we do not restore the integrity of these laws and make it whole and complete, it would be impossible to enable proper systematization and further development for many laws in the administrative legal sector.

### III. Ways for solutions

Let me try to propose solutions for the question: How can we address the three problems outlined above?

1. First, we need to start with the third issue-making the laws complete. We must respect science and follow global practices by treating the concept of "law" in its entirety. Fragmenting intact laws into separate pieces can be likened to dismantling a car, removing its wheels and engine, and leaving the parts scattered. In order for citizens to use the car (the law), it must be reassembled. Furthermore, while the **special part of administrative law** develops independently to reflect the peculiarities of each sector, the practice of fragmenting laws and consolidating them elsewhere runs counter to legal science.

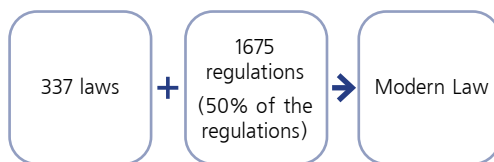


As a researcher, I have written numerous articles and held discussions about this issue, such as on April 20, 2017, providing information about the Law on Violations<sup>17</sup>; on April 5, 2017, regarding the rationale for withdrawing the draft Law on Violations<sup>18</sup>; and on March 27, 2022, discussing the collapse of the national legal system due to the Law on Violations.<sup>19</sup> Despite these efforts, no progress has been made. To prevent further mutilation of laws in the future, legal professionals must unite and raise their voices.

Without complete laws, it is impossible to talk about a sound legal system or the right systematization of the law. Therefore, the provisions on penalties and licenses that were separated from their original laws must be returned to the respective laws so that we can have **"complete laws."** This is essential for proper legal systematization.

2. Creating "proper laws" that are compatible with the rule of law and the market-based society involves adding administrative normative acts or procedural regulations to existing laws.

*Diagram 1. Laws, Regulations to Modern Law.*



<sup>17</sup> National Human Rights Commission of Mongolia, "Provided information regarding the Law on Offenses", 2017, <https://nhrcm.gov.mn/medee/zorchlian-tuhai-huuliar-medeeel-hiilee/>, accessed Apr 20, 2017.

<sup>18</sup> "Draft of the Law on Offenses: Criminal Legislation or Administrative Legislation?", <http://law.num.edu.mn/uc/172/177/17>, accessed Apr 05, 2017.

<sup>19</sup> "Law on Offenses and the Collapse of the National Legal System" 2022, <https://www.unuudur.mn/a/232561>, accessed Mar 21, 2022.

A regulation is an act of administrative legal norms that regulates the exercise of special rights granted by law. In other words, it regulates the decision-making process. First of all, the legal concept of **" decision consideration "** should be clarified. Under a socialist regime, decision-making procedures were not given much importance, whereas a rule-of-law state, decision-making procedures **are considered the "key" part of the law and a vital institution of democracy.**

Legal professionals must break away from socialist legal traditions, ideologies, and attitudes, as they are incompatible with the rule of law and market-based societies. Every decision-making process involves comprehensive regulations including the rights and duties of participants, their representation, the initiation, continuation, and conclusion of the process, the making of decisions, the correction of mistakes, the lodging of complaints, and oversight. It is important to recognize that human rights and interests may be violated, and disputes may arise at any stage of the decision-making process. A single issue may require several decision-making procedures to fully resolve. That is why a single law is often followed by many regulations. During the decision-making process, civil servants can infringe on others' rights, violate the law, engage in bureaucratic behavior, succumb to corruption, or pursue private interests. Therefore, the rule of law requires that each risky decision-making process be clearly regulated by law in order to prevent these unlawful actions.

These fundamental regulations, containing multiple elements noted above,



are codified in the "**General Administrative Law**", and is referred to as the general part of administrative law. It establishes the minimum standards for state interaction with citizens (decision-making).

It is through the vessel of the general administrative law (administrative acts and its decision-making processes), the principles of the Constitution, such as the rule of law, equality, and human rights, are implemented and enforced at the citizen level. In other words, depending on the regulation of decision-making procedures, the rule of law and democracy come to life for individual citizens. Thus, when incorporating regulations into laws, it is essential to apply modern administrative law theory. This is what I mean by "creating proper laws." We already have "socialist-style laws," as well as regulations that have arisen from the practical need to implement these laws, and we also have the general part of administrative law in the form of the General Administrative Law. Now, the only thing we need to do is incorporate the regulations into the laws based on the framework of the general part of the administrative law or the General Administrative law.

The consolidation of many regulations into the law will be done based on the structure model of the General Administrative Law.

3. After creating proper laws, the systematization of laws, especially within specific sectors, becomes a critical issue. When systematizing laws, it is essential to carefully examine the relationship between the **general part** and the **special part** of the law. This includes scientifically

analyzing and clearly demarcating legal terms, their categories and classifications, foundational principles, forms of activity, and legal protections within each sector.

Depending on how many laws govern a particular sector and field, the inter-legal systematization of sectoral laws leads to the creation of an independent body/field/branch of law for that sector. For example, the environmental sector is regulated by 31 laws and 102 regulations, while the tax sector is regulated by 15 laws and over 30 regulations. The systematization of large sectoral laws involves building on the general part of administrative law and, within each sector creating yet again a general part or **general sectoral law**. It can be exemplified by the Law on Environmental Protection or the General Law on Taxation. Once a general sectoral law is established, it is followed by more specialized laws that retain the characteristics of the sector (such as the Law on Forestry, Law on Water), which are systematized in a way to distinguish.

In the systematization of branch laws, rather than the norms that create material rights and obligations, the common aspect of the regulation of the procedure for their implementation should be put forth into the general basis law, eliminating the duplication and gaps. Meanwhile, as the distinguishing specific regulations remain clear, it creates an opportunity to eliminate conflicts between specialized laws.

Systematizing laws literally means making them more scientific. In that sense, legal systematization is the work of legal researchers in the field, who comprehensively examine an entire body



of sectoral law, from legal terminology to the resolution of complaints. The laws of critical sectors that are most in need of systematization include Tax law, Environmental law, Land law, Public Service law, and Mining law.

The General Administrative Law model will be used to create the general law of the field, such as the General Tax Law and the Environmental Protection Law, and the specialized laws will be linked within the broader framework.

#### **IV. Theoretical Issues in the Systematization of Laws**

As previously mentioned, when consolidating multiple regulations into a unified law or creating a general law for a specific legal sector and linking it with specialized laws within that sector, the model structure of the "General Administrative Law" will serve as the foundation. In other words, when systematizing over 300 laws and 2,357 regulations that serve as sources for administrative law, the General Administrative Law plays a crucial role.

It has already been said that the general law of the field of law will be based on the model structure of the "General Administrative Law" in order to create a general law of the field of law combining many procedures and to connect the specialized laws of the field with it. In other words, the general administrative law will play the main role in the systematization of more than 300 laws and 2357 regulations, which are sources of administrative law.

From a researcher's perspective, I deem that the General Administrative Law fulfills two primary functions: 1) in terms of structure, it serves as a foundational model

necessary for the creation of a special part of administrative law and 2) it contains methods and mechanisms for the unified application of hundreds of administrative laws and regulatory acts of administrative norms. The role and importance of the General Administrative Law are closely tied to its first function. Mongolia's case clearly shows that merely adopting the General Administrative Law does not automatically resolve all issues. First and foremost, to ensure the effective functioning of the mechanism for applying laws, i.e., the institution of administrative acts, and to yield social benefits, it is essential to establish an administrative legal system based on the General Administrative Law model.

As a model law for hundreds of other laws, the General Administrative Law sets the minimum standards for relations between administrative bodies and citizens. In this sense, the General Administrative Law does not aim to regulate specific social relations directly but rather provides a foundational model for other laws, which is why it cannot contain more detailed and specific regulations. On the other hand, sectoral laws, which include detailed regulations reflecting the specific characteristics of their respective sectors, do not necessarily have to align strictly with the General Administrative Law. Therefore, if the sectoral relationship is not specifically regulated by a sectoral law, the General Administrative Law will be applied, meaning the source hierarchy will be applied starting from the lower level. This is considered an advantage of having a standalone General Administrative Law within administrative law.



The law application methodology within the General Administrative Law, particularly the "institution of administrative acts," is the primary tool for implementing the fundamental principles of the Constitution and the protection of fundamental human rights at the individual level. Here, the interconnected subjects of administrative law's general section-such as the objectives of decision-making processes and the consequences of errors in these processes-are discussed. In other words, depending on how the consequences of errors are regulated, the decision-making process may fail to achieve its objectives. To avoid this, it is necessary to provide detailed regulation within sectoral laws that account for the specific characteristics of the sector and the type of decision-making process. Attention should be paid to the following aspects:

- Improving the transparency and openness of the decision-making process
- Enhancing the participation and cooperation of stakeholders in the decision-making process
- Refining the process of hearings
- Ensuring adequate provisions for correcting errors in the decision-making process
- Clearly identifying errors that must be avoided

In conclusion, the General Administrative Law plays a significant role in the systematization of specialized administrative laws. On the other hand, the better the specialized administrative laws and sectoral legal systems are systematized and the more accurately a proper legal

system is established, the greater the social role and importance of the General Administrative Law will eventually become.



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## **CODIFICATION OF ADMINISTRATIVE LAW: EXPERIENCES IN MONGOLIA AND BEYOND**

**Rainer Grote<sup>1</sup>**

- I. Introduction: The Concept of Codification
- II. Codification of Administrative Law in Mongolia
- III. The Mongolian Experience in a Comparative Perspective
- IV. Recent developments

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<sup>1</sup> Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Ph.D., LL.M.



## CODIFICATION OF ADMINISTRATIVE LAW: EXPERIENCES IN MONGOLIA AND BEYOND

**RAINER GROTE,**

*Senior Research Fellow, Max Planck Institute for Comparative Public Law and International Law, Ph.D., LL.M.*

### I. Introduction: The Concept of Codification

If we talk about the codification of administrative law in various countries, it is important to clarify first what we are referring to when we use the term codification. The way in which the concept of codification is used today has been shaped decisively by the great national codification projects which were first undertaken in a number of European countries, and more specifically in civil law countries like France, Germany, Italy or Spain, since the early 19<sup>th</sup> century mainly in the areas of civil and criminal law. The concept of codification that was implemented in these countries was closely linked to the ideas of the Enlightenment, i.e. the desire to create a legal system that was based on reason, not on tradition and prejudice. Codification as understood by the legal drafters of the 19<sup>th</sup> century was thus characterized by its reformist outlook. It was a deliberate effort to reorganize a larger area of the law on the basis of conceptual and substantive guiding principles designed to give the area of law under consideration a coherent structure.

Codification defined in this way has to be distinguished from a codex. A codex is

meant to produce a summary of the already existing law as complete as possible, but does not seek to change much or even anything at all in the law. The archetype of a codex, the *Corpus Iuris Civilis* of the East Roman Emperor Justinian of the 6<sup>th</sup> century CE, incorporates court decisions, textbooks and laws to give as complete a picture as possible of the Roman civil law as it stood at the time of its compilation.<sup>1</sup>

The philosophical and intellectual tools necessary to construct a whole area of the law around a limited number of foundational principles were provided by Enlightenment thinking. However, this thinking did not produce the same results everywhere. Whereas it wrought fundamental change in virtually all countries in the Western hemisphere, it was not applied in a uniform manner, but in the conditions and forms shaped by the pre-existing legal structure. Thus in England it was the judiciary, and namely the Chief Justice Lord Mansfield, who transformed the common law through his jurisprudence at the Court of King's Bench like few judges before him or since then have done.

<sup>1</sup> Markus Heintzen, *Codification of Administrative Law in Germany and the European Union, Codification of Administrative Law: A Comparative Study on the Sources of Administrative Law*, Felix Uhlmann ed., Hart Publishing, 2023, 147, 150.



Mansfield played down the significance of precedent in his judicial decisions and turned for inspiration to the Enlightenment ideas of the time, emphasizing reason, equity, and convenience to bring the common law into line with the new commercial needs of mid-18<sup>th</sup> century British society.<sup>2</sup> The most famous English theorist of the 18<sup>th</sup> century, William Blackstone, in his *Commentaries on the Laws of England* similarly tried to instill order and rationality into the confusion which he saw as the result of Parliament's multiple interferences with the common law through statutory legislation. He therefore conceded judges an extraordinary authority, to adapt statutory law through interpretation and fit it into the common law, but also discover new law when no customs or statutes existed, or use legal fictions to adapt the law to new social circumstances.<sup>3</sup> By contrast, the big push for modernization of the law in many civil law countries took the form of wholesale reform by way of legislation. This kind of modernization had the avowed goal to reshape large chunks of the existing legal system on the basis of first principles. It was France where this movement, supported and pushed forward by the powerful political impulses from the French Revolution, first took the form of comprehensive and innovative reorganization of whole branches of the law through codification. Many other civil law countries, in Europe and beyond, followed suit in the course of the 19<sup>th</sup> century.

<sup>2</sup> Norman S. Poser, *Lord Mansfield: Justice in the Age of Reason*, McGill-Queen's University Press, 2013, 402.

<sup>3</sup> David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain*, Cambridge University Press, 1989, 61-63.

In the 20<sup>th</sup> century the rate and the scope of new codifications have slowed down considerably. They are nowadays mostly limited to reorganizing and reforming the existing codifications and/or to modernize smaller domains of the law. By contrast, the urge to recreate or found anew large areas of the entire legal system seems to have largely subsided.

In order to be a suitable object for codification, an area must have its own identity which is defined by its purpose, a certain number of issues and themes in need of regulation, and a potential for abstraction. Administrative law, and in particular general administrative law, meets all of these requirements. Its identity is determined by its purpose, which is to regulate the conduct of the administration in the discharge of its duties and the exercise of its powers in the performance of the tasks and missions bestowed upon it by the constitution and the laws. The legal issues raised by the far-flung activities of the modern administration are manifold and quite complex. General administrative law also offers a large potential for abstraction, especially with regard to the forms of action the administration might use, but also with regard to the general criteria of lawfulness to which all its actions have to conform.<sup>4</sup>

## II. Codification of Administrative Law in Mongolia

Mongolia has followed the example post-war Germany in adopting as first major codification in the field of general administrative law the Law on Administrative Court Procedure. This Act is not limited to regulating the judicial procedure in

<sup>4</sup> Heintzen, *supra* note 2. 150.



administrative law cases, but also deals with important aspects of substantive administrative law, e.g. by defining basis terms of general administrative law like administrative authority, administration official or administrative act. It also regulates the preliminary proceedings an individual who wishes to challenge an administrative decision has to go through without obtaining redress before he can apply to the courts for review. In addition, the Act formulates the general criteria to which the courts shall have regard when they assess the lawfulness of the administrative decision under review.

A second major piece of legislation in the field of general administrative law was adopted by the Mongolian Parliament 13 years after the Administrative Court Procedure Act. The Act on Administrative Procedure is designed to fill the gaps in the general administrative law which a law which focuses on the procedure of the administrative courts had inevitably left. The Act deals with the general issues arising in the relations between the citizens and the administration. It fixes the procedure through which the administration reaches its decisions and the rights which individuals who are affected by the administrative decision have in the procedure leading up to the administrative authority's decision.

### III. The Mongolian Experience in a Comparative Perspective

From a comparative perspective, the codification of central parts of general administrative law was achieved in Mongolia much more quickly than in many other countries, occurring 12 and 25 years, respectively, after the entry into force of

the new Mongolian Constitution. It was helpful that Mongolia did not have to start from scratch when it started to consider the codification of general administrative law but could draw upon the experiences of a number of other countries, among them Germany. By contrast, the situation was very different in those countries in which the issue whether administrative law was suitable for codification first arose, i.e. in late 19<sup>th</sup> century Europe. The experience of three countries merits particular attention in this context: France, England, and Germany, the three European countries in which the dramatic transformation of the economy and of society which resulted from rapid industrialization first created the need for a modern public administration.

#### a) Codification in the Shadow of the Administrative Judge: The Case of France:

The example of France is particularly instructive. France was the first country in which the modern idea of codification took root in the wake of the French Revolution. The great codifications of French civil, commercial and criminal law – the *Code Civil* (1804), the *Code de Procédure Civile* (1806), the *Code de Commerce* (1807), the *Code de Procédure Pénale* (1808) and the *Code Pénal* (1810) – were enacted in swift succession in less than decade. On the other hand, France is also widely seen as the country where modern administrative law (*droit administratif*) originated at the end of the 19<sup>th</sup> century, following the establishment of the Third Republic which marked the final victory of the Republic over the monarchical form of government. French *droit administratif* has served as a model for the administrative law of



many continental legal systems, and has also influenced a number of international institutions, such as the Administrative Tribunals of the United Nations and, more importantly, the Court of Justice of the European Union.<sup>5</sup> Although French administrative law was already considered as a true legal discipline at the end of the 19<sup>th</sup> century, it is remarkable that no major effort at comprehensive codification similar to that in the fields of civil and criminal law has ever been made. Instead general administrative law developed mainly as judge-made law because of the central role of the French Council of State in the delimitation and definition of legal principles of administrative law since its establishment by Napoleon more than two centuries ago. Compared to the jurisprudence of the Conseil d'Etat, the other sources of general administrative law – the Constitution, laws, codes, and secondary legislation – have remained of secondary importance.<sup>6</sup> Since the 1970's, general legislation setting out a number of general principles of general administrative has become a more visible feature of the French legal system. However, this legislation draws heavily on the previous jurisprudence of the administrative courts, and notably the *Conseil d'Etat*. It rarely innovates on the principles developed by the jurisprudence, and is thus more in the style of a codex than of a codification proper.<sup>7</sup>

<sup>5</sup> L. Neville Brown, John S. Bell with Jean-Michel Galabert, *French Administrative Law*, 5<sup>th</sup> ed., Clarendon Press, 1998, 3.

<sup>6</sup> Delphine Costa, *Codification of Administrative Law – A French Oxymoron*, in Felix Uhlmann (ed.), *Codification of Administrative Law: A Comparative Study on the Sources of Administrative Law*, Hart Publishing, 2023.

<sup>7</sup> *Ibid.*, 134.

## b) The Difficult Birth of Modern Administrative Law in England

In England, codification of administrative law has faced even longer odds than in France. This is not only because the modern concept of codification sits uncomfortably with the central role assigned to judge-made law in virtually all branches of the law in a common law jurisdiction. This, after all, is precisely the situation which has prevailed in France ever since modern administrative law made its first appearance towards the end of the 19<sup>th</sup> century. It is also because administrative law took considerably longer in England than on the Continent to assert itself as a separate branch of law and legitimate object of study. When *droit administratif* first emerged as a true legal discipline in late 19<sup>th</sup> century France, this branch of the law was denied the right to exist in England. It is well-known how vigorously the influential Victorian lawyer and scholar Albert Venn Dicey denounced the French *droit administratif* as incompatible with central tenets of the English constitution: "In many continental countries, and notably in France, there exists a scheme of administrative law – known to Frenchmen as *droit administratif* – which rests on ideas foreign to the fundamental assumptions of the English common law, and especially to what we have termed the rule of law."<sup>8</sup>

In particular Dicey was vehemently opposed to the notion of discretionary powers of the administration which he considered to be alien to liberal principles on which the rule of law in England was based.

<sup>8</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 8<sup>th</sup> ed., Macmillan, 1915, 213.





jurisdiction of the state administrative courts ended at the borders of their respective territory. The first administrative court whose jurisdiction covered all of Germany was only established after World War II, with the creation of Federal Administrative Court of Germany in the Federal Republic of Germany in 1959. Thus the task to establish the doctrinal foundations of a common German Administrative Law was largely left to legal scholars. The publication of Friedrich Franz Mayer's "Principles of Administrative Law with Special Reference to the Common Law of Germany" (*Grundsätze des Verwaltungsrechts mit besonderer Rücksicht auf gemeinsames deutsches Recht*) can be regarded as initiating the first phase of the pioneer epoch of German Administrative Law. The publication of his treatise almost coincided with the introduction of the first separate system of administrative courts in the state of Baden in 1863. The introduction of these courts provided a strong impulse for the development of administrative law as a separate scholarly discipline in Germany. Mayer's pioneering work was followed by numerous other books on administrative law.<sup>13</sup>

However, Germany had to wait until the first edition of Otto Mayer's seminal treatise "German Administrative Law" (*Deutsches Verwaltungsrecht*) was published in 1895 before it reached the stage where the science of administrative law could be said to have been firmly established as a separate legal discipline. Mayer has been hailed as the foundational figure and classical exponent of the modern German method of approaching

administrative law. His approach influenced leading textbooks on German administrative law long into the 20<sup>th</sup> century. Ernst Forsthoff, one of the leading authorities on German administrative in the early post-World War II period wrote that "within a short time the dogmatic method founded by Otto Mayer was able to gain general acceptance. Nearly all systematic treatises on the subject which have been published later followed his example. None of them were able to escape his influence."<sup>14</sup>

In marked contrast to Dicey's view that administrative law is contrary to the rule of law, for Mayer the well-ordered administrative law is the very essence of the rule of law: "Der Rechtsstaat ist der Staat des wohlgeordneten Verwaltungsrechts".<sup>15</sup> In order to develop the central concepts and doctrines of administrative law Mayer did not look merely at the practice and case law of the newly established administrative courts in the various German territories, he looked also to foreign countries. In particular, he looked to France where the Conseil d'Etat was already well on its way to establish the foundations of a modern *droit administratif* as the country from which the most relevant insights into this new field of law could be gained.<sup>16</sup> Unlike Dicey who did not penetrate deeply into French administrative law, Mayer studied the new

<sup>14</sup> Ernst Forsthoff: *Lehrbuch des Verwaltungsrechts*, Band 1, C.H. Beck, 1958, S. 49.

<sup>15</sup> Otto Mayer: *Deutsches Verwaltungsrecht*, vol. 1, 3rd edition, Duncker&Humblot, 1924, S. 58.

<sup>16</sup> Otto Mayer, *Deutsches Verwaltungsrecht*, vol. 1, Duncker&Humblot, 1895, S. 65: "Nichts wäre ... verfehler als zu glauben, die Idee des Rechtsstaates sei eine ganz besondere deutsche Eigentümlichkeit. Sie ist uns in allen wesentlichen Grundzügen gemeinsam mit unseren Schwesternationen, welche die gleichen Entwicklungsstufen durchgemacht haben; insbesondere mit der französischen, mit welcher das Schicksal uns nun einmal trotz alledem geistig zusammengebunden hat".

<sup>13</sup> Henning, *supra* note 10. 93.



French public law very carefully.<sup>17</sup> In 1886 Mayer published a 500 pages-strong book on the theory of French administrative law. This book, in which Mayer analysed the general concepts that in his interpretation were underlying the much admired French public law,<sup>18</sup> served as a preparatory study for his groundbreaking work on German administrative law, published about a decade later.<sup>19</sup>

This achievement was all the more remarkable since intellectual and academic exchanges between France and Germany in the 19<sup>th</sup> century, and for much of the first half of the 20<sup>th</sup> century, were overshadowed by intensely hostile political relations between the two countries in which France, in the eyes of Germany's political class and large parts of its public, appeared as Germany's 'hereditary enemy' (*Erbfeind*) from which few, if any positive things could be learned. In this difficult environment, Mayer was one of the few prominent voices calling for reconciliation and a better mutual understanding of the two countries, to which he contributed in an exemplary manner through his work in the field of comparative administrative law.<sup>20</sup>

In his treatise on German administrative law Mayer did not simply transcribe the French legal concepts into German law but

used them rather as source of inspiration for shaping the doctrinal structure of German administrative law, as evidenced by his adaptation of the notion of administrative act (*Verwaltungsakt*) which played a secondary role in French law at the time but in its refashioned form became the linchpin of modern administrative law doctrine in Germany.<sup>21</sup> There are few other examples where the creative adaptation of foreign law has played such an important and fruitful role in the fashioning of domestic public law doctrine as in Mayer's case.

Mayer's work had a lasting impact on the further development of German general administrative law. Its influence can also be seen in the federal Administrative Procedure Act of 1977 which, together with the rules on the administrative procedure in tax and social security matters (which are to be found in the Fiscal Code and the Tenth Book of the Social Security Code, respectively) is the key codification of general administrative law in Germany.<sup>22</sup> The main topic of the federal Administrative Procedure Act is, in addition to the inquisitorial principle as the guiding principle of the administrative procedure, the administrative act as the typical, the standard form of administrative action. It is comprehensively regulated in sections 35 to 53 of the Act. These provisions deal with the various issues arising in respect of the preparation, announcement, effectiveness, illegality and repeal of administrative acts. The definition of the administrative act in section 35 of the Act – an administrative act shall be any order, decision or other sovereign measure taken by an authority to

<sup>17</sup> On the resulting different German/French and English rule of law concepts see Rainer Grote, *Rule of Law, Rechtsstaat and "Etat de droit"*, in: Christian Starck ed. *Constitutionalism, Universalism and Democracy – a comparative analysis*, Nomos Baden-Baden, 1999, 269.

<sup>18</sup> Otto Mayer: *Theorie des französischen Verwaltungsrechts*, Truebner, 1886.

<sup>19</sup> Otto Mayer: *Deutsches Verwaltungsrecht*, vol 2, Duncker&Humblot, 1895/96.

<sup>20</sup> Jean-Marie Woehrling, Otto Mayer, *Un acteur de la coopération interculturelle juridique franco-allemande*, *La Revue Administrative* 52, 1999, Numéro spécial 7, 25.

<sup>21</sup> Woehrling, *supra* note 20. 27.

<sup>22</sup> Heintzen, *supra* note 2. 150.



regulate an individual case in the sphere of public law and intended to have a direct, external legal effect – is an almost literal rendering of the standard definition of administrative act first provided in Otto Mayer's treatise.

#### IV. Recent developments

The distinctive features which have influenced codification efforts in the field of general administrative law in the three major European legal systems discussed above still remain relevant today. In France, despite its reputation as the birthplace of modern codification, the *Conseil d'Etat*, not the legislator continues to be the main producer of general administrative law and the source of many legal principles in the field.<sup>23</sup> It is true that since the 1970s general legislation dealing with public administration and laying down a number of principles of general administrative law has occupied a more prominent role in French public law. This legislation is now continued by a new general code that groups together many of these principles, the 2016 Code on the relations between the public and the administration (*Code des relations entre le public et l'administration*). The Code lists a number of important principles which shall guide administrative action, beginning with the principle of legality (lawfulness) and including impartiality, equality, neutrality and secularism. The Code also contains provisions on the basic rights of citizens vis-a-vis the administration and in the administrative procedure, such as the right to be heard and the right to fairness. In addition, it distinguishes three sorts of administrative acts: regulatory, individual, and acts which are neither regulatory nor

<sup>23</sup> Costa, *supra* note 7. 129.

individual. These distinctions have some important consequences for the legal regime of the respective acts, especially in relation to their coming into force, or amending or deleting them.<sup>24</sup>

However, the primary purpose of this codification is not innovation or reform, but clarification so that the law is more easily understood by both administration and citizens and legal certainty is increased. For example, the Act regulates the conditions for the withdrawal of an administrative act with and without retroactive effects, a complicated matter which previously had only been subject to judge-made rules which were considered to be unclear. Another example concerns the legal consequences of administrative inactivity. Until 2013 the general rule was that the administrative silence following a citizen's request had to be interpreted as a refusal of the request. In 2013, a law changed this rule, stating that if the administration does not take a decision on a citizen's request within two months, this shall be taken to mean that the request is granted. The 2016 Code eliminated the many exceptions which the new rule had initially admitted, thus simplifying the law considerably.<sup>25</sup>

The increasing codification of French administrative law in recent times has left unchanged the basic division between the legislature and the administrative courts, i.e. the *Conseil d'Etat*. Even when the relevant rule of administrative law is codified, it can still be interpreted or even transformed by the supreme administrative judge without the need for a formal legislative or regulatory change.

<sup>24</sup> Ibid 132-133.

<sup>25</sup> Costa, *supra* note 7. 143.



An example is provided by the application of the Administrative Justice Code. Until 2001, the rules governing the judicial proceedings before the administrative courts had not been codified. Then the new Administrative Justice Act came into force. It had been prepared, as is usual for French codifications, by a working group under the supervision of the Superior Codification Commission. The working group included eminent scholars of administrative law, but was composed mainly of members of the Council of State. In the initial version of the Code adopted by the Commission there was a rule according to which citizens could challenge an administrative decision for an indefinite period if the written notification of the decision did not fix a time limit for the challenge or indicate the judge with whom the challenge had to be filed: "Time limits for appeals against an administrative decision may be invoked only on condition that they have been indicated, together with the means of appeal, in the notification of the decision." Despite this clear wording the Council of State in an important judgment issued in 2016 decided that this rule only allowed challenges brought within a "reasonable" period of time, a "reasonable" period in the Council's interpretation being a maximum period of one year. Although the wording of the relevant provision in the Administrative Code has remained unchanged, there is no question that it has to be applied in the light of the 2016 judgment. An amendment of the Administrative Justice Code to this effect would be desirable for reasons of clarity, but there is consensus that such a change would merely have a declaratory effect, as the substance of the rule has

been fixed authoritatively in the judgment of the *Conseil d'Etat*.<sup>26</sup>

In the UK, the situation is not fundamentally different. Even after the initial aversion of British scholars and British judges towards modern administrative law<sup>27</sup> had been overcome, there has been only sporadic interest in codifying administrative law. Procedures and remedies on judicial review have been rationalised and statutorily recognised, but it is the judges who are said to have crafted the substantive common law principles of general administrative law. Though many specific areas of administrative policy and decision-making such as immigration, procurement, town and country planning, and environmental law are subject to significantly codified statutory regimes, the substantive principles of general administrative law have largely remained unaffected by codification efforts.<sup>28</sup>

The few attempts which have been made have been limited to procedural issues related to the judicial review of administrative action. The Law Commission's Report on *Remedies in Administrative Law* in 1976 examined court organisation and procedure, but did not consider principles of administrative law or their relationship to private law. The Law Commission's main recommendation was the development of an Application for Judicial Review (AJR) intended to harmonise ancient procedures with modern civil claims for declarations

<sup>26</sup> Ibid 145.

<sup>27</sup> On the latter see e.g. *Re Grosvenor Hotel, London* (1964) 3 All ER 354, at 372 (CA), per Lord Salmon; *Ridge v. Baldwin* (1964) AC 40, 72 (per Lord Reid).

<sup>28</sup> Sarah Nason, *Codification of Administrative Law in the United Kingdom – Beyond the Common Law*, in Felix Uhlmann ed. *Codification of Administrative Law: A Comparative Study on the Sources of Administrative Law*, Hart Publishing, 2023, 297.



and injunctions, in order to improve access to justice and the efficiency of the courts. The resulting AJR under Order 53 of the Rules of the Supreme Court put in place in 1977 was in effect a rationalization as well as a simplification of the existing disparate remedies and procedures. The Order also introduced a leave criterion, today known as permission stage, and specific time limits for issuing claims. The procedure was revised in 1980 and is now contained in section 31 of the Senior Courts Act 1981 and Part 54 of the Civil Procedure Rules.

By contrast, few attempts were undertaken by the Law Commission or other bodies to venture into the field of substantive administrative law. In 1978, a committee of experts began a review into administrative law. It made wide-ranging recommendations; specifically in terms of legislative change it recommended the enactment of a duty to provide reasons for administrative decisions, and a duty to provide financial compensation where a person suffers loss as a result of wrongful administrative action not involving negligence. However, until now neither duty has been enacted in legislation or been recognized as a principle under common law.<sup>29</sup>

Following the commitment of the Conservative Party in its election manifesto of 2019 to update both administrative law and the Human Rights Act 1998 – which has incorporated the European Convention on Human Rights (ECHR) into British domestic law – the notion of codifying administrative law moved from relative obscurity to the forefront of public debate. Against this backdrop the UK Government

<sup>29</sup> Ibid 306.

set up an Independent Panel for Review of Administrative Law. The Panel was asked to consider the question whether substantive public law should be placed on a statutory footing, and whether such legislation would promote clarity and accessibility in the law and increase public trust and confidence in judicial review. More specifically, it was requested to examine whether the amenability of public law decisions to judicial review by the courts and the grounds of public law illegality should be codified in statute. The Panel ultimately concluded that little significant advantage would be obtained by statutory codification of the grounds of judicial review, confirming the subordinate role codification has historically played in the development of modern British administrative law.<sup>30</sup>

In Germany, codification of general administrative law has been more successful. It is also important to stress the important contribution legal scholarship has played in the elaboration of the structure and principles of general administrative law since the time of Otto Mayer. Thus the codification of German administrative law has not merely been a compilation and systematization of the relevant case law of the courts, but has been built on the doctrinal foundations elaborated by the modern science of administrative law as exposed by Mayer and his successors.

The three main pillars of general administrative law in Germany today are the Federal Administrative Procedure Act, the Fiscal Code and the Tenth Book of the Social Security Code. Of these three pillars, the Fiscal Code is the oldest. However, in the 1970s it came under influence of general

<sup>30</sup> Sarah, *supra* note 29. 298.



administrative law to such an extent that it was revised in 1977 in order to bring it into line with the new Federal Administrative Procedure Act.<sup>31</sup>

The focus of the Federal Administrative Procedure Act is on the forms of administrative action, and in particular on the administrative act (*Verwaltungsakt*) as the practically most important form of administrative action. The standard definition of the administrative act rests upon the foundations first established by Mayer, but is adapted to the requirements of a modern rule-of-law based democracy as defined by the German Basic Law. At the same time the Act builds heavily on the case law developed by the German administrative courts. A practically important example is provided by the rules on the protection of legitimate expectations in the case of the repeal of a favourable administrative act. For a long time, it was considered that an unlawful administrative act may be revoked in accordance with the principle of legality of administrative action even if the addressee trusts in its existence, as trust in illegal state action does not merit legal protection. However, this assumption came under attack by the administrative courts since the 1950s. Evoking the requirements of the rule of law, the courts restricted the possibility of withdrawing unlawful administrative acts on the grounds of legitimate expectations. This position prevailed and was incorporated in section 48, paragraphs 2 to 4 of the Federal Administrative Procedure Act of 1977.

## V. Conclusion

In the light of the foregoing, it is hard to contest that codification of the law in many countries has been accorded much less importance by legislators and scholars alike in the field of general administrative law than in civil and criminal law. Even in France, which is widely acknowledged as the birthplace of modern codification, it is in fact the Council of State which has developed almost single-handedly the modern general administrative law. Legislation has codified much of the Council's case law, but added few new rules and principles of its own. In Germany, the situation is different, as Otto Mayer and his successors have contributed significantly to elaborating the doctrinal structure and main concepts of general administrative law. But the role of the courts has been no less important, as some key principles, like the principle of proportionality and the protection of legitimate expectations, have first been formulated by the courts. In the development of its own general administrative law, Mongolia has been able to build on the experiences of these countries and to codify relatively swiftly important parts of the law. Administrative law is not a static, but a dynamic area. It will have to keep changing in line with the needs and the expectations of the public which the administration and administrative law shall serve. If the foreign experiences discussed in this contribution are any guidance, it is the courts which will have a central role in further developing general administrative law to keep it relevant and effective.

<sup>31</sup> Heintzen, *supra* note 2. 152.



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**COMMON LAW AND CIVIL LAW APPROACHES  
TO ADMINISTRATIVE LAW: A COMPARATIVE ANALYSIS  
FROM A CANADIAN PERSPECTIVE**

**Paul Daly<sup>1</sup>**

- I. The Legislature and Administrative Law
- II. The Courts and Administrative Law
- III. Principles in Contemporary Administrative Law

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<sup>1</sup> Chair in Administrative Law and Governance, University of Ottawa (Faculty of Law, Common Law Section), (Ph.D.).



## COMMON LAW AND CIVIL LAW APPROACHES TO ADMINISTRATIVE LAW: A COMPARATIVE ANALYSIS FROM A CANADIAN PERSPECTIVE

**PAUL DALY,**

*Chair in Administrative Law and Governance, University of Ottawa  
(Faculty of Law, Common Law Section), (Ph.D.).*

My subject is the influence of civil law on Canadian administrative law. It should be noted that administrative law has two components, the structure of the state – the administrative bodies created by the legislature – and the judicial review of administrative action by the courts. The interest of the subject is that Canadian administrative law, which applies both in Quebec and in the common law provinces, is of British heritage and, therefore, is strongly inspired by the common law method. There is no clear distinction, as in French law, between administrative law, which has its own institutions and norms, and private law. Canadians, including Quebecers, do not have such a clear and sharp distinction between public and private relations.

However, Canadian administrative law, a creature of the common law, clashes with the culture of the civil law province of Quebec. Of course, the administrative law that applies in Quebec is Canadian administrative law, with only certain Quebec specificities. But this administrative law must be applied by lawyers who are trained in civil law. Even if in principle the state of the law is largely the same throughout Canada, its application in Quebec is likely

to be different because lawyers are trained differently. Indeed, there are important differences, both in terms of legislation and case law.

According to my simplified version of the civil law approach, developed only as heuristics to highlight the convergences and divergences between Quebec and English Canada, legal relations are specified in a *Civil Code* that has two characteristics. First, the *Code* is a coherent whole, organized in a taxonomic manner, in order to make the applicable rules of law clear to jurists and citizens. Moreover, the logic of the *Code* is that Parliament should begin with a statement of general principle, followed by specifications of that principle. I will therefore look at administrative law from the perspective of these characteristics. First, I will explain how the *Act respecting administrative justice* is a good example of statements of principle followed by specifications. I will contrast this Quebec framework law with its Anglo-Canadian counterparts in a comparison that will prove very flattering for the civil law legislator. Secondly, I will explain the influence of the taxonomy tendency in civil law on the law of judicial review of administrative action: while the common lawyer focuses on the



question of the appropriate remedy or remedy, his civil law counterpart undertakes his analysis rather in search of conceptual harmony.

### **I. The Legislature and Administrative Law**

#### **1. The Act Respecting Administrative Justice**

The cornerstone of Quebec's administrative law system is the *Act respecting administrative justice*, CQLR c J-3. This framework law, which sets out the exercise of power by the public administration in Quebec, is clearly of civil law inspiration.

It is initially distinguished by declarations of general principles from which more detailed obligations subsequently derive.

We begin with a description of its purpose in the first section of the *Act*. It is not, it should be noted, in the preamble, the interpretive weight of which would be doubtful, but is a provision having the force of law.

The purpose of this Act is to affirm the specificity of administrative justice and to ensure its quality, speed and accessibility, as well as to ensure respect for the fundamental rights of citizens.

It establishes the general rules of procedure applicable to individual decisions taken with regard to a citizen. These procedural rules differ depending on whether the decisions are taken in the exercise of an administrative or judicial function. They shall, where appropriate, be supplemented by special rules established by law or under the authority of the law.

This Act also establishes the Administrative Tribunal of Quйbec and the Conseil de la justice administrative.

The following general statement in section 2 of the Act follows :

Proceedings leading to an individual decision taken in respect of a citizen by the Government Administration, in accordance with the standards prescribed by law, shall be conducted in accordance with the duty to act fairly.

This is a declaration imposing a normative obligation on the Government Administration, requiring it to respect the duty to act fairly in making decisions that concern the governed. There is therefore a principle of procedural fairness, imposed by the legislator, which the government administration must respect.

Parliament goes on to provide more specification regarding this general principle of procedural fairness. In order to implement it, the Government Administration must, according to section 4, take appropriate measures to ensure that:

- (1) that the proceedings are conducted in compliance with legislative and administrative standards and other applicable rules of law, in accordance with simple, flexible and informal rules and with respect, prudence and speed, in accordance with the standards of ethics and discipline governing its agents, and in accordance with the requirements of good faith;
- (2) that the person concerned has had the opportunity to provide the information necessary for the decision to be taken and, where appropriate, to

complete his or her file;

(3) decisions are made diligently, communicated to the person concerned in clear and concise terms and provided with information to contact the person;

(4) that the instructions to the officials responsible for making the decision are in accordance with the principles and obligations set out in this chapter and that they may be consulted by the citizen.

In the next article, section 5, we meet a new entity, the "administrative authority". Except in exceptional circumstances, the Commission may not make an unfavourable decision on a permit or other similar authorization without first:

(1) have informed the citizen of his intention and the reasons on which it is based;

(2) have informed the latter, where applicable, of the content of the complaints and objections concerning him;

(3) have given the applicant the opportunity to present his observations and, if necessary, to produce documents to complete his file.

Here is a specification by Parliament of what the general principle of procedural fairness requires in relation to an adverse decision concerning a licence or authorization.

The legislator continues in section 6 by specifying the requirements of procedural fairness in circumstances where an administrative authority is about to take an unfavourable decision on compensation or benefits:

She is responsible for ensuring that the employee has had the appropriate information to contact her and that his or her file contains the information needed to make the decision. If it finds that this is not the case or that the file is incomplete, it delays its decision for the time necessary to contact the citizen and give him or her the opportunity to provide the relevant information or documents to complete his or her file.

It must also, when communicating the decision, inform the citizen, if necessary, of his right to obtain, within the period indicated, that the decision be reviewed by the administrative authority.

Once a decision has been issued, there is the possibility (both in the case of a permit or an authorization and in the case of an indemnity or benefit) for the citizen to request that it be reconsidered by the administrative authority: section 7. An unfavourable decision must be reasoned and must indicate "the remedies other than judicial remedies provided for by law, as well as the time limits for appeal": section 8.

The whole is succinct and clear, clearly stating Parliament's expectations of procedural fairness. The principle is clear and so are the obligations arising from it, as the legislator has expressed himself in language that the citizen and the members of the government administration can understand. The Quebec citizen does not need a lawyer to explain the basic obligations of Government Administration.

In the next chapter of the *Act*, the legislator addresses adjudicative



functions, that is, those conducted by "the Administrative Tribunal of Quйbec or by another body of the administrative order responsible for deciding disputes between a citizen and an administrative authority or a decentralized authority": section 9.

Once again, there is a general principle. Proceedings before such a body must be conducted "in such a way as to allow for a fair debate, in compliance with the duty to act impartially": section 9.

And, again, Parliament specifies in more detail the specific requirements of this general principle.

The decision-maker must provide "the parties with an opportunity to be heard": section 10. Moreover, the hearing must be held in public, except that a hearing in camera "is necessary to preserve public order": section 10.

As for the conduct of the hearing, the decision-maker is the "master", while conducting "the debates with flexibility and in such a way as to reveal the law and ensure its sanction": section 11. It is above all for him to decide "on the admissibility of the elements and means of evidence and may, to this end, follow the ordinary rules of evidence in civil matters".

However, some procedural obligations are provided for. The body has :

- (1) to take measures to delimit the debate and, if necessary, to promote the parties to come together;
- (2) to give the parties an opportunity to prove the facts in support of their claims and to discuss them;
- (3) if necessary, to provide each of the parties, at the hearing, with fair and

impartial assistance;

(4) to allow each of the parties to be assisted or represented by the persons authorised by law for this purpose.

Section 12.

The body must also justify its decision in writing:

Any decision made by the agency must be communicated in clear and concise terms to the parties and other persons specified in the legislation.

The decision terminating a case must be in writing and reasoned, even if it has been brought to the parties' attention orally.

Section 13.

The body cannot receive evidence "obtained in conditions that infringe fundamental rights and freedoms and the use of which is likely to bring the administration of justice into disrepute": section 11.

Here is an excellent example, in administrative law, of the civil law method.

## 2. Contrasting the Common Law Provinces

In fact, the contrast with the common law provinces is striking. There is no common law province that imposes an obligation on the government administration to act fairly, let alone one that details the obligations that flow from it. Everything is left to the discretion of the government administration at first, with the courts able to intervene after the fact. The common law attitude is that the courts are available to beg for the legislature's omission. Of course, this presupposes citizens with the resources in terms of finances and time to



bring cases to court. There are many cases in which litigation could have been avoided if the legislator had followed the example of the National Assembly of Quebec.

With respect to adjudicative functions, the legislature has acted in the common law provinces, but without the statements of principle and clarity of the Quebec legislature.

In British Columbia, the framework law for administrative justice is the *Administrative Tribunals Act*.<sup>1</sup> For the purposes of this Act, an adjudicative function is exercised by a "court to which some or all of the provisions of this Act are made applicable".<sup>2</sup> This is done by the Lieutenant Governor in Council. The article simply gives the institutions covered by the law the discretion to make "rules respecting practice and procedure to facilitate the just and timely resolution of the matters before [them]" and "practice directives".<sup>3</sup> There is even a power to grant itself other powers: a court "to facilitate the just and timely resolution of an application", to make an order "in relation to any matter that the tribunal considers necessary for purposes of controlling its own proceedings".<sup>4</sup> As for the more specific obligations concerning witnesses, disclosure of documents and suspensions (ss. 34, 38, 39), there is always a significant discretion in the hands of the tribunal.<sup>5</sup>

The Alberta law, on the other hand, is more in line with the spirit of the *Act respecting administrative justice*. It lists obligations concerning notice (s. 3), evidence (ss. 4, 9), cross-examination (s. 5) and reasoned and written decisions (s. 7). The obligations are clearly described. As an example, let us take the cross-examination provision :

When an authority has informed a party of facts or allegations and that party

(a) is entitled under section 4 to contradict or explain them, but

(b) will not have a fair opportunity of doing so without cross-examination of the person making the statements that constitute the facts or allegations,

the authority shall afford the party an opportunity of cross-examination in the presence of the authority or of a person authorized to hear or take evidence for the authority.

However, this obligation does not derive from a general principle. Unlike the *Act respecting administrative justice*, the subject matter of the proceedings is not specified, the legislature does not express its intention regarding the conduct of the proceedings, and while the Quebec legislature uses a clear definition to determine the extent of the obligations, the definition of its Alberta confer is excessively prolix (s. 1).

The same is true, or even worse, of Ontario's framework legislation, the *Statutory Powers Procedure Act*, RSO 1990, c S.22. It is not written in such a way as to facilitate its reading by a person who is not educated in the law. For example, complex provisions regarding the formation of

<sup>1</sup> Administrative Tribunals Act, SBC (2004), chapter. 45.

<sup>2</sup> Administrative Tribunals Act, SBC (2004), §1.

<sup>3</sup> Administrative Tribunals Act, SBC (2004), §13 "Practice directives: The tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties." (sec. 12(2))".

<sup>4</sup> Administrative Tribunals Act, SBC (2004), §14(c).

<sup>5</sup> Administrative Tribunals Act, SBC (2004), §34(3), 38(2), 39(2).



adjudicative committees are found before provisions identifying parties, the format of the hearing, and the content of the notice. The location of this last provision is surprising: chronologically, it is placed after a provision concerning the disclosure of evidence. A reasonable reader, uneducated in the mysteries of administrative law, might well wonder how it would be possible to know what to disclose if one does not already have notice of the dispute to be resolved.

Moreover, it should be noted that even when the legislator in the common law provinces refers to principles, it does not follow the same as its civil law counterpart by specifying obligations arising from them. As an example, consider *the Adjudicative Tribunals Accountability, Governance and Appointments Act, 2009*, SO 2009, c 33, Sch. 5. It contains a statement of principle, namely that "The selection process for the appointment of members of an adjudicative tribunal is a competitive process based on merit": section 14(1). However, apart from a few very vague criteria that must be taken into consideration in the appointment of members, the legislator is silent on the specification of this principle.

In short, in *the Act respecting administrative justice*, we find a flagship example of the civil law method. Its provisions concerning the duty to act fairly have no equivalent in the common law provinces. The population of the latter is then relatively impoverished, without a statement of principle that can be understood by every public servant practising in the province, nor concrete obligations clearly communicating the

expectations of the legislature to the citizens and to government. With respect to the "adjudicative function" part of the *Act respecting administrative justice*, the civil law approach gives it a clarity and utility that exceeds equivalents in other provinces.

### 3. The Role of the Legislature

A few remarks on the role of the legislator in both systems are in order. Although the civil law legislator, like its common lawyer counterpart, has a supremacy, it tends to use it in a different way.

Parliament's interventions at the common law have historically been rather ad hoc, acting to correct problems – real or perceived – created by decisions of the judicial branch. Hence the sometimes twisted drafting of common law legislative provisions, marginal interventions intended to do as little harm as possible to the jurisprudence developed by the judges.

As for the civil law method, the philosophy is quite different. The legislator plays a key role in this and it is incumbent on him to draw up a coherent *Code* that provides comprehensive details of the legal relations on his territory. It is impossible, not conceivable, to act only on the margins or on an ad hoc basis. Without the legislator, there is no common law. I am only exaggerating slightly: the fate of the legislator in the two systems is very different.

## II. The Courts and Administrative Law

### 1. The Origins of Judicial Review

We inherited the judicial review we have today in Canada from the British



Empire. During the 16th and 17th centuries in England – a period of extraordinary political turmoil – the courts sitting in London developed *prerogative writs* to control the legality of proceedings before lower courts. At the time, English justice was essentially local justice, administered by agents of the king scattered throughout his kingdom. Through the writs of prerogative – *certiorari*, *mandamus*, prohibition, *quo warranto*, *habeas corpus* – the royal judges in London were able to centralize the administration of justice. They found that some breaches of natural justice and excess of jurisdiction could be remedied through a prerogative writ. The citizen who wished to complain of a deviation from the state of the law established by the judges in London had the right to ask them for a writ of prerogative. Depending on the circumstances, *certiorari* was used to quash a decision tainted by a serious error, prohibition to prevent a serious error in the future, *mandamus* to order justice, *quo warranto* to declare that an inferior judge lacked jurisdiction, and *habeas corpus* to stop an unlawful detention.

Each prerogative writ had its own scope – to ask for *mandamus* when the theory of the case would have a decision quashed would be a formal error that would render the citizen's claim inadmissible. Over time, the courts of justice allowed the use of prerogative writs not only against the inferior courts that dispensed justice on behalf of the king in the realm, but also against the administrative bodies – the Commissioners of Sewers and the College of Physicians – which had significant statutory powers over property and physical integrity and exercised jurisdictional functions.

By increment, little by little, and by analogy – the classic common law method – the scope of prerogative writs in principle encompassed almost the entire gamut of administrative action, while the state, first during the Industrial Revolution and subsequently with the rise of the welfare and regulatory state, was the subject of the prerogative writ of the public. This incremental evolution was not without its problems: in many respects, the rapid development of the state apparatus, especially in the 20th century, exceeded the development of prerogative writs. There were significant gaps in what was subject to judicial review. For example, in the 20th century, decisions about privileges escaped justice, as did errors of law within the jurisdiction of the government administration.

Let us therefore retain three aspects of this short version of the history of judicial control of administrative action until the middle of the 20th century. First, it is a system based on the notion of remedy rather than on the notion of fault or error. The common law intervenes when a citizen who has the right to apply for a prerogative writ appears before a court of law in circumstances that meet the requirements for a judge to issue a remedy. Second, there is necessarily no code of administrative law in common law, but rather an incremental evolution over the centuries leading to a relatively coherent system that nevertheless has significant flaws. Third, there were necessarily no general principles – rather, there were principles related to each prerogative writ, with its own area and rules of application.



The contrast with the philosophy of civil law could not be clearer. The general principles are conspicuous by their absence. There is no structure given by the legislator. Taxonomy, there is none at all. Whereas the civil lawyer begins with a general principle and a concrete duty flowing from it, the common lawyer starts from the circumstances of each case in search of a remedy that would be appropriate given the context. And of course, just as in private law, the common law is the "ordered chaos" of judges, far from the structure imposed by the civil law legislator.

## 2. The Taxonomic Civil Law Approach

I will soon see that in some respects the gap between civil lawyers and common lawyers has been narrowed recently. Nevertheless, at the base, there is a very marked philosophical divergence. Principles and taxonomy on the one hand, evolution on a case-by-case basis and orderly chaos on the other. A reading of some recent decisions shows that this divergence persists.

First, consider the Supreme Court's decision in *Ferme ViBer inc. v. Financier agricole du Quйbec*, 2016 SCC 34, [2016] 1 SCR 1032. This was a decision concerning the *Farm Income Stabilization Insurance Program*, (2001) 133 G.O. 1, 1336 ("ASRA Program"), administered by the respondent *La Financier agricole du Quйbec* ("La Financier"). The majority reasons written by Wagner and Gascon JJ devoted several paragraphs to a taxonomic issue, namely the classification of the relationship between the respondent and farmers supported by the Program: "In order to decide whether the private or public law

regime is applicable to it, it must first be determined whether the ASRA Program is a contract" (at para. 30). There follow hundreds of words written to support the conclusion that this was an "administrative contract" (at para. 46). The judges have thus devoted themselves to the search for conceptual purity, identifying the possible forms that the relationship between the parties may be and applying the related legal framework :

Thus, when the Crown enters into contractual relationships, it does so under a special scheme, and the public interest must then play a role in the interpretation of such relationships. At the stage of interpreting the scope of the contracting state's powers, for example, whether a contractual instrument grants the state discretion, the public interest principle may weigh in favour of greater discretion in the implementation of the scheme. This will be all the more true in cases where the contractual regime in question pursues a social objective. These are not principles of public law but considerations related to the subject matter of the contract, which are likely to influence the interpretation of the scope of the contractual powers of the public authority in question... The discretion available to the state is nevertheless subject to limits. In the context of an administrative contract such as the one at issue here, these limits are not a matter of public law procedural fairness but rather of good faith and contractual fairness (at paras. 48-49).



There is therefore a concept – the administrative contract – and rules specific to it. Just as common lawyers would begin with the relief sought to determine whether it would be permissible, civil lawyers begin with the taxonomy to properly situate the legal form within the *Code* and then apply the relevant rules of law:

In short, like the contract itself, the fairness of the exercise of these discretionary powers must be assessed in light of the public interest and the social objective pursued by La Financière. Nevertheless, contract law will make the latter liable for the financial impact of its decisions when they distance it from the requirements of good faith and contractual fairness. It is this legal framework that must govern the analysis of La Financière's actions here. Before analyzing these actions in light of this contractual legal framework, it is now necessary to determine whether the rules specific to the insurance contract apply to it (para. 51).

...

since in this case, the ASRA Program is an unnamed administrative contract that does not meet the characteristics of an insurance contract, it is the rules of contractual interpretation set out in arts. 1425 to 1432 C.C.Q. that will seal the outcome of the appeal. We must refer to them in order to answer the central question in dispute, namely whether La Financière could collectively align the amounts received under the two federal assistance programs that are the subject of the appellants' action

(para. 66).

It is worth mentioning here that at common law the concept of an "administrative contract" does not even exist. With respect to tenders (and leaving aside statutory legislative interventions), the common law does not recognize any distinction between the public and private sectors: the rules of contract apply equally to government administration and private corporations. Why? The common lawyer begins with the question of remedy rather than with the question of the classification of powers, so that what matters in a tender document is whether the tenders have been dealt with in accordance with the rules set out in the tender.

The Ontario Court of Appeal's recent decision in *Thales DIS Canada Inc. v. Ontario (Transportation)*, 2023 ONCA 866 is revealing. It involved a call for tenders for the production of identity cards. Thales's bid to make maps in France was not accepted. After reconsideration in accordance with the process put in place pursuant to the Canada-European Union Free Trade Agreement, the Department maintained its decision to exclude Thales. There are therefore, if you will, two decisions: that of publishing the call for tenders and that of excluding Thales (decision maintained after reconsideration).

The company chose to seek judicial review of both decisions and was successful at trial. What is striking about reading the Court of Appeal's decision – especially in contrast to the Supreme Court's decision in *Vi-Ber Farm* – is that the judges make every effort to avoid any classification of the decision that Thales sought judicial



review of. The Department argued that the decision was completely immune to judicial review because it was a contractual decision. However, the Court replied that 'this is not an appropriate case in which to decide the general issue of whether a request for bids can be subject to judicial review. The issue in this case should be decided based on its specific circumstances' (at para. 124). Of course, Thales questioned the legality of the tendering process, and of course the Department argued that the tendering process was contractual and not subject to the rules of public law, but the Court completely avoided any taxonomic issues by focusing exclusively on the reconsideration :

Indeed, as a general principle, if an administrative process is set up for dealing with an issue, what is typically referred to as an adequate alternative remedy, the parties should first participate in that process before seeking judicial review: *Canada (Border Services Agency) v. C.B. Powell Limited*, 2010 FCA 61, [2011] 2 F.C.R. 332, at paras. 31-32; *Volochay v. College of Massage Therapists of Ontario*, 2012 ONCA 541, 111 O.R. (3d) 561, at paras. 68-69. The reviewing court then has the benefit of the administrative decision makers' reasons and expertise. If the parties have participated in the administrative process, there is no basis for ignoring the administrative decision and separately reviewing the request for bids afresh. That is not the role of the court on an application for judicial review (au par. 129).

Because the reconsideration process was an appropriate remedy in the circumstances, and because the decision resulting from that process was reasonable, there was no need to consider the solicitation as such. Note the preponderant emphasis on the question of remedy: if the problem was the legality of the tender, then voila, the reconsideration process was adequate. It should also be noted that the Court of Appeal avoids any question of taxonomy: the notion of any "administrative contract" is not found at all, as the judges are quick not to classify the relevant legal instruments.

Another recent example of taxonomy primacy in the civil law mind is the Supreme Court of Canada's decision in *Sharp v. Autoritй des marchйs financiers*, 2023 SCC 29. In this case, the issue was the jurisdiction of the Quebec authorities to prosecute before an administrative body residents of British Columbia who allegedly contravened Quebec securities laws by creating a company in Quebec for the purpose of "inflation and dropping" shenanigans. Much of the majority's analysis – Wagner C.J. and Jamal J. – focuses on the issue of the application of the rules of the *Civil Code* to determine "the international jurisdiction of an administrative tribunal over out-of-province defendants" (at para. 40). In the end, the majority is of the view that the Code's rules of private international law prevail in all situations, even when an administrative body is called upon to determine the limits of its jurisdiction, and the Code did not provide the extraterritorial jurisdiction sought in this case. However, after this lengthy analysis of the relevant provisions of the Code, the Supreme Court



nevertheless came to the conclusion that the Quebec authorities did have jurisdiction in this case :

Although the *C.C.Q.* does not confer jurisdiction on the TAMF in these circumstances, it remains to be asked whether the court has jurisdiction under the special rules of jurisdiction of the Quebec securities regime. This Court has stated that "[t]he various rules governing the order of private international law in Quebec are found mainly in Book Tenth of the *C.C.Q.*" (*Spar Aerospace*, at para. 22). However, this does not preclude the application of other jurisdictional rules set out in specific statutes (at para. 92).

The Supreme Court subsequently confirmed the test for the exercise of extraterritorial jurisdiction by administrative bodies, that of *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63.

What is still striking is the time and energy devoted to a taxonomic issue which, in the eyes of a common lawyer, has no bearing on the outcome of the litigation. If, in any event, the Quebec authorities had jurisdiction under their enabling statutes, there is no need to address the question of the application of the *Civil Code*. It is clear that the appellate courts of the common law provinces that have previously considered this issue of extraterritoriality have not undertaken a taxonomic exercise to determine which legal framework is applicable, but rather have rushed to the *Unifund* criteria in order to provide an answer to the questions in dispute relating to extraterritoriality.

### III. Principles in Contemporary Administrative Law

While the difference between the approaches of civil lawyers and common lawyers seems to me to have deep roots, it must also be recognized that the last few decades in administrative law have been marked by a rapprochement between the two groups, culminating in the Supreme Court of Canada's decision in *Vavilov*.

At first glance, it should be noted that prerogative writs, once the backbone of the common law system of judicial review, were marginalized by legislative and judicial developments in the second half of the 20th century. In fact, in order to respond to the difficulties created by the incremental evolution of prerogative writs in the face of the rapid growth of the welfare state with its new management and regulatory functions, Parliament intervened to replace the prerogative writs with a simple application for judicial review. Intended as a one-stop shop, a procedural response to procedural problems, the consequences have proved to be very significant. At the same time, or at least during the same period, the judges took it upon themselves to eliminate certain formalities due to the writs of prerogative, such as the notion of intrajurisdictional error of law. Freed from the constraints of the prerogative writs and their former analytical framework, the common law courts could now develop general principles of judicial review. In the 1960s and 1970s, the rules of natural justice were replaced by the concept of the duty to act fairly, in a series of unilateral normative acts of the judicial branch. Over the following decades, moreover, the notion of



reasonableness, a purely judicial creation, was developed. It follows, therefore, that while the recent decisions in *Thales* and *Sharp* reflect fundamental differences, it can no longer be said that the common law of judicial review of administrative action is solely dependent on prerogative writs and an approach that focuses on remedies rather than principles. Now, the replacement of the writs of prerogatives by general principles has brought about an important alignment between the civil law mentality and that of the common lawyers.

The landmark decision on judicial review – *Vavilov* – is eloquent proof of this. Admittedly, the *Vavilov* case is a case in point. After a tumultuous decade during which the Supreme Court's jurisprudence was criticized from all sides and from all sides, the Court decided to start from scratch. As the majority of the justices explained in *Vavilov* :

Since this appeal and the related appeals involve an adjustment of the approach to be used in selecting the standard of review and a clarification of the appropriate application of the reasonableness standard, it is necessary to briefly discuss how to interpret the current administrative law jurisprudence in the future. These reasons involve a comprehensive review of the analytical framework used to determine the applicable standard of review. A court seeking to determine the applicable standard of review in a case before it should first defer to these reasons to determine how that general framework applies in the case in question. It is thus possible that the court will be called upon to decide subsidiary issues on which

the case law continues to provide useful guidance. In fact, much of this Court's jurisprudence continues to apply essentially as it stands: for example, cases involving general questions of law of central importance to the justice system as a whole or questions relating to the delimitation of the respective jurisdictions of administrative bodies. For other categories of questions, some cases, such as those dealing with the effect of statutory appeal mechanisms, "genuine" jurisdictional issues, or the old contextual analysis, will necessarily have less precedential value. As for cases that set out the manner in which review is to be conducted on a standard of reasonableness, they will generally retain their usefulness, but they should be used with caution and ensure that their application is consistent with the principles set out in these reasons (at para. 143).

I think, although I am still very familiar with the jurisprudence of the common law countries, that this is unprecedented. This is in stark contrast to *Dunsmuir* in 2008, where the Supreme Court sought continuity, inferring from its earlier decisions an analytical framework that would allow courts to exercise their function of reviewing administrative action. In *Vavilov*, on the other hand, the validity of any previous decision must be weighed against the new analytical framework developed there.

It would not be inaccurate to say that the Supreme Court acted as a legislator in *Vavilov*. Not feeling bound by the past, the judges developed a new analytical framework to better guide judicial review in Canada. It should be noted, moreover,



that they relied on principles in order to achieve this. The first part of the judgment, dealing with the choice of the standard of review, is based on the principle of the legislature's choice of institutional design. This principle gives rise to certain rules, such as a presumption of deference, compliance with the standards of review established by Parliament, and the application of standards of appeal where Parliament provides a right of appeal. The second part of the judgment, dealing in particular with the standard of reasonableness, is based on the principle of "responsive justification": the reasoned decision is the basis of the legitimacy of the administrative action, a legal decision must respond to the main elements of the case, including the enabling law and the previous practices of the government administration. There are also a series of obligations to respond to the concerns and interests of the parties, to apply the techniques of statutory interpretation, to consider the evidence in the record and to justify any new departure in terms of its internal policy. It is not out of place to note that *Vavilov* provides a *Code* for judicial review: a coherent text, based on general principles from which concrete obligations flow. It was precisely the fact that the majority was establishing a *Code* that provoked concurring reasons (written by two common lawyers) castigating the majority's approach: "The reasons of the majority are an apology for correctness and a death knell for the principle of deference." (at para. 201).

Perhaps, then, *Vavilov* stands as an example of a rapprochement between two systems, a common law decision written very much in a civilian style.

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LEGISLATIVE  
PERSPECTIVE:  
THE ROLE OF  
LAWMAKERS IN  
ADMINISTRATIVE LAW  
LEGISLATION AND ITS  
CODIFICATION



## THEORETICAL ISSUES OF HARMONIZING AND SYSTEMATIZING LEGISLATION IN ADMINISTRATIVE DECISION-MAKING PROCESSES

**Dulguun Battulga<sup>1</sup>**

- I. The position and the role of the gal in the legal sources and systematization of related legislation
- II. Current challenges
- III. Relations not covered by the general administrative law
- IV. Japan's experience
- V. Classification of legislation: scope and limitations of regulating administrative decision-making procedures
- VI. Conclusion and recommendations

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<sup>1</sup> Head of the Judicial Research Center, Judicial Training, Research and Information Academy, (Ph.D.).



## THEORETICAL ISSUES OF HARMONIZING AND SYSTEMATIZING LEGISLATION IN ADMINISTRATIVE DECISION-MAKING PROCESSES

**DULGUUN BATTULGA,**

*Head of the Judicial Research Center, Judicial Training, Research and Information Academy, (Ph.D.).*

On June 19, 2015, Mongolia passed the General Administrative Law (hereinafter referred to as "GAL"), which regulates the principles of administrative actions as well as administrative acts, administrative contracts, the provisions for administrative normative acts, and the procedures for their issuance which are the fundamental forms of administrative actions. The law stipulates that when an administrative body makes a decision that affects the rights or legitimate interests of an individual or legal entity, the concerned party must be notified and allowed to provide explanations and comments regarding the facts (Articles 4.2.6, 26, and 27 of the GAL). As of June 2, 2024, there are 880 laws and 2,765 administrative normative acts<sup>1</sup> in force in Mongolia, with more than half of these laws pertaining to the field of administrative law. Only a few laws, such as the Law on Infringement, the General Law on Taxation, and the Law on Minerals, have special provisions for decision-making procedures based on the specifics of the sector and the characteristics of administrative acts. In other words, for most administrative acts with adverse effects, the decision-making process outlined in the GAL is applied, and courts

<sup>1</sup> As of May 16, 2024, [https://legalinfo.mn/mn\\_](https://legalinfo.mn/mn_)

continues to make decisions following this procedure unless there are specific laws providing otherwise. However, the question arises: Does applying the decision-making procedures set forth in the GAL to "ALL SECTORS" and "ALL ADMINISTRATIVE ACTS" align with the principle of due process of law<sup>2</sup>? In this presentation, I will address the following questions and share my conclusions and suggestions:

- Define the theoretical framework for the scope of regulation and the role of the unified substantive administrative law from the perspective Mongolia and international trends.
- Clarify current issues by reviewing the legal regulation of administrative decision-making procedures and court practice in Mongolia.
- Examine how other countries systematize the interrelationship between general administrative law, basic sectoral laws, and specialized sectoral laws in decision-making processes.
- Examine whether it is appropriate for Mongolia's context to classify laws

<sup>2</sup> As for the principle of "due process of law", there is no agreed translation among researchers, and there are cases of translating it as "mandatory action".

according to its nature and determine the optimal level of scope of regulation for the decision-making procedures in General Administrative Law, basic sectoral laws, and sectoral specialized laws.

### **I. The position and the role of the gal in the legal sources and systematization of related legislation**

**1.1.** Should the General Administrative Law be viewed on par with Civil Code and Criminal Code?

Most countries around the world have adopted a Administrative General Act or an Administrative Procedure Act, which regulates the relationship between administrative bodies and citizens. In particular, Austria adopted its Administrative General Act and Administrative Procedure Act in 1925<sup>3</sup>, while Poland in 1928, the United States in 1946, Hungary in 1957, Spain in 1958, Norway in 1967, Switzerland in 1968, Sweden in 1971, Germany in 1976, Denmark in 1985, Italy in 1990, and the Netherlands in 1994<sup>4</sup>, respectively. In Asia, Japan enacted its Administrative Procedure Law in 1993, China in 1996<sup>5</sup>, South Korea in 1996, and Taiwan in 1999. However,

<sup>3</sup> Austria is the first country to have enacted a law regarding administrative decision-making procedures. In 1875, the country passed a law establishing administrative courts, which stipulated that the administrative court is bound by the facts established by the administrative authority. The law also emphasized that the administrative authority must ensure the implementation of procedures required for determining the facts of the case.

<sup>4</sup> Among European countries, those without a general law on administrative decision-making procedures include the United Kingdom, Ireland, and Belgium.

<sup>5</sup> China's Administrative Accountability Law passed in 1996 regulates the hearing process for the issuance of adverse administrative acts. Also, the issuing of administrative norms was regulated by the regulation of 1987. 宇賀克也『行政手続法の解説（第4次改訂版）』（学陽書房 2003年）27頁。

post-socialist countries have generally lagged in developing their administrative law frameworks, this situation is especially prevalent in the countries with its legal systems rooted in the Soviet Union, which are the "first model" countries of the socialist legal sector. Many of those countries adopted general laws on administrative decision-making protocols after the dissolution of the Soviet Union, starting in the late 1990s, for example, Lithuania and Georgia in 1999, Kazakhstan in 2000, Estonia and Latvia in 2001, Armenia in 2004, Azerbaijan in 2005, Tajikistan in 2007, Belarus in 2008, Kyrgyzstan in 2015, and Uzbekistan in 2017<sup>6</sup>. In Mongolia, the "General Administrative Law" was enacted on June 19, 2015, codifying the culpable administrative decision-making procedures and the matters subject to the general part of administrative law.

Nonetheless, there is a slight difference in the content of regulation between the General Administrative Law and the Administrative Procedure Law. As an example, let's briefly review the scope of Japan's Administrative Procedure Law<sup>7</sup> (enacted in 1993, hereinafter referred to as "APL") and Mongolia's GAL.

<sup>6</sup> Popov L.L., Zubarev S.M. Administrative procedure. M., 2018. S. 235.

<sup>7</sup> 行政手続法



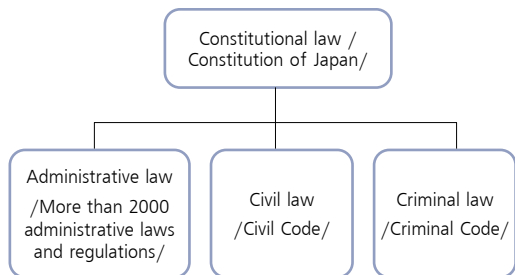
Table 1. Comparison of Japan and Mongolia харьцуулалт

	APL of Japan	GEL of Mongolia
Chapter one	General provisions	General provisions
Chapter two	Administrative acts issued based on applications and requests	Administrative body
Chapter three	Administrative act with adverse effect	Administrative decision-making procedures
Chapter four	Administrative guidance and recommendations	Administrative act
2nd part of the fourth chapter	Requesting the issuance of an administrative act	
The fifth chapter	Notifying the administrative body	Administrative agreement
The sixth chapter	Public hearing	Administrative normative act
The seventh chapter	Others	Planning
Eighth chapter		Implementation of administrative decision
The ninth chapter		Procedure for filing a complaint
The tenth chapter		Recovery of loss
Chapter eleven		Liabilities

As shown in Table 1, while the structure of APL and GAL differs, there are some common aspects which can be exemplified by the facts that administrative bodies defined in Chapter 2 of GAL correspond to those listed in Section 5 of Article 2 of APL; the decision-making procedures regulated in Chapter 3 of GAL align with those regulated in Chapters 2 and 3 of APL; both laws' Chapter 6 covers the procedures for issuing administrative normative acts. However, in terms of the procedures for filing a complaint against administrative acts, GAL addresses this in Chapter 9, whereas Japan regulates it separately through the "Administrative Complaint Review Act" (行政不服審査法). In this sense, Mongolia's GAL can be considered as covering a broader range of matters than Japan's APL. Given this broader scope, one might question whether the General Administrative Law in Mongolia is similar to the Civil Code and Criminal Code. In

this regard, the diagram by Japanese legal scholar Hiroyuki Hashimoto (橋本博之), illustrating the structure of Japan's legal framework, becomes particularly significant.<sup>8</sup>

Diagram 1. Core sources of Japan's legislation



According to him, administrative law in the country does not have a "basic law/codex" (Basic law, 基本法典) unlike the Civil Code or the Criminal Code<sup>9</sup> and

<sup>8</sup> 橋本博之「第1回 行政法の「歩き方」——3つの指針」, <https://gyoseihou.hatenablog.com/entry/2021/03/12>

<sup>9</sup> 橋本博之「第1回 行政法の「歩き方」——3つの指針」, <https://gyoseihou.hatenablog.com/entry/2021/03/12>

the Administrative Procedure Act, the Administrative Case Litigation Act, and the State Compensation Act are merely the part of the codex. Because the matters regulated by those laws are limited to the scope of that particular law.

In Mongolia, however, unlike Japan, it has the GAL and to clarify whether or not the law is similar to the Civil Code and the Criminal Code, I have reviewed the notes and related documents during the discussion of the law. During a session of the State Great Khural (Parliament) on April 9, 2015, where the draft of the GAL was discussed, the Legal Advisor of the President, Ch. Unurbayar, who presented the bill, stated the following about the regulatory relations of the law:

*" ... With the adoption of a foundational, basic law regulating administrative activities, administrative operations are now subject to a unified regulation, providing a legal basis for the administrative court to review disputes. This law enables the standardization of general administrative procedures and prevents violations of human rights, freedoms, and legitimate interests through this legal framework..."<sup>10</sup>*

*"Indeed, this is a major fundamental law with significant implications. In countries where democracy is well-established, the General Administrative Law is considered to be the second most important law after the Constitution and since this is a fundamental law, many other laws must also be amended as a result. We have already prepared*

<sup>10</sup> Minutes of the General Session of the State Great Khural (04/09/2015), page 44, <https://www.parliament.mn/nn/2098/> Accessed: 05/14/2024 □

*drafts of amendments for 11 laws that need to be changed in connection with this law, starting with the Law on Administrative Case Proceedings, the Law on the Government of Mongolia, and other related laws. It should be noted that, I would not deny that, once this law is passed, amendments to around 250 other laws related to administrative activities might follow."*<sup>11</sup>

Also, the concept paper behind the GAL also states, "Currently, more than 420 laws are in effect in Mongolia, of which over 250 fall under administrative law.<sup>12</sup> This law will serve as a foundational law to ensure coherence and consistency between these laws. In the future, this foundational law will provide the basis for refining and developing sectoral laws."<sup>13</sup> PhD P. Odgerel has similarly stated, "The General Administrative Law itself ensures consistency among the more than 1,000 legal sources belonging to the special part of administrative law and serves as the foundation for creating a modern legal system."<sup>14</sup>

Furthermore, in comments from administrative court judges regarding the draft of the GAL, Judge S. Munkhjargal remarked, "Since there are other laws regulating administrative legal relations, the use of the word 'general' is appropriate."

<sup>11</sup> Minutes of the General Session of the State Great Khural (04/09/2015), page 53, <https://www.parliament.mn/nn/2098/> Accessed: 05/14/2024 □

<sup>12</sup> THE CONCEPT FOR THE BILL ON THE GENERAL ADMINISTRATIVE LAW, PART 3

<sup>13</sup> P.Odgerel's speech on October 8, 2018, "Legal regulations and problems of the special part of administrative law" presented at the International Academic Conference on the main issues of constitutional and administrative law.

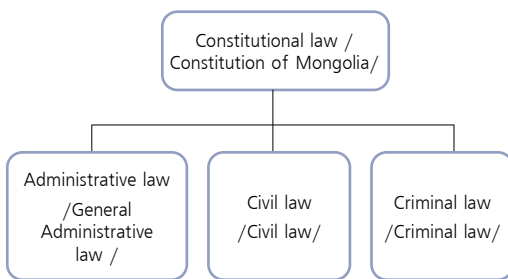
<sup>14</sup> Opinions of the Judges on the bill on the General Administrative Law, 22.03.2013, Part 2.



Judge Ts. Tsogt commented, "The general procedures for administrative activities will be governed by this law, while specific relations will be regulated by specialized laws, so the word 'general' is acceptable."<sup>15</sup> He also added, "Although the General Administrative Law was developed and passed to serve as a foundational, overarching law governing relations between all administrative bodies and citizens or legal entities in Mongolia, it is not yet considered a 'constitutional law' by current standards. Therefore, future legislators are not strictly bound by this law when introducing changes or amendments."<sup>16</sup> He further suggested that the law could be titled the "Administrative Law," similar to the Civil Code or Criminal Code.

Based on the aforementioned, it can be concluded that the lawmakers of Mongolia has enacted the GAL as a foundational administrative legal framework on par with the Civil and Criminal codes.

Diagram 2. Core sources of Mongolian legislation



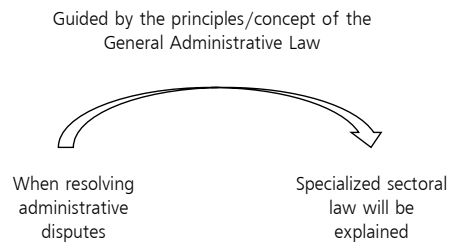
## 1.2 The Role Of General Administrative Law

<sup>15</sup> Ts.Tsogt, "General administrative law: stages of development, concept, implementation, expected importance", 2019, page 34, <https://legaldata.mn/buteel/pdf?id=652>.

<sup>16</sup> Opinions of the Judges on the Bill of General Administrative Law, 22.03.2013, Part 2.

The role of the General Administrative Law will differ depending on whether it is regarded on the same level as civil and criminal law. Specifically, according to the Japanese legal scholar Hashimoto, fundamental laws such as civil and criminal law are directly referenced and applied by the courts when resolving disputes. In Japan, as there is no foundational administrative law equivalent to civil and criminal law, courts predominantly rely on judicial precedents as the primary guiding concept when interpreting specialized sectoral laws in the field of administrative law.<sup>17</sup> According to him, if there is an administrative law equivalent to civil and criminal law, it would serve as the key guiding concept in the interpretation of sector-specific laws when resolving disputes. In other words, if the General Administrative Law is viewed on the same level as civil and criminal law, it will play the role of a "guide" for the courts in interpreting the specialized laws in the process of resolving specific cases.

Diagram 3. The role of the GAL.



Therefore, the General Administrative Law regulates the fundamental relationships of all administrative activities. It establishes the principles that administrative bodies must follow in their operations, the

<sup>17</sup> 橋本博之「第1回 行政法の「歩き方」——3つの指針」, <https://gyoseihou.hatenablog.com/entry/2021/03/12>.

definition of administrative bodies, and outlines the core forms of administrative activities, such as administrative acts, administrative contracts, and the definition of administrative normative acts, and specifies legal requirements, consequences of legal errors, the procedure for filing preliminary complaints, all of which are the aspects subject to the general part of the administrative law. As for other countries, the principles governing the operations of administrative bodies, administrative acts, administrative bodies, the decision-making processes of administrative authorities, the procedures for filing complaints, and state liability are also commonly regulated by a general administrative law.

### 1.3 Systematization of Legislation Upon the Adoption of The General Administrative Law

Legislative systematization means creating a sound system based on scientific principles. According to Professor, PhD P. Odgerel, the lack of systematization causes many negative consequences including "conflicts between laws, duplications, gaps, and a general decline in the legal system's capacity to regulate social relations".<sup>18</sup> Therefore, in any country where a General Administrative Law and a law on administrative decision-making procedures are enacted, there is a concurrent need for the systematization of the legal framework within administrative law.

#### **How it should be done properly, then?**

Let me introduce a case of a

<sup>18</sup> P.Odgerel's speech on October 8, 2018, "Legal regulations and problems of the special part of administrative law" presented at the International Academic Conference on the main issues of constitutional and administrative law, part 3.

systematization that was carried out following the adoption of the Administrative Procedure Law in Japan in 1993 (hereinafter referred to as the "ALP").

At the time the LAP was enacted, ministries and agencies expressed concerns such as: "Standardizing decision-making procedures uniformly in form may, conversely, disregard the specific characteristics of different administrative bodies and hinder the flexibility of administrative organizations to operate" (by the Ministry of Labor), and "Uniform regulation, even for specialized procedures, could cause the risk of mandatory measures that are inappropriate in particular cases" (by the Ministry of Telecommunications).<sup>19</sup> During discussions in the House of Representatives on the draft law, Minister Ishida mentioned the concept of the ALP and stated:

"Since administrative activities cover a wide range of areas, it would not be appropriate to apply the provisions of this draft law uniformly to all sectors. Therefore, certain types of relationships have been excluded from the scope of this law. In other words, relationships involving sectors with independent decision-making procedures based on the specific characteristics of administrative law, or decisions directed at subjects with distinct characteristics, such as legal entities, based on special regulations between administrative organizations, have been excluded from the scope of this law." In conjunction with the enactment of the ALP, amendments were made to 360 laws<sup>20</sup>, while following these key principles

<sup>19</sup> 岸田真夫「青色申告に対する更正の際の理由付記をめぐる問題点」税理44巻1号（2001. 1）pp.22-26.

<sup>20</sup> 衆議院第128回官方、内閣上海議録第一号、Heisei 5年10月14日、3頁。



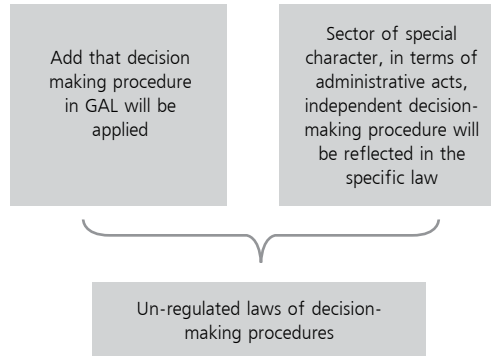
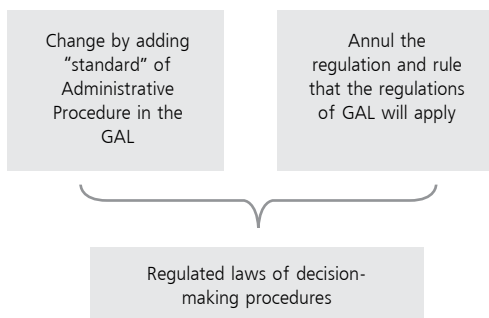
below:

First, regulations in sectoral laws that overlapped with the provisions of the ALP were removed. If a sectoral law had regulations related to hearing procedures similar to the content of the ALP concerning negative decisions, the corresponding provisions in the specialized laws were annulled. Second, in cases where a sectoral law contained independent regulations on decision-making procedures, based on the characteristics of that sector, and the nature of administrative acts is incompatible with the ALP's provisions on decision-making, it was specified in both the ALP and the sectoral law that the ALP would not apply.<sup>21</sup>

Additionally, in case of issuing administrative acts with adverse effects, changes were made to unify terminology such as "hearing procedures" in the relevant legal frameworks with the aim to streamline the regulations for hearing procedures.

It can be seen from the above that when a General Administrative Law is enacted, it requires a parallel systematization of legislative frameworks. In doing so, the following measures can be taken:

Diagram 4. The systematization upon the adoption of the GAL



As seen in Diagram 4, when the General Administrative Law is enacted, the systematization of laws may include: first, amending sectoral laws that already contain provisions on decision-making procedures to conform to the General Administrative Law, or annulling the sectoral provisions and regulating that the General Administrative Law will apply; secondly, in cases where sectoral laws do not contain regulations on decision-making procedures, specifying that the provisions of the General Administrative Law regarding decision-making procedures will apply; thirdly, codifying independent decision-making procedures in sectoral laws based on the specific characteristics of the sector, and regulating that the provisions of the General Administrative Law regarding decision-making procedures will not apply.

**WAS THE SYSTEMATIZATION OF LEGISLATION FULLY COMPLETED CONCURRENT THE GENERAL ADMINISTRATIVE LAW?**

In Mongolia, when the GAL was enacted, certain laws were amended in connection with its adoption. During the discussion on the draft law, Ch. Unurbayar

<sup>21</sup> 衆議院第128回官方、内閣上海議録第一号、Heisei 5年10月14日、3頁。

stated: "Regarding the conflicts with other laws, there are no direct conflicts with these laws. Initially, changing these 11 laws will suffice initially. These laws regulate the substantive norms of administrative bodies. Detailed regulations for specialized sectors will continue in those sectors. Therefore, this law introduces common standards that administrative agencies must follow, while specialized regulations, such as customs under the Customs Law and taxes under the Tax Law, will remain, so there will be no direct conflicts."<sup>22</sup>

Those 11 laws mentioned during the discussion of the GAL that were subject to amendments include the Law on the State Great Khural of Mongolia, the Law on the Legal Status of Ministries of Mongolia, the Law on the Government of Mongolia, the Law on the Legal Status of Government Agencies, the Law on Administrative Litigation Procedure, the Law on the Territorial and Administrative Units and Their Governance, the Law on Regulating Public and Private Interests in Public Service and Preventing Conflicts of Interest, the Law on the Police Service, the Law on the Right to Information and the Transparency of Information, the Law on State Supervision and Inspection, and the Law on Addressing Citizens' Complaints to Government Bodies and Officials.<sup>23</sup>

Among the 11 laws that were mentioned to be amended during the discussion of the law are: the Law on the Great Khural of Mongolia and the Law on the Legal Status of the Ministry of Mongolia. law, the Law on the Government of Mongolia, and the

<sup>22</sup> Minutes of the State Great Khural (04/09/2015), page 60, <https://www.parliament.mn/nn/2098/>, (accessed:05/14/2024).

<sup>23</sup> General Administrative Law Draft Concept, Part 4.

legal status of government agencies Law, Law on Administrative Proceedings, Law on Administration, Territorial Units and Their Management, Law on Regulation of Public and Private Interests in Public Service and Prevention of Conflict of Interest, Law on Police Service, Right to Information Disclosure and Access to Information Law on State Inspection, Law on State Inspection, and Resolution of Petitions and Complaints Submitted by Citizens to Government Organizations and Officials laws included.

The amendments to these laws can be categorized into two main aspects. First, "General Administrative Law" was added to the legal framework. For example, Article 1 of the Law on the Legal Status of Government Agencies was revised to state that the law comprises the Law on the Management and Financing of Budgetary Institutions and the General Administrative Law. Second, amendments were made concerning administrative normative acts and their registration. For example, Article 8.5 of the Law on the Legal Status of Ministries was amended to state: "In cases where special authorization is granted by law, normative administrative acts shall be adopted in compliance with legal requirements and registered in the state registry in accordance with the procedure specified in the General Administrative Law."

However, the amendments to these laws related to the enactment of the GAL are only amendments in form and did not comprehensively cover the entire legal sources of the administrative law field, in other words, the work of systematization



was omitted. In this regard, the 2016 report on monitoring and evaluation of Mongolia's Legal Reform Program "urged the need to amend sectoral laws in accordance with the General Administrative Law and conduct legal systematization by establishing a working group involving scholars and researchers."<sup>24</sup> Nevertheless, as of today, eight years after the implementation of the law, no significant, comprehensive, or unified systematization of legislation has been carried out.

The lack of systematization of legislation upon the adoption of the GAL has resulted in the application of GAL's decision-making procedures across all sectors of administrative law and in all administrative acts, thereby undermining the "principle of legal legitimacy." The following section will address specific issues related to this matter.

## II. Current challenges

### 2.1. Legal Regulation Of Administrative Decision-Making Procedure And Coherence Between Laws

#### Regulation under general and sectoral laws

GAL in Article 4.2.6 outlines the principle that, when making decisions affecting the rights and legitimate interests of citizens or legal entities, administrative bodies must notify the concerned parties and provide them the opportunity to submit explanations and opinions regarding the facts. Articles 26 to 27 of the GAL further elaborate on the methods of notification and hearing procedures.

However, sectoral laws that were

already in effect before the adoption of the GAL, such as the Law on Minerals (1997), the Law on Radio Waves (1999), the Law on Telecommunications (2001), the Law on Insurance Intermediaries (2004), the Law on Insurance (2004), the Customs General Administration Director's Order No.192 on Conducting Customs Inspections (2008), the Law on Health (2011), and the Law on Savings and Credit Cooperatives (2011), stipulate procedures for revoking relevant special permits. However, these laws regulate that, when issuing decisions with adverse effects, the grounds for the decision must be communicated to the affected party, and the party must be given the opportunity to submit relevant evidence in writing.

On the other hand, specific types of administrative sectors and administrative acts are regulated by other laws, such as the Law on Resolving Violations (2017), which governs the procedures for resolving violations, and the General Law on Taxation (2019), which governs the procedures for decision-making related to taxation.

### III. Relations not covered by the general administrative law

In Mongolia, Article 3.1 of the GAL states that "This law shall not apply to the following relations with respect to":

- 3.1.1. Formulating a draft legislation, and legislative enactment;
- 3.1.2. Entering into an international treaty to which Mongolia is a party;
- 3.1.3. Resolving a crime and a legal dispute by the Constitutional Court, and courts of all levels;
- 3.1.4. Criminal inquiry and investigation,

<sup>24</sup> Monitoring, analysis and evaluation of legal reform program of Mongolia, Report, 2008, 447 pages.



prosecutorial supervision over criminal procedure and maintenance of public order as well as enforcement of court decisions;

3.1.5. Using armed force, and mobilizing an army upon the declaration of state of emergency and war;;

3.1.6. Activities related to intelligence and direct implementation of production of the national security and foreign policy of the state;

3.1.7. Government decision with purpose to implement political decision of State Ikh Khural of Mongolia;

3.1.8. Complaint resolution process of human right violation of the National Commission of Human Right of Mongolia;

3.1.9. Disciplinary proceedings of a judge specified in the Law on Courts of Mongolia.

These exceptions primarily concern judicial and legislative activities, as well as criminal proceedings, rather than activities of the executive authority.

### **THE PRINCIPLE OF PRIORITIZING SPECIFIC LEGAL REGULATIONS**

Article 3.4 of the GAL states, "The relations that are not regulated by the respective law governing the activities of the administrative body, shall be governed by this Law." Regarding this regulation, the commentary on the GAL explains three main scenarios. Specifically, if both the GAL and a specific law regulate the same relationship, the procedures outlined in the specific law will be applied. For instance, Article 56.2 of the Law on Minerals (2006) provides detailed procedures for

cancellation decisions, so the GAL does not apply. However, if a relationship is regulated under the GAL but not detailed in a specific law, the GAL will be followed. For example, if there is no detailed regulation in the Law on Land, the provisions of the GAL will apply. Moreover, if the regulation in the specific law does not contradict the principles of the rule of law, it will be followed, but if it contradicts, the provision of the specific law will not be followed. For example, the law will not be followed in cases where it is stipulated not to conduct hearings.<sup>25</sup>

According to D. Sunjid, Ph.D., "If norms with equal legal power conflict with each other, the norm that regulates the relationship in more detail will be applied."<sup>26</sup> He further notes that the GAL does not apply to the procedures outlined in the Law on the Budget and the Law on Procurement of Goods, Works, and Services with State and Local Property. Furthermore, given that there are many laws in the field of administrative law, he states,<sup>27</sup> since the relationships being regulated are diverse and different, some specific relationships will be regulated by specific laws based on their characteristics," referencing the Law on Minerals as an example. However, in the science of administrative law in Mongolia, the theoretical understanding of what constitutes "relationships with specific characteristics" that are to be regulated by specific laws remains not clear enough.

<sup>25</sup> Hanns - Seidel Foundation, "Legal Education" Academy, Commentary on the General Administrative Law of Mongolia (Research and Application), 2017, pp. 41-42.

<sup>26</sup> D. Sunjid, General Administrative Law: Concept and Application, 2017, p. 32.

<sup>27</sup> D. Sunjid, General Administrative Law: Concept and Application, 2017, p. 32.



## COURT PRACTICE

Let's examine the judicial stance on the laws applicable to decision-making procedures.

**1/ When both the General Administrative Law (GAL) and a specific law regulate the same relationship, the procedures in the specific law will be followed.** For instance, the courts have referred to specific laws in cases concerning the registration of industrial property rights (Appellate Court for Administrative Cases Decision No. 221/MA2023/0713<sup>28</sup>, dated November 30, 2023) and the cancellation of mining licenses and notification of such (Supreme Court Decision No. 001/XT2023/0085, dated November 22, 2023, and Supreme Court Decision No. 62, 2018)<sup>29</sup>. These decisions are based on the more detailed regulations in the Law on Minerals, with the courts citing the relevant provisions of the Law on Minerals and applying it in subsequent rulings.

**2/ When the GAL regulates a matter that is not specifically detailed by a specialized law, the GAL will apply.** In order to identify administrative acts subject to dispute that have been regulated by the GAL, Supreme Court decisions from January 1, 2021, to January 1, 2024, have been reviewed.

**Land disputes:** In most land disputes, the courts have ruled that the decision-making procedures outlined in the GAL should be followed. For example, this applies to administrative acts related to the

<sup>28</sup> Link to the full text of the court decision: [https://shuukh.mn/single\\_case/6510?daterange=2023/01/01%20-%202023/12/31%20&id=2&court\\_cat=3&bb=1](https://shuukh.mn/single_case/6510?daterange=2023/01/01%20-%202023/12/31%20&id=2&court_cat=3&bb=1)

<sup>29</sup> Link to view the full court decision: [https://shuukh.mn/single\\_case/3195?daterange=2023-01-01%20-%202024-01-29&id=3&court\\_cat=3&bb=1](https://shuukh.mn/single_case/3195?daterange=2023-01-01%20-%202024-01-29&id=3&court_cat=3&bb=1)

revocation of land ownership certificates, termination of the right to use the subsoil<sup>30</sup>, and decisions to take land for special purposes.

In Supreme Court Decision No. 001/XT2023/0002, dated January 16, 2023, concerning the revocation of a land ownership certificate, the court ruled: "... it was found that the respondent had not provided the affected party (the landholder '\*\*\*\*\*' LLC) with the opportunity to express its position or participate in the decision-making process, nor had it given notice of its decision to revoke the land certificate. This is in violation of the General Administrative Law's Article 4.2.6, Article 26.1, and Article 43, which stipulate that affected parties must be notified and given the opportunity to participate. Therefore, the respondent's decision to revoke the landholder's rights is deemed an unlawful act that infringes upon the landholder's rights." Similarly, in Supreme Court Decision No. 001/XT2023/0060<sup>31</sup>, dated October 2, 2023, the court ruled: "... "...the claimant legal entity did not receive the notification, and according to the agricultural expert's report dated October 22, 2021, the mail had not been delivered, which is why the claimant did not attend the hearing. As such, it was found that the administrative body, when revoking the claimant legal entity's land possession certificate, had failed to notify the claimant in advance, did not conduct a hearing, did not collect evidence, nor investigate the circumstances,

<sup>30</sup> 001/ HT 2022/0036 of UDSH, May 30, 2022, link to view the full text of the court decision: [https://shuukh.mn/single\\_case/2848?daterange=2021-01-01%20-%202024-01-01&id=3&court\\_cat=3&bb=1](https://shuukh.mn/single_case/2848?daterange=2021-01-01%20-%202024-01-01&id=3&court_cat=3&bb=1)

<sup>31</sup> Decision No. 001/HT2023/0060, [https://shuukh.mn/single\\_case/3158?daterange=2021-01-01%20-%202024-05-21&id=3&court\\_cat=3&bb=1](https://shuukh.mn/single_case/3158?daterange=2021-01-01%20-%202024-05-21&id=3&court_cat=3&bb=1)

thereby infringing upon the claimant's rights and lawful interests. Article 4.2.6 of the General Administrative Law stipulates that 'when making an administrative decision that affects the rights and lawful interests of others, the concerned party must be notified in advance and their participation must be ensured.' The primary court's conclusion-that 'the agricultural expert had verbally informed the claimant to come to the district for a hearing over the phone and that the claimant had the opportunity to participate in the hearing and provide explanations'-is incorrect. The administrative body has the duty to be fully aware of the activities of the farmer operating in that district, as well as the conditions of their land and ongoing operations. If violations are found, the administrative body must immediately halt the violations and take the necessary measures to address them."

As seen from the above case, the respondent had revoked the land use rights under Article 40.1.6 of the Law on Land, which allows for revocation when the land is not used for two consecutive years without a valid reason. However, since the Law on Land does not specify the decision-making procedures, the court applied the GAL's procedures.

**Civil service:** In cases involving the imposition of disciplinary actions on civil servants, the GAL's decision-making procedures are being applied.

For example, in Supreme Court Decision No. 001/XT2021/0063<sup>32</sup>, dated March 10, 2021, concerning the dismissal of a civil servant, the court ruled:

<sup>32</sup> Link to view the full court decision: [https://shuukh.mn/single\\_case/2727?daterange=2021-01-01%20-%202024-01-01&id=3&court\\_cat=3&bb=1](https://shuukh.mn/single_case/2727?daterange=2021-01-01%20-%202024-01-01&id=3&court_cat=3&bb=1)

Also, regarding the complaint that "the official document No.36 and the report and implementation of 11 task directives submitted by the claimant were not received by the ministry, which has been proven, yet the appellate court misinterpreted the relevant law" (Section 11 of the Determination), although it has not been established that the document was received by the ministry, the actions reported in that document cannot be denied in reality (as previously mentioned). Based on this, the appellate court's conclusion that "...when dismissing the claimant from the civil service, the respondent failed to conduct a hearing in accordance with the law and did not provide the opportunity to submit explanations and suggestions, nor did they carry out the necessary actions to determine the relevant and important factual circumstances supporting the decision, nor did they collect and evaluate the evidence as required by law. As a result, the principle that the administrative decision should be goal-oriented, based on reality, lawful, and well-grounded was violated..." is justified."...In other words, when any administrative body makes a decision that affects the rights and lawful interests of any individual, it must not merely perform the procedural steps of the decision-making process as a formality but must also effectively and genuinely carry out these steps-such as establishing the facts, collecting evidence, providing the opportunity to participate, and allowing the submission of explanations and suggestions-in order to ensure that the decision it makes is well-founded, lawful, and based on real circumstances. This is the true purpose of the procedure stipulated in



the law.”

In this dispute, the administrative body had made its decision based on Article 47.1.1 of the Law on Civil Service, but since the Law on Civil Service does not detail the decision-making procedures, the court applied the GAL’s provisions.

**Special Permit: In Most Disputes Related To Special Permits, Cases Are Resolved By Citing The Decision-Making Procedures Outlined In The General Administrative Law (Gal).**

For example, in the Supreme Court’s January 25, 2021 decision (Resolution 001/HT2021/0037), regarding a dispute over the annulment of a professional water permit to drill, repair, and equip wells, the court stated: *“...The purpose of the hearing procedure regulated by Articles 26 and 27 of the General Administrative Law is to provide an opportunity for the person to whom the administrative act is directed to submit explanations and opinions on the factual circumstances important for making the decision. If the content and significance of these explanations and opinions are such that their absence affects the administrative decision, this serves as grounds for annulling the act. In this case, although the claimant had the opportunity to submit an explanation and evidence during the first instance trial, the violation of Articles 26 and 27 of the General Administrative Law does not negate the fact that the claimant failed to fulfil their professional duties in water activities. Therefore, the administrative act cannot be annulled solely on this basis.”*

This dispute involves the annulment of the claimant’s professional water

permit due to drilling a well in a location where no permit had been granted, as per Articles 10.1.5 and 21.4 of the Water Law. Although this dispute is related to a special permit, the Water Law was applied. The court noted that “Article 2.3 of the Law on Special Permits for Business Activities<sup>33</sup> states that the activities and permits related to water are governed by the Water Law.” Thus, the court applied the Water Law. In other words, the Law on Special Permits for Business Activities is a fundamental law for the sector. Article 2.1 of the Law on Special Permits for Business Activities states, “The law on special permits for business activities consists of the Civil Code, this law, and other legal acts issued in conformity with them.” On the other hand, Article 2.1 of the Water Law, which provides detailed regulation, states, “The law on water consists of the Constitution of Mongolia, the Law on Environmental Protection, this law, and other legal acts issued in conformity with them.”

**Monitoring and Inspection:** In such disputes, some cases are deemed to be appropriate to be resolved by applying the decision-making procedure of the General Administrative Law.

In particular, in the Supreme Court’s March 15, 2021 decision (Resolution 001/HT2021/0072), concerning a dispute over the inspection report of the Chief State Auditor regarding incomplete initial transactions being recorded as direct expenses and inefficient use of budget funds, the court stated: “Article 26.1 of the General Administrative Law states, ‘Before issuing an administrative act or

<sup>33</sup> This law shall be deemed invalid from the date of entry into force of the Law on Permits /Revised/ adopted on June 17, 2022.



*contract, the person whose rights and legitimate interests may be affected by the administrative decision shall be given the opportunity to provide explanations and opinions on the factual circumstances important for the decision.' Article 24.4 states, 'The administrative body is obliged to thoroughly investigate the grounds for each case relevant to the decision-making process and establish the circumstances significant to the participant.' Article 27.5 states, 'The period for conducting the hearing must allow the participant to provide explanations and opinions.' If the claimant had been granted the right to present relevant evidence during the inspection, the circumstances of the case would have changed, as established by the respondent's statement during the court hearing that '...had they provided it at the time, we could have considered the relevant materials.' Therefore, the claimant's complaint that they were not granted the right to submit evidence from the beginning and were not given sufficient time is well-founded."*

In this case, the respondent administrative body made its decision based on Articles 13.7<sup>34</sup> and 20.1.4<sup>35</sup> of the Accounting Law, but since there is no regulation on decision-making procedures in that law, the court applied the decision-making provisions of the General Administrative Law.

**Social Insurance:** In disputes related

<sup>34</sup> Section 13.7 of Article 13 of the Law on Accounting states, "It is prohibited to record work and transactions without primary documents and to include them in financial statements."

<sup>35</sup> Section 20.1.4 of Article 20 of the Law on Accounting states that it is "required not to record work and transactions that are not supported by invalid primary documents or primary documents."

to social insurance, the courts apply the decision-making procedure outlined in the General Administrative Law. For example, in the Supreme Court's January 18, 2021 decision (Resolution 001/HT2021/0023), concerning a dispute over the recalculation of pension benefits, the court stated: "*Article 26.1 of the General Administrative Law states that before issuing an administrative act or contract, the person whose rights and legitimate interests may be affected by the decision shall be given the opportunity to provide explanations and opinions. In this case, the respondent, the General Director of the Social Insurance General Office, failed to notify the claimant B. Buyandelger and conduct a hearing before issuing the contested order. Although this failure was established, it is not sufficient to declare the entire order unlawful.*"

The court referenced the principles of Articles 23<sup>36</sup> and 22.2 of the Social Insurance Law (1994) regarding the authority to recalculate pension benefits. The Social Insurance Law serves as the fundamental law for the social insurance sector. Article 2.1 of the Social Insurance Law states, "*The law on social insurance consists of the Constitution, this law, and other legal acts issued in conformity with them.*"

**Analysis:** Upon reviewing the Supreme Court's resolutions, it is obvious that most disputes reference the decision-making procedure outlined in the General Administrative Law. For instance, this

<sup>36</sup> law shall be considered repealed from the date of entry into force of the General Social Insurance Law Revised/ adopted on July 7, 2023. The social insurance organization shall adhere to the principles of self-financing, social insurance inspectors shall uphold the law, not be influenced by others, and shall respect and protect the legal rights and interests of the insured and the employer.



procedure is applied in cases involving the annulment of land possession rights, the appropriation of land for special purposes, disputes over special permits such as the annulment of professional water rights to drill and repair wells, supervision-related disputes such as audit findings on inefficient use of budget funds), social insurance disputes such as recalculation of pension benefits, and disciplinary decisions related to public servants such as the dismissal of public servants and revocation of police ranks. However, in disputes involving issues such as industrial property registration, taxation, mining, and inspection procedures, the relevant sectoral laws are applied instead of the General Administrative Law. In all other cases, the decision-making procedures of the General Administrative Law are applied.

In other words, decision-making procedures should vary depending on the sector and the nature of the administrative act. However, in Mongolia's current legal framework and judicial practice, the decision-making procedures outlined in the General Administrative Law are applied across most sectors for administrative acts. This practice does not align with the principle of "due process of law." Administrative actions are diverse and complex, and decision-making procedures should be tailored and legislated according to the specific characteristics of the sector and the administrative act, and it would be appropriate for general decision-making procedures not to be applied. In this context, it is worth noting the views of Japanese scholars, who argue that the content of "due process of law" as outlined in the Constitution is not a fixed,

uniform concept (成田新法事件、最末教程 4 7 1民集46巻5号437頁), and therefore, each sectoral law should be examined to determine whether the decision-making process is appropriately legislated in accordance with the specific characteristics of the administrative act.<sup>37</sup>

#### IV. Japan's experience

Japan has a systematic approach to the application of its Administrative Procedure Law (APL). It distinguishes which sectors or types of administrative actions fall under the APL and which do not, either by listing exclusions directly in the APL or specifying exclusions in sector-specific laws. This is done in two ways: first) listing exclusions directly in the APL, and second) specifying exclusions in individual sector-specific laws, making the APL inapplicable<sup>38</sup>.

##### 4.1. Exclusions Listed in the APL

According to Article 3 of Japan's APL, the regulations from Chapters 2 through Section 2 of Chapter 4 do not apply to the following 16 types of administrative decisions. These decisions can be broadly categorized into three main groups:

1. Administrative decisions unrelated to the exercise of executive power:
  - Decisions made in accordance with resolutions passed by the House of Representatives and the House of Councillors
  - Judicial decisions, including court proceedings and enforcement of court rulings.

<sup>37</sup> 『コンメンタール行政法：I 行政手続法・行政不服新法(第3版)』(日本評論社・2018) 52 pages.

<sup>38</sup> 室井力、芝池義一、浜川清、本多滝夫「コンメンタール行政法I 行政手続法・行政不服新法」(2018・日本評論社) 45 pages.



- Decisions made following resolutions or upon obtaining approval from the House of Representatives or the House of Councillors."
  - Decisions made by the Audit Commission: Since the Audit Commission is a constitutionally independent body, its decisions are excluded from the scope of APL, as it is deemed the decisions from the body should have regulations that are suitable to the body's specific functions.
  - Decisions made by prosecutors or police officers based on the legislation related with criminal cases.
  - Decisions made by directors, division heads, and staff of tax authorities based on legislation related to tax crimes, including local taxes<sup>39</sup>.
2. Decisions that, due to the nature of the matter, should be regulated by sector-specific laws rather than the APL:
- Decisions made in relation to students, trainees, or children, or their guardians, for the purpose of providing education, training, or practice at schools or training centres: These decisions are dependent on the objectives of the institution. In other words, schools and educational institutions established by the state or local government aim to provide education to students, and decisions made to fulfil this purpose

<sup>39</sup> 宇賀克也『行政手続法の調説(第4次改訂版)』(学陽書房・2003年)63頁。

do not fall under the relationships governed by the APL<sup>40</sup>.

- Decisions made to detain or imprison an individual in a prison, juvenile detention center, or temporary holding facility to fulfil the objective of confinement: These decisions are made by the head or staff of the correctional facility to detain the individual. Due to the "special" nature of such decisions, which occur daily and routinely, they differ from the general decision-making procedures outlined in the APL, which presupposes daily interactions with administrative authorities.<sup>41</sup>
- Decisions made in relation to a public official or a former public official regarding their duties and legal status: Decisions related to the functions and status of a public official are made to ensure the effectiveness of public service. However, the APL prioritizes the implementation of justice over mere effectiveness, distinguishing it from such decisions.<sup>42</sup>
- Decisions related to the entry, exit, registration, or deportation of foreign nationals: Such decisions fall under the authority of the state and are made by taking into account various factors, including the protection of state interests, international conditions, and

<sup>40</sup> 『コンメンタール行政法：I 行政手続法・行政不服新法(第3版)』(日本評論社・2018)49 pages.

<sup>41</sup> 『コンメンタール行政法：I 行政手続法・行政不服新法(第3版)』(日本評論社・2018)49 pages.

<sup>42</sup> 『コンメンタール行政法：I 行政手続法・行政不服新法(第3版)』(日本評論社・2018)49 pages.



relations with foreign countries. Therefore, the APL does not apply to such decisions.

3. Decisions that, by nature, do not conform to the APL:

- Decisions related to the assessment and determination of an individual's professional skills: Any examination is a preliminary procedure that establishes the situation before making a decision, so there is no need to give an opportunity to hear the comments and suggestions of the person who is addressed differently<sup>43</sup>.
- Decisions, based on legislations, aimed at mediating between parties with conflicting interests: If two parties with a conflict of interest are included, this relationship becomes a tripartite relationship<sup>44</sup>, however APL only oversees bilateral relations and legislates the decision-making process.
- Decisions made by the police or entities responsible for protecting public interests in cases where situations arise or are likely to arise that concern public health, environmental protection, safety, or the public interest: Due to the urgency of such situations, which must be resolved immediately on-site, the decision-making procedures outlined in the APL, which require prior notification and a hearing after a set period, are not applicable.

<sup>43</sup> 『コンメンタール行政法：I 行政手続法・行政不服新法(第3版)』(日本評論社・2018) 49 pages.

<sup>44</sup> 『コンメンタール行政法：I 行政手続法・行政不服新法(第3版)』(日本評論社・2018) 50 pages.

- Decisions to obtain reports and items: Administrative authorities may issue decisions to require reports or items from individuals in order to ascertain facts related to a case; however, such decisions are made during the preparatory stage of implementing administrative objectives and are therefore not subject to the decision-making procedures outlined in the APL.
- Decisions resulting from preliminary procedures: In this country, preliminary procedures are governed by specific laws.

#### 4.2. Regulations in Sector-Specific Laws

The decision-making procedures in the APL that are ruled not to be regulated by sector-specific laws can be categorized into three main sections.

##### 1/Decisions exempt from APL's decision-making procedures:

- Decisions on release on bail and supervision of juvenile under the Law on the Reintegration of Offenders (更生这些法91条)
- Decision to resolve private legal disputes within the framework of public law (準司法的另分処分): Decision to be issued by the Fair-Trade Commission in accordance with Article 117 of the Law on the Prohibition of Unfair Monopolies and Adherence to Fair Trade
- Decision on compulsory imposition of tax in accordance with Article 74, section 1 and section 2 of Part 14, of the Customs Tax Law; Article 88, section 1 and section 2 of Part

2 of the Customs Tax Law /租税の  
賦課徴収に関する処分/

- Decision related to the granting of industrial property rights /Article 195, Part 3 of the Law on Special Permits/
- Decision on providing government subsidies /Article 24 of the Law on Government Subsidies/
- Decisions related to elections / Article 264 Part 2 of the Law on Elections/
- Decisions related to registration and family registration
- Decisions regarding the modification and alteration of land
- Decisions with regard to traffic regulation
- Decisions to be made in cases where the residence of the other party to the decision is unclear
- Decisions of special nature: Decisions of the Japanese Bar Association, decisions on the return of foreign passports, etc.,

**2/ Decisions for which the hearing procedures stipulated in the APL for the issuance of administrative acts with adverse effects do not apply:**

- Decisions regarding measures related to social welfare
- Decisions made through councils or meetings (collective decision-making)
- Decisions on determining conditions and requirements for pensioners and insured
- Decisions conducted under special

procedures

In summary, Japan's approach to non-application of the APL in certain relationships involves legislating matters that are unrelated to the exercise of executive power while taking into account the goals of the decision-making organization and whether the decision is part of their day-to-day operations. For example, educational and penal institutions make decisions as part of their daily responsibilities to provide education or detain individuals involved in violations or crimes. The objectives of the civil service and the APL differ, so certain relationships are excluded from the APL. However, sector-specific laws do stipulate when the decision-making and hearing procedures of the APL do not apply.

**V. CLASSIFICATION OF LEGISLATION: SCOPE AND LIMITATIONS OF REGULATING ADMINISTRATIVE DECISION-MAKING PROCEDURES**

**5.1. Classifying Legislation**

Legislation can be categorized based on the relationships it regulates and its characteristics, such as "general laws", "sector-specific fundamental laws", and "sector-specific detailed laws". A *general law* is defined, first, as a law that "does not apply to a particular territory or specific subjects," and second, as a law that "regulates general or national issues."<sup>45</sup> In other words, the *General Administrative Law* (GAL) reflects the general principles of administrative law<sup>46</sup> and legislates the

<sup>45</sup> 編精代表『英米法辞典』（東京大学第二・2017）378頁。

<sup>46</sup> In accordance with Article 107, Section 2 of the Constitution of the Netherlands, the "General Administrative Law" was approved in 1994, according to which the general rules of administrative law /problems/ shall be regulated by law.

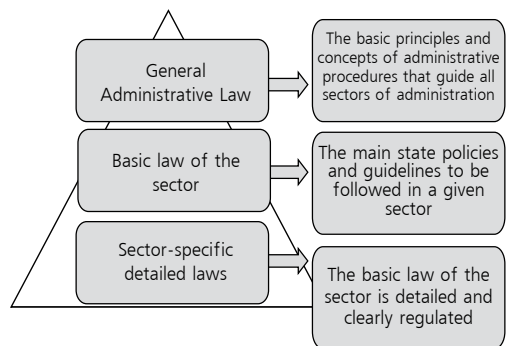


foundational and minimum content/standards<sup>47</sup> for decision-making procedures. On the other hand, a *special law*<sup>48</sup> (special law or private law) is defined as a law that applies "to specific individuals, groups, or geographical areas"<sup>49</sup>.

In addition, countries like Japan, South Korea, and Taiwan have a concept of "*fundamental laws*" (基本法, *basic* or *fundamental laws*), which encompass three key elements: 1/the law establishes the state's policies and principles for a particular sector, 2/the law conveys a message or call to action to the public.3/the law systematically regulates the framework and policies for the sector<sup>50</sup>. In other words, the fundamental law in a sector is ranked above other detailed laws within that sector, and the detailed laws within that sector are guided by<sup>51</sup> the fundamental

law. The regulations within a fundamental law serve as a key direction for interpreting the detailed law in specific cases<sup>52</sup>. A fundamental law generally outlines the purpose of the law, its basic principles, the duties and authority of the state and local governments, and the financial measures for implementing the law. It does not usually directly influence individual rights and obligations.<sup>53</sup> Thus, the hierarchy and content of general laws, sector-specific fundamental laws, and sector-specific detailed laws can be illustrated in *Diagram 5*.

*Diagram 5. Classification of legislation*



Regarding Mongolia's sectoral fundamental laws, Dr. P. Odgerel mentioned that "*Establishing a sound national legal system requires specialized knowledge of legal theory to harmonize the relationship between the Constitution, the GAL, sectoral general laws, sectoral specialized laws, and normative acts. Particularly, the interaction between the GAL and sectoral general laws must be meticulously reviewed based on modern administrative law theory, requiring a comprehensive approach that*

<sup>47</sup> The APA's "legislative history is more conflicting than the text is ambiguous." Wong Yang Sung v. McGrath, 339 US 33, 49 (1950); "Congress expressed a mood." Universal Camera Corp. v. NLRB, 340 US 474, 487 (1951). See SEN. Doc. No. 248, at 303-4. Senator McCarran (not a specification of the details of administrative procedure, nor a codification; merely "an outline of minimum basic essentials"); id. at 407, Attorney General Clark (there is nothing inherent in the subject of administrative law "which defies workable codification"); id. at 298, Senator McCarran (a "bill of rights for . . . Americans whose affairs are controlled or regulated . . . by agencies . . . ; a simple and standardized plan of administrative procedure"); id. at 307, Senator McCarran (nothing in the bill that interferes with existing administrative procedures); id. at 318-19, Senators McCarran and McKellar ("principal purpose of the bill" as well as its "general underlying purpose" is to afford aggrieved parties judicial review); id. at 347, Congressman Pittenger (same); id. at 345-7, Congressmen Sabath and Michener (to improve the administration of justice by prescribing fair administrative procedures; to see that the people receive justice). etc.,

<sup>48</sup> In the United States of America, "special law" is used as "private law".

<sup>49</sup> 編輯代表『英米法辞典』（東京大学第二・2017）796 pages.

<sup>50</sup> 西川明子「天天法の意義と电影」レファレンス Heisei 27年2月号、47頁。

<sup>51</sup> 西川明子「天天法の意義と电影」レファレンス

Heisei 27年2月号、46頁。

<sup>52</sup> 大橋洋一『行政法I（経代行政性用論）第2版』（有斐閣・2013年）67頁。

<sup>53</sup> 西川明子「天天法の意義と电影」レファレンス Heisei 27年2月号、46頁。



*covers the main concepts of the sectoral regulation, including its legal protection.*<sup>54</sup> This emphasizes the importance of "sectoral general laws" and "sectoral specialized laws."

Moreover, Dr. Odgerel stated, *"As for the major sectoral laws of the administrative law special part, which consist of dozens of individual laws and normative acts, the foundation of an independent legal system has been properly established, reflecting the specifics of the sector. For instance, environmental legislation consists of the General Law on Environmental Protection and over 40 specialized laws, such as the Law on Forests, the Law on Water, and the Law on Specially Protected Areas. Tax law, for example, comprises the General Law on Taxation and over 20 specialized laws, including the Law on Personal Income Tax, the Law on Corporate Income Tax, and the Law on Excise Tax."*<sup>55</sup> From this, we can infer that laws such as the General Law on Taxation and the Law on Civil Service could be considered sectoral fundamental laws in Mongolia.

**5.2.** Scope and limitations of regulation for administrative decision-making: GAL, sectoral fundamental laws, and sectoral detailed laws

In the second part of this presentation, examples of laws regulating decision-making include the General Law on Taxation, the Minerals Law, and the Law on Violations. The General Law on Taxation, Article 3.2, states, "If a matter is not regulated by this law or if other tax laws contain provisions different from this law, the provisions of those specific tax

laws shall prevail." The Minerals Law states, in Article 2.1, "The legal framework for taxation shall consist of the Constitution of Mongolia, this law, and other legal acts issued in accordance with these laws." Considering that the structure of these laws includes provisions on state policy and organizational management in the relevant sector, they can be considered sectoral fundamental laws.

However, if we look at the legal basis for decisions made under the APL as discussed in the second part of this presentation, relevant legal acts include:

- The Law on Land
- The Law on Civil Service
- The Law on Police
- The Law on Water
- The Law on Social Insurance
- The Law on Accounting

Among these, the Law on Land, the Law on Civil Service, and the Law on Social Insurance are considered sectoral fundamental laws, while the others are sectoral detailed laws. In other words, in Mongolia, the regulation of decision-making is primarily covered by sectoral fundamental laws.

In contrast, in other countries, such as Japan, sectoral detailed laws seem to cover these matters. Japan has a total of 46 sectoral fundamental laws, one of which is the Foundational Land Law (土地基本法). Although the decision-making process is not regulated by this law, the sectoral detailed law, the Land Expropriation Law, Article 128 Part 2, states that *"The hearing procedures of Chapters 2 and 3 of the APL do not apply to decisions made by the Expropriation Council in accordance with*

<sup>54</sup> P. Odgerel, speech, part 3.

<sup>55</sup> P. Odgerel, speech 2nd part.



*this law.*" Furthermore, Article 64 of the same law includes special procedural rules tailored to this relationship.

In Mongolia, while the APL establishes standard procedures for decision-making, if sectoral fundamental laws regulate the specifics of a sector, independent decision-making procedures suited to that sector should be governed by the sectoral fundamental law. If the administrative act in question has unique characteristics and the standard procedures of the sectoral fundamental law are not suitable, it should then be regulated by a sectoral detailed law. This approach ensures the principle of "due process of law."

## **VI. Conclusion and recommendations**

Based on the above, it can be inferred that the Mongolian legislature has established the GAL as a fundamental administrative law at the same level as the Civil and Criminal Codes. If the GAL is regarded as being on the same level as civil and criminal law, it would serve as a "guide" in interpreting detailed laws when courts review specific cases and disputes.

The codification process that followed the adoption of the GAL involves the following steps: First, for sectors where decision-making procedures are already regulated, sectoral laws should be amended to align with the GAL or render the sectoral regulations void, ensuring that the GAL applies. Second, where no sectoral decision-making regulation exists, the GAL's procedures should apply. Third, if a sector requires independent decision-making due to its specific nature, this should be legislated within the sectoral law, and the GAL's procedures should not apply.

However, eight years after the GAL came into effect, Mongolia has yet to conduct thorough, adequate, and comprehensive codification of legal acts. Due to this lack of systematic codification, the GAL's decision-making procedures have been applied to all sectors and administrative acts, undermining the principle of "due process of law." In other words, although decision-making procedures should vary according to the characteristics of each sector and administrative act, the current legal framework and court practice in Mongolia apply the GAL's procedures to most administrative acts. Since administrative activities differ significantly in form and nature, decision-making procedures should be tailored to the sector and its specific administrative acts, and the general decision-making procedures of the GAL should not apply universally.

To ensure coherence in the legal regulation of decision-making procedures, Mongolia should classify administrative law sectors with unique characteristics by regulating decision-making in the sectoral fundamental laws and, for specific administrative acts with distinct characteristics, regulating decision-making through sectoral detailed laws. This would exclude such relationships from the scope of the GAL's applicability.

In Japan, when determining which relationships, the APL does not apply to, they have legislated interactions unrelated to the exercise of executive power. They also consider the purpose of the organization issuing the decision and whether such decisions are part of their daily operations when determining if the APL applies. For



instance, educational institutions and correctional facilities make decisions on a daily basis to achieve their goals, such as providing education or detaining individuals involved in offenses or crimes. Similarly, since the objectives of civil service and the APL differ, relationships related to civil service have been excluded from the scope of the APL. However, sectoral laws explicitly state that the decision-making and hearing procedures outlined in the APL do not apply.

Mongolia must thoroughly study the experiences of Japan and other countries, implement this knowledge with theoretical backing, and urgently begin the systematic codification of laws related to the GAL in a comprehensive manner. This process would clarify the coherence between the GAL, sectoral fundamental laws, and sectoral detailed laws, ensuring the principle of "due process of law" based on the concepts of the "rule of law," "Rechtsstaat," and "human dignity."

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# THE REVITALIZATION OF ADMINISTRATIVE LITIGATION BASED ON JUDICIAL PRECEDENTS, THEORY AND LEGISLATION: IN ILLUSTRATION OF JAPANESE ADMINISTRATIVE CASE LITIGATION ACT AND LOCAL AUTONOMY ACT

**Takahashi Akio<sup>1</sup>**

- I. Legal Framework of Administrative Litigation in Japan and the Administrative Case Litigation Act
- II. 2004 amendments to the Administrative Case Litigation Act
- III. Objective litigation in the Local Autonomy Act
- IV. Conclusion

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<sup>1</sup> Professor Emeritus, Osaka University; Professor, Faculty of Law, Otemon Gakuin University



## THE REVITALIZATION OF ADMINISTRATIVE LITIGATION BASED ON JUDICIAL PRECEDENTS, THEORY AND LEGISLATION: IN ILLUSTRATION OF JAPANESE ADMINISTRATIVE CASE LITIGATION ACT AND LOCAL AUTONOMY ACT

**TAKAHASHI AKIO,**

*Professor Emeritus, Osaka University; Professor, Faculty of Law, Otomon Gakuin University*

### I. Legal framework of administrative litigation in Japan and the Administrative Case Litigation Act

Japan does not have a general administrative code, but basic laws do exist. In the area of administrative organization law, following the provisions on the Cabinet in the Constitution enacted in 1946, the Cabinet Act, National Government Organization Act and other laws and regulations exist. In the area of administrative action, the Administrative Procedure Act enacted in 1993 exists as a general law, in addition to the Administrative Organ Information Disclosure Act enacted in 1999, Act on the Protection of Personal Information enacted in 2003 and Public Records Management Act enacted in 2009, respectively. In the area of administrative remedy, the Administrative Case Litigation Act and Administrative Complaint Review Act, both enacted in 1962, are general laws, and around local self-government, the Local Autonomy Act of 1947 exists as a code.

The following report focuses on the area of administrative litigation, particularly on the process leading to the major revision of the Administrative Case Litigation Act in 2004 and subsequent developments, and then it refers to the process leading to the revision and subsequent developments of the 2000

amendment of the Local Autonomy Act concerning litigation between the national and local governments.

In Japan, a centralized court system has been in place, since the 1946 Constitution of Japan abolished the administrative courts that existed under the 1889 Constitution of the Empire of Japan. However, already in 1948, immediately after the Constitution of Japan was enacted, the Act on Special Provisions for Litigation of Administrative Cases provided for the special treatment of administrative cases. Subsequently, the Administrative Case Litigation Act of 1962 established administrative cases as an independent case category alongside civil and criminal cases, and administrative litigations shall be heard under a centralized litigation system in the category of administrative cases. As in the era of the administrative courts in the former Constitution, the administrative court system thus formed is built around appeals against the exercise of public power (administrative dispositions); and according to judicial precedent and common view, administrative dispositions subject to appeals are interpreted as administrative acts that individually and concretely determine citizens' rights and obligations. Under the provision that only those with a legal interest in seeking the



revocation of an administrative disposition may bring an appeal, the concept of legal interest has been strictly interpreted in common view and judicial precedents. The academic literature has long indicated, as problems, the too narrow entrance to administrative remedies, that is the lack of a clear procedure for litigating administrative actions other than administrative acts, the limited number of persons who can sue for administrative acts, and no statutory provision for actions other than ex post facto revocation actions. Therefore, the judicial reforms that began in 1999 aimed to strengthen the check function of the judiciary against the administration. Thus, the Administrative Case Litigation Act was amended in 2004. This report clarifies the content, discussions leading to the amendment, changes in judicial precedents and their application in subsequent court cases.

The Local Autonomy Act enacted in 1947 underwent its first major revision since its enactment in 2000. One of the goals was to legalize (verrechtlichen) the relationship between the State and localities, between which a new lawsuit was established. This report refers to the rough history of this period and the subsequent application of the above lawsuit process.

## **II. 2004 amendment to the Administrative Case Litigation Act**

### **(1) Major contents of the amendment.**

The major contents of the amendment to the Administrative Litigation Law in 2004 were the elaboration of the provisions on the standing of plaintiffs in actions for appeal and the establishment of declaratory actions as a type of action against administrative actions other than administrative acts.

In addition, the revised act provides action for issue of an administrative disposition and

action for injunction of an administrative disposition as new types of litigation for appeal. These types of preliminary actions were regarded negatively in traditional theory and judicial precedents as they insisted on the principle of ex post facto actions, i.e. actions for revocation, from the viewpoint that the administrative authority's right of primary decision-making must be reserved. Therefore, although it was possible to interpret the general provisions of Article 3 of the Administrative Case Litigation Act widely, which generally defines appeals actions, high requirements were imposed for the preliminary actions in the prevailing judicial precedents. In response to the academic criticism, in the 2004 amendment, actions for issue of and for injunction of an administrative disposition were stipulated, and at the same time, provisional remedies such as provisional issues and injunction actions were introduced.

In this regard, as it was difficult to file ex ante obligatory actions, in many cases, state liability for damage caused as a result of regulatory inaction had been sought ex post facto as an alternative remedy. In the process of judicial system reform, in some Supreme Court cases, state liability for regulatory inaction was recognized ex post facto.

**(2) Maintenance of the concept of administrative disposition and greater flexibility in judicial precedents**

A key issue in the 2004 amendment was how to provide a remedy for administrative actions other than appeals against an administrative disposition. As mentioned above, in Supreme Court precedents and common view, the subject matter of remedies by appeal proceedings was limited to administrative acts, by interpreting administrative dispositions as



equivalent to administrative acts. In contrast, influential theories and some lower court precedents advocated the idea of broadening the scope of remedies in appeals actions by flexibly interpreting administrative actions other than administrative acts as administrative dispositions when no other means of remedy were available.

In the process of the judicial system reform, the Japan Federation of Bar Associations proposed abolishing appeals litigation and creating a new type of litigation called rectification litigation, which would seek to declare the illegality of administrative decisions and their rectification. This litigation would cover all administrative actions, including administrative legislation, administrative plans, administrative contracts, administrative guidance, factual acts, as well as and administrative acts. According to the proposal, the basis of a rectification action is to seek the confirmation of illegality and correction of an illegal administrative decision as it is invalid. Rectification actions include no litigation types, but they comprise various types of decisions, such as obligatory decisions, illegal confirmation decisions, directive decisions and decisions to remove the consequences. The plaintiff is not required to specify the type of judgement sought as it is sufficient to specify the administrative decision to be rectified in the purpose of the claim.

This proposal was a bold one as it was an attempt to fundamentally change the existing administrative litigation system, which had been built around appeals, particularly actions for revoking administrative dispositions, and it could transform Japan's administrative law system, which was structured around administrative acts. However, the Supreme Court, which had consistently upheld the concept of administrative

disposition in its precedents, did not accept the proposal; such proposal did not gain widespread support in academic circles either as the judicial system reform should require urgent results, so that there were not sufficient time enough to struggle with a systematic challenge. Thus, no changes were made to the subject matter of appeals in the amendments to the Administrative Case Litigation Act. However, the diversification of the mode of judgement included in the proposal was partly realized in the form of actualization of preliminary actions in the types of appeal actions, as mentioned above.

Although the radical reform proposal of rectification actions was not realized, examples of flexible interpretations of administrative disposition have emerged in Supreme Court cases following the judicial reform. Here, two examples concerning administrative planning and administrative guidance are noticed.

In current Japanese administrative jurisprudence, the system of administrative action is articulated with the following criteria: whether the action is authoritative (unilateral) or non-authoritative (subject to the other party's consent); whether it is a general act (directed at an unspecified number of persons) or an individual act (directed at a specific person or a specific object); and whether the individual act generates legal effects or is a factual act. The legal nature of so classified administrative actions and their legal control (statutory discipline, procedural discipline, judicial control) is discussed. The currently generally accepted classifications can be illustrated as follows.



【The Matrix of administrative actions】

Administrative plan

		Authoritative	Non-authoritative
General act		Administrative order	Standard setting publication
Individual Act	Legal act	Administrative act	Administrative contract
	Factual act	Compulsory execution Immediate enforcement	Administrative guidance

Administrative investigation

Administrative acts, which are defined as authoritative individual legal acts, have been interpreted as administrative dispositions subject to appeal proceedings in consistent Supreme Court precedents. Despite of their common attributes of setting goals and synthesis of means, administrative plans have never been recognized as administrative dispositions in Supreme Court precedents before the judicial system reform. However, in a judgement of 10 September 2008, after the revision of the Administrative Case Litigation Act, the Supreme Court changed the previous case law and acknowledged the administrative dispositional nature of an administrative plan for land redevelopment, on the ground that the issue of the plan's illegality could not be raised if the suit was about the concrete administrative disposition of land conversion (the act of converting the previous land ownership to the land ownership after the project's completion), which would be conducted during the project.

As another example, the administrative dispositional nature of administrative guidance was not recognized in previous Supreme Court precedents as its legal nature is regarded as a non-authoritative factual act. However, in a judgement of 15 July 2005, likewise after the revision of the Administrative Case Litigation Act, the Supreme Court, in a decision on the recommendation to stop the establishment of a hospital on the ground that it did not conform

to the regional medical plan, recognized the administrative dispositional nature of the recommendation. Although, based on the Medical Care Law, the recommendation itself was administrative guidance, and following it was not mandatory, a system under the Health Insurance Law (and National Health Insurance Law) allowed those who did not follow the recommendation to later be denied designation as an insurance medical institution; if they were not designated as such, they would have to give up opening hospitals in Japan, where universal health insurance is in place. The decision to accept the administrative dispositional nature of the recommendation was held in view of its practical following effect.

These two cases evidence the Supreme Court's efforts to enhance remedies through appeal actions following discussions in the judicial system reform, although no changes were made to the subject matter of appeal actions in the amendment of the Administrative Case Litigation Act.

**(3)** Legislation of declaratory actions and examples of application in court cases.

Although no changes were made to the subject matter of appeal actions, scholars coincided that administrative remedies for administrative actions other than administrative acts are necessary. Therefore, another type of administrative litigation originally provided for by the Administrative Case Litigation Act



was afresh explicitly defined as a means of remedy for administrative actions other than administrative acts. In the amendment, the term 'action for declaratory judgement' of legal relations under public law was inserted in the definition of party litigation (Article 4 of the Administrative Case Litigation Act), which is a type of administrative litigation alongside appeals litigation. I would like to explain the background shortly.

The previous definition of party litigation was simply a 'litigation concerning legal relations under public law'; therefore, it covers claims for both confirmation and performance. In this sense, the amendment to the Administrative Case Litigation Act appears to have merely clarified the obvious. The following circumstances indicate why such an amendment was made.

Before the judicial system reform, the inclusion of the expression 'legal relations under public law' in the definition of party litigation was problematic. The traditional view interpreted this as a provision presupposing a distinction between administrative law as public and private law, even in substantive law, and taught that administrative law is regarded as public law and sharply distinguished from private law and that the application of private law is excluded or limited regarding administrative law relations as public law relations. Thus, according to this old theory, the party litigation shall have wide application in public law relations. Conversely, the critical theory estimated the party litigation negatively as it shall cover the public law relations, since the distinction between public law and private law should not be presupposed in substantive law. In the Administrative Case Litigation Act, only a few provisions are concerned with party actions, and only some of the provisions on appeal actions are applied

mutatis mutandis; these provisions also do not have much meaning in practice. Thus, when the critical theories of the traditional view came to dominate, the situations in which party actions should be applied in court practice as distinguished from civil actions were limited, and party actions were rarely used. So, the party litigation would not be applied widely, if no statutory change is made.

In the judicial system reform, researchers indicated that the type of litigation known as declaratory litigation is utilized as a remedy against administrative actions even in comparative perspective (e.g. injunction in American law, Feststellungsklage in German law) and that confirmation litigation should be made explicit in Administrative Case Litigation Act as a remedy for administrative actions other than administrative acts. Since researchers reached however no agreement on how to position confirmation actions in the system of the Administrative Case Litigation Act, this was ultimately left to the government to decide, which resulted in the clarification of confirmation actions as a type of party action. However, many academic opinions are opposed to the positioning of declaratory actions as actions for the confirmation of legal relations 'under public law' owing to the aforementioned discussion on the distinction between public and private law. The view that, although stipulated as a type of party action, the portion 'legal relations under public law' should not be emphasized and should be interpreted as an expression of the legislator's intention to pave the way for a wide range of administrative actions other than administrative acts is gaining support.

Several Supreme Court cases have recognized claims as declaratory actions after the amendment of the Administrative Case



Litigation Act. The first such case was the Supreme Court's decision of 14 September 2005; it concerned the illegality of the Public Offices Election Law, which did not entitle nationals residing in foreign countries to participate in national elections, and the Supreme Court recognized the claim for confirmation of their status as eligible to vote in national elections. In another decision on 11 January 2013, when the Pharmaceutical Affairs Law was amended, the Supreme Court ruled that the ministerial administrative order which prohibited the sale of certain medicines by post and dispositioned face-to-face sales was illegal on the ground that this regulation exceeded the scope of the Pharmaceutical Affairs Law's mandate. The Court granted the claim of the sellers for the sale of pharmaceuticals by mail via the Internet.

However, the amendments to the Administrative Case Litigation Act did not make any improvements to the lack of provisions on party litigation, which resulted in a lack of clarity on the requirements for a declaratory action to be brought. Since the Administrative Case Litigation Act states that matters for which no provisions exist shall be governed by the examples of civil actions, the theory on declaratory actions in civil actions shall be referred to for the requirements for an administrative declaratory action, and following the benefit of confirmation is necessary for filing a declaratory action, as in civil actions. As a result, the existence of concrete relations of rights and obligations and the interest in immediate confirmation (ripeness of the dispute) are considered necessary. Although some have argued that the interest in immediate confirmation should not be a requirement, as in civil litigation, and a straightforward illegal confirmation action should be permitted as some administrative actions include factual acts

such as administrative guidance, which cannot be said to give rise to a relationship of rights and obligations, or administrative order with only general and abstract effects. So far, no Supreme Court case has explicitly recognized an action for confirming illegality on the ground of the supplementary nature of declaratory actions, which is one of the barriers to the wider use of declaratory actions. This illustrates that it is not easy to change court practice when legislative measures are not clearly made.

**(4)** Legislation of considerations for standing to sue and trends in judicial precedents.

The best example of how academic theories, judicial precedents and legislation reacted to the amendment of the Administrative Case Litigation Act is the provision on the standing to sue in an appeal action. The Administrative Case Litigation Act stipulates the requirement of having 'legal interests' as the standing to sue for an appeal. This concept is problematic in cases where persons other than the addressees of the administrative disposition, particularly many third parties are affected, as in the case of a nuisance establishment that has been granted a permit. In Supreme Court cases, legal interests are defined as interests guaranteed by administrative regulations imposing restrictions on the exercise of administrative power to protect the personal interests of private individuals and other right holders in particular. The leading case was that the interests of a group or unspecified number of persons, such as of consumers, should not be interpreted as legal interests (Supreme Court's decision of 14 March 1978); this was based on the traditional theory that legal interests are distinct from reflexive interests, which certain persons happen to have, because of administrative regulations imposing restrictions on the exercise of administrative



power to realize public interest. In response to this attitude of the judiciary, academics have argued that constitutionally guaranteed interests and interests that are not clearly treated in the law on which the administrative disposition is based should be admitted as legal interests if they deserve judicial protection and no other avenues of redress are available.

On 22 September 1992, in a case in which residents of the surrounding area sued for the revocation of a nuclear power plant's operating license, the Supreme Court formulated a new frame of judgement whether an administrative law or regulation implies that the concrete interests of an unspecified number of persons should also be protected as their individual interests. The new formulation states that whether an administrative regulation contains this intention should be determined by considering the purpose and objective of the relevant administrative regulation as well as the content and nature of the interests that it seeks to protect through the relevant administrative disposition. In its application, the law regulating the establishment and operation of nuclear power plants is to include to protect the individual interests of the life and physical safety of residents who live near nuclear power plant facilities and who are expected to suffer direct and serious damage due to a disaster caused by an accident.

Since the content and nature of the interests in question are considered in this formulation, in many cases, plaintiffs were found to have standing after this case, particularly regarding interests such as life, physical safety and health. Many scholars favored this formulation of extended standing to sue. Thus, in the judicial system reform, Article 9(2) of the Administrative Case Litigation Act was newly established, and

the new formula, which had been established in Supreme Court precedents, was stipulated as a matter to be considered when determining the standing of plaintiffs. Article 9(2) of the revised Administrative Case Litigation Act provides as follows: 'When judging whether or not any person, other than the person to whom an original administrative disposition or administrative determination is addressed, has the legal interest prescribed in the preceding paragraph, the court is not to rely only on the language of the provisions of the laws and regulations which give a basis for the original administrative disposition or administrative determination, but is to consider the purpose and objectives of the laws and regulations as well as the content and nature of the interest that should be taken into consideration in making the original administrative disposition. In this case, when considering the purpose and objectives of those laws and regulations, the court is take into consideration the purpose and objectives of any related laws and regulations which share the objective in common with those laws and regulations, and when considering the content and nature of that interest, the court is to take into consideration the content and nature of the interest that would be harmed if the original administrative disposition or administrative determination were made in violation of the laws and regulations which give a basis therefor, as well as in what manner and to what extent that interest would be harmed'.

This provision appears to focus on the value judgement of the interest in question, thus creating room for balancing interests without being bound strictly by the provisions of the law governing the administrative disposition, and it



is close to the principle of proportionality or theory of correlation in tort law, with which the content of legal protection has been extended.

Under the new rules, the Supreme Court has actively recognized standing to sue in cases where personal rights interests, such as life and limb, are at issue; however, it has been reluctant to extend standing to cases where the local living environment is at issue, such as when residents sue over the construction of entertainment and gambling establishments (e.g. Supreme Court's decision of 15 October 2009).

In a recent case in which residents of the surrounding area sought the revocation of a permit for an ossuary under the Cemetery and Burial Act, the Supreme Court ruled that, on the grounds that the bylaws of the city that granted the permit stipulate that a permit cannot be granted if the location of the cemetery is generally within 300 meters of a person's house, the court allowed persons residing in buildings within 100 meters to qualify as plaintiffs (Supreme Court's decision of 9 May 2023). The Supreme Court held that the wording of the law itself, which only regulates from the perspective of compatibility with the public's religious sentiments and the public welfare of public health, is not sufficient to recognize the standing of persons living in the vicinity, but the wording of the relevant municipal enforcement bylaws allows for it.

This case can be seen as an example of the way in which the provisions of the law and regulations still hold the key to the determination of standing to sue in Japanese administrative litigation, and of the limitations in the provision of equitable consideration of the interest's content and nature.

### III. Objective litigation in the Local Autonomy Act

(1) The creation of national-local dispute processing litigation in the 2000 amendments to the Local Autonomy Act and the internal relational understanding of national-local relations.

The last issue is the 2000 amendment to the Local Autonomy Act, which newly provides for lawsuits to settle disputes between the State and local governments. This amendment allowed local authorities to sue the State, and in fact, cases of litigation between the State and local authorities have arisen.

One reason for the difficulty in recognizing lawsuits between the State and local governments in Japan is that, although the Constitution of Japan provides for a unitary court system, Japan traditionally belongs to the continental legal sphere and has a legal system based on the distinction between subjective and objective lawsuits. Article 3 of the Court Act stipulates that 'The courts decide all legal disputes, except as otherwise provided for in the Constitution of Japan, and to have other powers that are specifically provided for by law'. The common interpretation of this provision is that 'legal disputes' in the first sentence means subjective litigation, while 'specifically provided for by law' in the second sentence includes objective litigation. In addition to the actions for appeal and party actions, the Administrative Case Litigation Act also stipulates citizens actions and interagency actions as administrative actions, of which actions for appeal and party actions are understood as subjective, while citizens actions and interagency actions are understood as objective. Therefore, citizens suits and interagency suits are not legal disputes as referred to in Article 3 of the Court Act and



are only possible in case of statutory provision.

Another circumstance is that in Japan, under the Constitution of the Empire of Japan, which made no provision for local self-government, the relationship between the State and localities was understood to be 'internal' to the administration, and the idea that the localities were subject to the State's supervision developed as a common theory. Even under the Constitution of Japan, which contains a provision guaranteeing local autonomy, this view remained the prevailing view. While local governments, in their capacity as business operators, stand in the same position as private individuals and can bring subjective lawsuits, in their capacity as governing bodies, they form the 'inside' of the governance structure with the State and cannot thus bring lawsuits 'inside' the governance structure. One of the reasons why this view has remained the prevailing theory is that, even under the Constitution of Japan, the system of delegated State's affairs, in which the State's affairs were executed by the executive bodies of local governments (chiefs, etc.) as organs of the State was widely practiced; under this system, the competent minister of the State had the power of direction and supervision over the local governments' executive bodies. This system has fostered a sense that the State and local governments generally stand in a hierarchical relationship, and an 'internal' understanding has supported this.

The Supreme Court of Japan has also accepted the traditional 'internal' understanding and ruled that local authorities are not allowed to sue the State or superior bodies unless provided for by law (Supreme Court's decision of 30 May 1974). In this case, Osaka City, in its capacity as national health insurer, refused

to grant insured status to a private individual with its authority provided by the law. The private individual appealed to the National Health Insurance Examination Board established in Osaka Prefecture, a superior body, in accordance with the provisions of the law, and the Board of Osaka Prefecture decided to grant the request. The city appealed against the decision, seeking to have the decision annulled. The Supreme Court held that, even though the affairs handling national health insurance are not State's affairs, when a superior body is in a relationship under the law to receive appeals against the administrative disposition of a subordinate body (a case known as adjudicative involvement), the prefectural examination board and the city have the same relationship as a general superior administrative agency and a subordinate administrative agency subject to its direction and supervision. So, the Court did not allow the city to challenge the Board's decision. In other words, the Supreme Court held that, in this case, the relationship between the State and locality is in effect one of inter-agency, and therefore, in the absence of a statutory provision, a subjective lawsuit cannot be established.

Owing to this 'internal' understanding, lawsuits between the State and localities were rarely recognized, although academic theory strongly argued that subjective lawsuits between the State and localities should be recognized.

The local autonomy reform that led to the revision of the Local Autonomy Act in 2000 aimed to legalize the relationship between the State and local areas, and to this end, the system of delegation of State's affairs was abolished and the rules for the State's involvement in local area established; further, local authorities were allowed to bring a dispute processing action



against the State's authoritative involvement. The lawsuits can now be brought by local authorities against the State's authoritative involvement. However, although some views on the nature of these lawsuits interpret them as subjective lawsuits, the prevailing view understands them as objective lawsuits authorized by law.

**(2)** Examples of the application of national-local dispute processing litigation and fluctuations in internal relational understanding.

The dispute processing litigation introduced in this way was filed in the 'Henoko' litigation between the State and Okinawa Prefecture. In this case, the State planned to reclaim the surface of the water in accordance with the Public Water Surface Reclamation Law to build a helicopter base for the US Forces in Japan off the Henoko coast of Okinawa Prefecture; against the plan that the Governor of Okinawa Prefecture had given his approval filed Okinawa Prefecture, whose governor was replaced, a number of lawsuits. The Supreme Court held that the State's adjudicatory involvement could not be challenged by the dispute processing litigation, under the circumstances that the State's Okinawa Defense Bureau, which carries out the surface reclamation work, appealed to the Minister of Land, Infrastructure, Transport and Tourism, the competent minister of the State, against the cancellation of the approval by the Okinawa Governor, and the Minister accepted the appeal, in accordance with the law. The Court rejected Okinawa Prefecture's argument on the grounds that it was not considered to be the subject of a dispute processing action (e.g. Supreme Court's decision of 20 December 2016). The main reason for this decision is that the Local Autonomy Act, as amended in 2000, allows the mechanism of adjudicatory involvement to exist, but the

political context of the construction of the US military base in Japan is also likely to be relevant behind the issue. In an old case in which the compatibility of the Treaty on Security Cooperation between Japan and the US with Article 9 of the Constitution was disputed, the Supreme Court adopted a doctrinal theory of governance and held that the highly political and discretionary decisions of the Cabinet that had concluded the Treaty and the Diet that had approved it were in principle not subject to review by the judicial courts, whose function is purely judicial (e.g. Supreme Court's decision of 16 December 1959).

Thereafter, national and regional disputes processing litigation has functioned in a case in which a city that had not been granted eligibility by the State to use the system of granting tax deductions for donations to local governments challenged the State's refusal decision in a dispute processing suit. The Supreme Court held that the State's decision was illegal, in violation of the rules of involvement stipulated by the Local Autonomy Act as amended in 2000 (Supreme Court's decision of 30 June 2020). In this case the local authority's claims were recognized for the first time in the framework of dispute processing litigation.

Conversely, in another case, the Supreme Court has recognized the establishment of a case between the State and a locality in the framework of subjective litigation, which is different from national-local dispute processing litigation. In a case where a city decided to disclose drawings of a building of a national Self-Defense Force base based on the information disclosure ordinance of the city, and the State sued to cancel the decision, the Supreme Court recognized that it was a legal dispute, interpreting the interest of the



State, the building's owner, as a legal interest (Supreme Court judgement of 13 July 2001). This case is as an example of how the distinction between governing and business entities, which is premised on an 'internal' understanding of the relationship between the State and localities, has been shaken.

#### **IV. Conclusion**

In the previous sections, we have examined the interdependence between academic theories, judicial precedents and legislations, with a focus on amendments to Japan's Administrative Case Litigation Act, as well as situations in which administrative litigation has become more active and situations in which it has not functioned adequately. In general, the groundwork for the activation of administrative litigation was laid after the revision of laws in the judicial system reform, but gradual steps are being taken in the interaction with the institutional and theoretical framework originating in the continental legal sphere. It is also worth noting that in the global trend to relativize the distinction between public and private, the institutional-theoretical framework derived from the continental legal sphere - including the relationship between the State and localities - has been shaken.

## JUDICIAL REVIEW PERSPECTIVE IN TÜRKIYE (APPLICATION OF ADMINISTRATIVE LAW)

**Ferhat Eker<sup>1</sup>**

- I. Introduction
- II. Administrative judicial system
- III. Review of administrative acts
- IV. Judgement
- V. Legislative perspective

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<sup>1</sup> Administrative Judge, Turkish Justice Academy



## JUDICIAL REVIEW PERSPECTIVE IN TÜRKİYE (APPLICATION OF ADMINISTRATIVE LAW)

**FERHAT EKER,**

*Administrative Judge, Turkish Justice Academy*

### I. Introduction

**A.** The Evolution of the Administrative Judiciary.

Similar to the rest of the world, complaints about administrative acts were directed to the administrative authorities in the Ottoman Empire up until the 19th century. Local areas outside the center were under the authority of the Beylerbeyi, who was the highest ranking official in that region. Beylerbeyi and other lower-level administrators convened councils known as "Divan" where they heard citizens' grievances about administration and attempted to resolve them. Viziers, grand viziers, and even the sultan himself also set up a council to hear complaints and cases in the center. In the early 19th century, there was weak judicial control of the administration, which was very limited and managed by the administrative authorities.

However, in the 19th century, development towards judicial control of the administration (as in France) started with the supervision of "Şura-yı Devlet" (Council of State), which was established in 1868 according to the French model. It has the authority to handle disputes between the government and individuals.

It was also the duty of Şura-yı Devlet to appeal the administrative cases heard by the provincial councils. Şura-yı Devlet played an active role in the preparation of the first Constitution in 1876.

After the independence war, in 1925, the Council of State took its place in the newly established Republic of Türkiye. There had been a few changes in its structure, with new laws in 1938 and 1964. Also, its name changed to "Danıştay".

The administrative judiciary was reshaped in accordance with the new Constitution that came into force in 1982. Three laws—the Council of State Act (Law No. 2575), the Act On the Establishment and Duties of Regional Administrative Courts, Administrative Courts, and Tax Courts (Law No. 2576), and the Procedure of Administrative Justice Act (Law No. 2577) established the administrative courts in Türkiye. Lastly, in 2016, major structural changes were made to the administrative jurisdiction system in order to rationalize the Regional Administrative Courts (RAC) and reduce the workload of the Danıştay (CoS). The RAC's have become intermediate appeal courts, and it is no longer possible to appeal directly to the CoS. Onward appeal from an RAC decision to the CoS is also



no longer possible in certain circumstances. These amendments have impacted the position of the CoS as a case-law court and created the possibility for the RAC to make case law in categories of cases where there is no onward appeal to the CoS.

**B.** The Basis of the Review by the Courts of Administrative Acts and Actions.

To address the administrative judicial system in Türkiye, it is essential to consider the rule of law's core elements, including the legality of administration and its accountability to judicial review. Administrative judicial review occurs through independent administrative courts, where the principle of separation of powers prevails.

In Türkiye, the judiciary functions independently alongside the legislative and executive branches. According to Article 9 of the Constitution, judicial power is exercised by independent and impartial courts on behalf of the Turkish Nation. Judicial activity involves the application of substantive legal rules to cases by impartial judges. It is based on fundamental principles, like the right to a fair trial. The Constitution describes the Turkish Republic as a state of law that is obedient to the rule of law in Article 2. The basis of the review by the courts of administrative acts and actions is stated as *"Recourse to judicial review is available against all actions and acts of administration."* in Article 125 of the Constitution. Therefore, the review by the courts aims to submit administrative authorities to the law and protect individual rights.

This constitutional provision ensures that individuals have the right to challenge

administrative decisions and seek legal remedies. If someone claims that an administrative action or decision is unlawful, they can take their case to court for review. The principle of judicial review allows for independent scrutiny of administrative actions to ensure compliance with the law, or, in other words, to realize the rule of law. In a state bound by the principle of the rule of law, the law absolutely prevails over all institutions of the state. All acts and actions of the administration must be in conformity with the law and the Constitution.

Same Article draws the limits of judicial review: Judicial power is limited to the review of the compliance of administrative acts and actions with the law. The administrative courts cannot review the expediency of them. No judicial ruling shall be passed which;

- restricts the exercise of the executive function in accordance with the forms and principles prescribed by law,
- has the characteristic of administrative acts,
- removes discretionary powers.

In administrative justice, safeguarding individuals' fundamental rights and freedoms is paramount, and the courts play a crucial role in upholding these rights.

**C.** Classification of Administrative Acts and Administrative Authority.

As known, "administrative acts" are meant:

- unilateral legal acts, both individual and normative (regulations, by-laws, general orders, etc.) and physical acts, i.e., actions of the



administration taken in the exercise of public authority that may affect the rights or interests of natural or legal persons,

- situations of refusal to act or an omission to do so in cases where the administrative authority is under an obligation to implement a procedure following a request.

There is no difference in Türkiye in this context. "Administrative acts" will be used in the following topics in this paper to emphasize all kinds of administrative exercise, as mentioned above.

The term "administrative authority" includes public institutions and organizations authorized to perform administrative transactions and persons authorized to make decisions on behalf of the administration, as well as private legal entities in cases authorized by legislation.

These entities are "Central Government Administrations," "Social Security Institutions," and "Local Administrations (municipalities)". Central Government Administrations are defined as "Administrations Included in the General Budget (presidency and ministries)," "Special Budget Administrations," and "Regulatory Supervisory Institutions (independent administrative authorities)."

**II. Administrative Judicial system**

**A. The Organization of the Courts.**

**ADMINISTRATIVE COURTS**



In the Turkish system, all administrative cases fall within the competence of the

administrative courts, except for a very limited number of cases referred by law to the ordinary courts. Review is reserved to administrative courts for administrative disputes. There are no administrative tribunals or boards. Also, internal review by the administrative authorities is very limited and ad hoc, but then these agencies' decisions themselves are subject to judicial control.

The powers and duties of the administrative courts are specified by the Procedure of Administrative Justice Act No. 2577. (Hereafter shall be mentioned as "PAJA No. 2577")

Administrative courts are the courts of first instance with general jurisdiction. In general, the tax courts are responsible for resolving cases concerning the application of Law No. 6183 on the Collection of Public Receivables on cases related to taxes, duties and charges, and similar financial obligations and their increases, penalties, and tariffs.

The regional administrative courts are in charge of examining and concluding the requests for intermediate appeal and resolving disputes regarding duties and jurisdiction between the administrative and tax courts. An appellate request can be made within thirty days of the notification of the decision to the regional administrative court within the judicial locality where the court is located against decisions of administrative and tax courts. There are 7 regional administrative courts.

The Council of State is the Supreme Administrative Court, an advisory and review authority assigned by the Constitution. It examines and decides on appeal requests against:



- Some of the decisions listed in PAJA No. 2577 were given by the regional administrative courts.
- The decisions regarding the cases heard in the Council of State as the first instance court (the decisions of the chambers of the Council of State).

The Council of State decides on administrative cases as the first instance court for annulment and full remedy lawsuits to be filed against:

- Regulatory actions other than presidential decrees issued by the President,
- Regulatory actions issued by ministries, public institutions, or professional organizations that are public institutions and to be implemented throughout the country,
- For matters falling within the jurisdiction of more than one administrative or tax court,
- Cases arising from concession clauses and agreements regarding public services for which arbitration is not foreseen.

The duty of the Council of State as the authority of appeal is limited to inspecting the contradictions to the law arising in the form of non-application or misapplication of a rule of law.

It also presents its opinion about the concession agreement and contracts related to public services and fulfills other duties assigned by law.

#### **B. Internal Organization and Composition of Courts.**

Administrative and tax courts shall consist of one president and an adequate number of members. The panel of judges shall be composed of the president and two members. However, cases whose monetary value is below a certain threshold set out by law are ruled by a single judge.

Each regional administrative court shall have at least two chambers: the administrative chamber and the tax chamber. Where necessary, the number of chambers can be increased or decreased by the Council of Judges and Prosecutors upon the proposal of the Ministry of Justice. The chambers shall consist of a single president and an adequate number of members.

Currently, in the Council of State, there are 12 chambers, including 1 administrative chamber and 11 litigation chambers. In each chamber, there is one president and a sufficient number of members and rapporteur judges. The panel of each chamber shall be composed of the president and four members and shall decide by absolute majority.

#### **C. Judges.**

Judges who review administrative acts do not belong to a specific category. The members of the administrative and tax courts have the same status reserved for the members of the judicial order. Different categories of judges do not exist according to the various kinds of control of administrative authorities. It is not possible for a member of the judiciary to take up a position in the public administration as a civil servant without resignation.



Candidates who graduated from law faculties or faculties of political science, administrative sciences, economics, and finance who succeed in competitive written and oral examinations held by the Ministry of Justice, later named “judge/prosecutor assistants”. They must then go through a period of pre-service training for three years. It consists of the basic training period, the duty period, and the final training period. Basic training and final training are given by the Turkish Justice Academy, an institution with scientific, administrative, and financial autonomy. The duty period is spent actually serving. Assistant judges and prosecutors work in courts and prosecutor’s offices, where trainer judges or prosecutors work and are under their supervision. After the training period and a final exam, the Council of Judges and Public Prosecutors decides on their acceptance into the profession.

On the other hand, the Council of Judges and Public Prosecutors has been performing the task of providing in-service training to judges and prosecutors, mainly in cooperation with the Turkish Justice Academy.

Members of the Council of State are elected by the Council of Judges and Public Prosecutors amongst senior administrative judges and by the President of the Republic amongst high-level civil servants. The members are elected for twelve years, and it is not possible to be elected twice. The President, Chief Public Prosecutor, Vice-Presidents of the Council of the State, and the Presidents and Members of the Chambers, as members of a high judicial organ, shall serve with the security of

tenure provided by the Constitution of the Turkish Republic and the law.

#### **D. Judicial Impartiality is Ensured.**

The principle is that judicial review should be exercised by a court established by law, the independence and impartiality of which are guaranteed. The impartiality of judges is guaranteed by the Constitution.

The Constitution states that everyone has the right to litigation, either as plaintiff or defendant, the right to a “fair trial” before the courts through lawful means and procedures, no one may be tried by any judicial authority other than the legally designated court, judges are independent in the discharge of their duties, no organ, authority, or individual may give orders or instructions or make recommendations or suggestions to judges relating to the exercise of judicial power, and the administration is obliged to comply with court decisions.

In PAJA No. 2577, it is stated that if the parties have any suspicions about the impartiality of the judges, they have the right to challenge the judge. The main reasons that prevent judges from hearing a case are cases directly or indirectly related to them or their relatives, cases in which they advised one of the parties or declared their opinion if not legally required, cases where they have hostility against one of the parties, etc.

#### **E. Role of Competent Bodies (Kinds of Recourse Against Administrative Acts)**

Pursuant to PAJA No. 2577, there are three types of administrative cases.

*1. An action for annulment* is the principal remedy against unlawful administrative acts, regulations, and by-laws and the best



option to force the administration to obey the rule of law. Although it is not an *actio popularis*, even the breach of a personal interest, not a right, is sufficient to bring such a suit before the court.

Actions for annulment are filed by those whose interests have been violated by the administrative acts to repeal such procedures based on their illegality due to one of their aspects, such as scope of authority, formal elements, reason, subject, and purpose. A judge can overrule the administrative act, but it is not possible to modify it or to order the administrative authorities to do so.

2. Full remedy actions (compensation cases) are filed by those whose personal rights have been directly violated due to administrative acts and actions. The concerned persons can directly file a full remedy action due to an administrative procedure that violates their rights, which now means the existence of concrete, personal, actual, and direct damage arising from the act and action of the administration, or file the actions of annulment and the full remedy actions together if needed.

They can also file the action of annulment first, and upon the resolution of the action for annulment, bring the full remedy action as of the notification of the decision on this matter or from the notification of the decision to be taken if an action against this decision is filed.

Article 13 of PAJA No. 2577 indicates that before filing a full remedy action, those whose rights have been violated by the administrative actions must request the fulfillment of their rights by applying

to the relevant administration within one year from the written notification or as of the date when they become aware of these actions by other means, and within five years as of the date of the action in all cases. If these requests are partially or wholly rejected, an action can be filed within the time limit for the action as of the day following the notification of the procedure on this matter, or if no answer is given within thirty days about the request, from the end of such period.

The Turkish administrative law system provides for the negative model as a general principle in the case of administrative silence. It means that administrative silence shall be recognized as a deemed refusal of a claim.

3. Administrative Contracts are the third type of case regarding disputes arising from all kinds of administrative contracts made for the execution of one of the public services, except for disputes arising from concession terms and agreements for which arbitration is foreseen.

4. Advisory Role of the Council of State is the consultation and examination authority assigned by the Constitution of the Republic of Turkey. The consultative function is exclusive to the highest jurisdiction. It is entrusted to give its opinion on the conditions and the contracts concerning public services under which concessions are granted.

#### **F. Exceptions.**

Pursuant to Article 125 of the Constitution, recourse to judicial review shall be available against all acts of administration. However, there are some exceptions.





such as the protection of the environment and historical and cultural values.

#### **C. Legal Aid.**

When suits are filed, postage and fees are charged. The amounts of these charges are stated in the law, and they can be paid through legal aid. Persons who have no ability to partially or totally afford necessary litigation or enforcement costs without putting their livelihoods or those of their families in a significantly difficult position may apply for legal aid. Against the court's decision to reject a legal aid application, it is possible to appeal the decision to the relevant court. The decision is final after the appeal examination.

#### **D. Time-limits.**

According to PAJA No. 2577, the period for filing a lawsuit is sixty days in the Council of State and administrative courts and thirty days in the tax courts, where a separate period is not specified in special laws.

These periods start from the date following written notification of administrative acts and from the date following the promulgation date of statutory instruments for which promulgation is required. If the last day of the time limit coincides with a holiday, the last day of the time limit extends to the end of the working day following the holiday. In addition, if the last day of the time limit coincides with the judicial holiday, then these periods will be deemed to be extended for seven days, starting from the date following the last day of the holiday.

According to Article 40 of the Constitution, administrative authorities must specify which legal remedies the

relevant persons will apply to and their deadlines. Under the case law of the Council of State, the time limit runs from the date of acknowledgement when there is no formal notification.

#### **E. Screening Procedures of Applications.**

The suits are filed with signed petitions addressed to the courts. In the petitions, the names, surnames, and addresses of the parties and their counsels (if they have any), the subject and reasons of the case, the written notification date of the administrative act, the disputed amount in full remedy actions, and tax cases are indicated. It is not necessary to state the full grounds for the application; merely a brief statement of the reasons is enough.

The petitions are examined to see if they comply with the rules stated in PAJA No. 2577. Admission procedures are in the hands of a single judge. A hearing is not involved at this stage. The examination shall be finalized no later than fifteen days from the date of receipt of the petition. If the petitions are found to be unsuitable for the conditions stated in the Act, they shall be rejected. An extra period of 30 days is given for the renewal of these petitions. A brief statement of the reasons will be sufficient.

It is not compulsory to ask for the advice of a lawyer or a counselor. On this issue, there are no discrepancies between the lower-level courts and the Council of State.

#### **F. E-procedures.**

There is the possibility of bringing proceedings via the Internet. Plaintiffs can also submit their petition online via UYAP (National Judicial Network Project).





Law No. 6100 in Article 31 of the law. The issue of pending cases and final judgments is not among the initial examination topics or among the references in Article 31.

However, in the administrative judiciary, this problem needs to be solved since two or more pending cases cannot be heard about the same acts at the same time, and the same case for which a final judgment has been issued cannot be brought before the judiciary again. For this reason, the issue of pending cases and final judgments is taken into consideration by the courts during the initial examination.

If a procedural deficiency is identified, the case may be dismissed due to procedural reasons or granted additional time for correction.

#### H. Suspension of the Execution.

Before delving into the substance of the case file, a request for the suspension of the execution of an administrative act or decision can be made. As a rule, filing a lawsuit does not suspend the execution of the administrative acts in question. An exception in the tax courts is that filing lawsuits arising from tax disputes suspends the collection of the assessed taxes, duties, and charges, as well as similar financial obligations and their increases and penalties. If the implementation of the administrative acts causes irreparable damages and is clearly against the law, the Council of State or administrative courts may decide to suspend the execution by citing justification. It is mandatory to specify the reasons why the administrative action is clearly against the law and the irreparable damages that will arise if the action is implemented.

Decisions regarding suspension of execution requests can be objected once only within seven days following the notification of the decision. The authorities must make a decision within seven days of receiving the objection file. Decisions made upon objection are final. Cases in which a suspension of execution is decided are first examined and decided.

## IV. Judgement

### A. Grounds of The Decision.

The courts should indicate with sufficient clarity the grounds on which they base their decisions. The Constitution and PAJA No. 2577 set out general rules regarding the justification of decisions. Article 141 of the Constitution states that *"all decisions of all courts are written with justification,"* while Article 24(e) of PAJA No. 2577 provides that judgments shall contain the legal basis of the judgment, statement of the justification, and conclusion.

In order to guarantee a fair trial, Constitutional Court precedents set out that the courts must evaluate claims on the merits of a case and evidence in this regard; and show the reasonable grounds of a decision. While the courts are independent and free to make their decisions, it must be accepted that they are obliged to state adequately the grounds on which their decisions are based. The justification of court decisions must be sufficient, clear, and understandable to ensure that a cause-and-effect relationship has been established.

Courts shall carry out all examinations of their own motion. The parties themselves may also present evidence. The courts may



ask the parties or any other persons and authorities to send documents and present all kinds of information.

#### **B. Criteria and Methods of Review.**

It is stated in Article 2 of PAJA No. 2577 that the review is limited to the review of the lawfulness of an act; courts cannot review the appropriateness of an act or action.

No ruling can be made that has the characteristic of an administrative action and procedure that restricts the performance of the executive function in accordance with the forms and principles prescribed by the laws or in a manner that will remove discretionary powers.

The discretionary power of the administration is not explicitly defined in our legislation. Also, it does not make a clear distinction between discretion and margin of appreciation. However, if a legal provision allows the administration to choose whether to take a certain decision or to choose one of the different solutions in case of certain conditions and circumstances (sometimes use not-so-clear terms as to what they mean by reason, such as "when necessary, if necessary, when needed, public safety, general health, public order requirements"), it is considered that this legal provision gives the administration discretionary power.

However, as a requirement of the rule of law, the discretionary power of the administration is not unlimited and should be exercised in accordance with the law, public interest, and public service requirements.

Actions for annulment are filed by those whose interests have been violated

by the administrative acts to repeal such procedures based on their illegality due to one of their aspects, as follows:

#### *1- Scope of authority*

What is meant by authority is whether the administration performing the administrative acts has the authority to carry out those acts. In other words, the annulment lawsuit may involve the claim that the administration does not have authority. There may be an authority problem in terms of person, subject, place, and time.

#### *Lack of authority in terms of person:*

It is a violation of the law due to the administrative acts being carried out by a person or board who is not authorized by law. The subsequent acceptance by the competent authority of administrative acts carried out by an unauthorized person or board will not eliminate the unlawfulness of the acts in question.

#### *Lack of authority in terms of subject:*

The competent administrative authority can only make decisions on the duties specified in the law and within the specified legal limits. If an administrative authority makes a decision on a matter that falls within the jurisdiction of another authority, the administrative action taken will be unauthorized in terms of the subject.

#### *Lack of jurisdiction in terms of*

*location:* The authority of an administrative body within a certain geographical border is jurisdiction in terms of location. If acts of an administrative body that is not competent in that geographical region fall within the geographical jurisdiction of another administrative authority, the acts will be unauthorized in terms of location



and will be unlawful.

*Lack of authority in terms of time:* It is the time period in which the administrative authority can exercise its authority.

#### 2- Formal elements

Administrative acts are subject to certain formal conditions. Valid administrative acts are only possible if they are carried out as stipulated in the legislation. An annulment lawsuit may be filed against administrative actions that are not carried out in accordance with these strict formal requirements.

#### 3- Reason

The reason is the factor that prompts the administration to take such action and is determined by the objective legal rules that precede the administrative acts. When the administration establishes an action, it must also present the reason for this administrative action with justification. The reason for the administrative action may be a concrete event or a legal transaction. For example, if a civil servant comes to work drunk, this is the reason for the administration to impose disciplinary punishment.

#### 4- Subject

After the reason is realized, establishing the legal result ordered by the law constitutes the subject element. Subject is the new legal situation created by the administrative acts. The legality of the acts in terms of their subject depends on the result created, which is the result shown in the legal rules. For example, Article 125 of Civil Servants Law No. 657 equates "disciplinary actions" with "disciplinary penalties". While the actions that require disciplinary

punishment, which are determined by law, are the reason, the disciplinary penalties given due to these actions are the subject of the administrative acts.

#### 5- Purpose

The purpose is the final result to be achieved by the administrative action, which is "public interest". Additionally, special purposes are also included in the legislation. If the administration acts for a purpose other than the public interest, it makes the administrative acts unlawful, like personal hostility. The review by lower-level courts is not different from the review by the Council.

#### C. Trial.

The proceedings are adversarial in nature. The equality of arms between the parties to the proceedings is also respected. PAJA No. 2577 states that the written trial procedure is applied. That means the review is carried out on documents, and the courts conduct all kinds of examinations of the cases they are dealing with on their own. The provision shows that the administrative trial procedure is dominated by the principles of written trial and *ex officio* review.

In cases where the principle of *ex officio* review is valid, the parties do not have the burden of subjective proof, and the court is not bound by the case material submitted by the parties. If the court deems it necessary, it may conduct research to confirm the accuracy of even non-controversial issues in the case or complete the deficiencies in the evidence. It is not possible to reject the case due to a lack of evidence. However, the judge is



always bound by the request stated in the petition.

A copy of the lawsuit petition and its annexes are notified to the defendant, and the defense petition of the defendant is notified to the plaintiff. The plaintiff's second petition is notified to the defendant, and the defendant's second defense is notified to the plaintiff. The plaintiff cannot respond to this. However, if it is understood that there are issues in the defendant's second defense that require the plaintiff to answer, the plaintiff is given a period of time to respond.

Third-party intervention is possible for those who consider that their interests or rights might be affected by the outcome of the case.

In the courts, a president and two members take part in the deliberations. The president of the court or chamber directs the deliberations. The decisions shall be taken by majority; dissenting opinions are placed in the judgment. There is no difference between lower and higher jurisdictions. All disputes brought before the Council of State are dealt with by a committee of judges.

The Act on the Establishment and Duties of Regional Administrative Courts, Administrative Courts, and Tax Courts (Act No. 2576) provides that actions of annulment and full remedy, the disputed amount of which does not exceed a certain limit, shall be reviewed by a single judge.

According to Article 25 of PAJA No. 2577, a copy of the judgment, certified by the seal of the court and the signature of the president or the judge, head of the chamber or the board, or a member to

be assigned in the Council of State, shall be sent to the parties; judgments are not delivered orally.

#### **D. Emergency Proceedings.**

Pursuant to Articles 20/A and 20/B of PAJA No. 2577, urgent trial procedures are applied to disputes arising from the transactions listed below:

- a) Procurement proceedings except for the decisions for prohibition from procurement
- b) Urgent expropriation proceedings
- c) Privatization High Council decisions.
- d) Sales, allocation, and rental transactions carried out in accordance with the Tourism Encouragement Law.
- e) In accordance with the Environmental Law, decisions taken as a result of an environmental impact assessment are excluded from administrative sanction decisions.
- f) Presidential decisions taken in accordance with the Law on the Transformation of Areas at Disaster Risk.
- g) Procedure for central and common exams.

These are exceptional and accelerated procedures aimed at shortening the periods according to the general judicial procedure in cases of urgency. There are also special arrangements for these procedures, especially in terms of shortening the periods during the appeal stage.

#### **E. Hearings.**

According to PAJA No. 2577, hearings



are open to the public; in cases where public morality or public security require it, all or part of the hearings are held in closed sessions by the decision of the court. The representatives of the defendant administration and the plaintiffs themselves, or their legal representatives, can take part in the hearing.

**F. Effects of Decisions and Execution of Judgement.**

In compliance with Article 138 of the Constitution, legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect nor delay their execution.

As stated by PAJA No. 2577, the administration must establish a procedure or take action without delay as required by the judgments and stay of execution decisions of the Council of State, regional administrative courts, and administrative and tax courts. The burden of execution is imposed on the administrative body that enacted the contested act. This period may not exceed thirty days starting from the notification of the decision to the administration under any circumstances.

Decisions of annulment related to regulatory acts and decisions on the unification of conflicting judgments of the Council of State both have *erga omnes* character. Decisions on individual acts produce effects for the parties; settled case law is applied as *stare decisis* by the judiciary and can be relied upon by the parties.

If the judgments of the court are not fulfilled by the public officials within the given period of time, an action for

compensation can be filed only against the relevant administration.

**G. Publicize Judgment and Communicate with The Public.**

The Ministry of Justice, the Council of State, and other high courts have their own websites. Some subordinate courts also share information with the public on their own web sites. The Council of State's data bank, which consists of approximately 25,000 precedent judgments, is open to the public on the website.

Besides, every important judgment of the Court that may require public attention is also published on the web.

**H. Alternative solutions.**

Amendments made to Articles 47, 125, and 155 of the Constitution, concession contracts, and agreements relating to public services may provide for the resolution of disputes arising from those at national or international arbitration, and only disputes containing a foreign element may be referred to international arbitration.

Except for this, rather than conventional procedures such as mediation, conciliation, etc., certain administrative remedies provided for in separate laws (Customs Law No. 4458, Expropriation Law No. 2942, Procedural Tax Law No. 213, etc.) are associated with alternative dispute resolution procedures.

Regulatory and Supervisory Public Authorities, which are independent administrative authorities authorized to make executive decisions in the name of the state with respect to regulation and supervision duties relating to sensitive areas of public life such as capital markets, competition, energy, tenders, radio and



television broadcasting, and banking services, are also authorized to settle disputes arising with respect to their area of activity through administrative decision without such disputes being referred to law courts. The decisions made by such authorities are not judicial decisions, but rather administrative decisions and are subject to judicial review.

The Ombudsman Institution has been established by Act No. 6328. The Ombudsman Institution, which is attached to the Turkish Grand National Assembly, has legal personality. It has the right to examine the allegations of violations of the right to equal treatment, discrimination, torture, and ill-treatment on the basis of the application. However, it does not provide an alternative solution to administrative justice.

### V. Legislative perspective

Every modern legal order needs a set of general rules to apply and enforce administrative law. The rules impose principles of acts, procedures, and organization of the authorities. The legal basis of these rules may be quite diverse.

In many countries, including Türkiye, fundamental principles that bind the administration are laid down in the Constitution. Some countries have tried to codify administrative law, while others work with few rules or unwritten rules. So it can be said that there are clearly different degrees of codification of administrative law.

In Türkiye, administrative law is a branch of public law and status law. Administrative law is generally not codified; it is a jurisprudential and dynamic branch

of law. Administrative law is not static; it is in constant change and development. From this perspective, court precedents and interpretations arising from administrative law fulfill an important function in resolving disputes. With this approach, a solution will be found to the silence of the current legal regulations regarding concrete events, and the gaps that may exist between written legal rules and general principles of law will be eliminated.

In Türkiye, case law has an important place in the codifications made in the field of administrative law. While working in such an area, some answers were needed to an important question about the contribution of codification to increasing predictability and legal certainty. The principles in the decisions that have become jurisprudence for many years find a place in general regulations, such as laws, or secondary regulations, such as regulations over time.

Of course, some areas of administrative law are not suitable for codification. Codification can mean, on the one hand, a mere consolidation of existing rules or, on the other hand, an innovative, substantial reform.

#### Improvement Opportunities

From a legislative reform perspective, it has been strongly argued that the Procedure of Administrative Justice Act (PAJA No. 2577) needs to be completely re-drafted. Although many amendments have been made over time, it is crucial to prepare a document that includes these amendments based on a holistic approach and will gather all procedural actions as much as it can within a single law in accordance with the principles of written proceedings.

In this situation, it is possible to say that the deficiencies in procedure law are the primary factor in the administrative justice process being prolonged.

It has also been suggested that modernization of the procedure law could include greater specialization according to the nature of the dispute. For example, given the complexity of zoning cases in terms of hearings and expert assignments, special procedures for these types of cases should be introduced. Procedures related to tax cases could also be developed in more detail to avoid ambiguity.

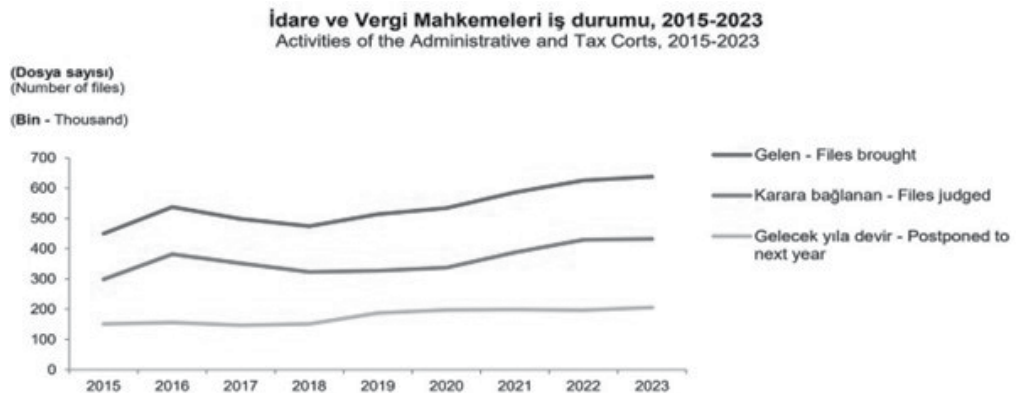
Another issue is the implementation of decisions by administrative authorities. The Constitution ensures that administrative authorities should implement judicial decisions within a reasonable period of time. However, in order to give full effect to these decisions, a legislative initiative is needed. Thus, in cases of non-implementation by an administrative authority of a judicial decision, an appropriate procedure should be provided to seek execution of that decision.

Though administrative authorities are held liable if they refuse or neglect to implement court decisions, there is no exact law that forms the procedures for how to implement them. Public officials in charge of the implementation of judicial decisions are also held individually liable in disciplinary or criminal proceedings if they fail to implement them. Still, it is a problem what kind of procedures have to be followed.

Finally, there is a need to work on facilitating the resolution of administrative disputes with alternative procedures and alleviating the workload in the administrative judiciary by introducing new alternative dispute resolution methods to the Turkish legal system.

The features of these procedures are counted as the principle of discretion, provision of flexibility in direction of the agreement and decision-making process, mutual dialogue, principle of confidentiality and as being cost-efficient and these features are emphasized to be the essential differences between alternative and judicial procedures.

## Annex: ADMINISTRATION OF JUSTICE AND STATISTIC DATA



When the working trend of the administrative courts (administrative and tax courts) in the last nine years is examined, an increase is observed in the total number of files brought (transferred from last year, filed within the year and

reversal by the Council of State). While the number of files brought to administrative jurisdiction courts was 449 725 in 2015, it reached 637 956 in

2023, with an increase of 41,9%.

#### Adalet sistemi evrelerine ilişkin bir dosyanın ortalama görülme süresi, Gün, 2015-2023

Average duration of a file regarding to the stages of justice system, Day, 2015-2023

	2015	2016	2017	2018	2019	2020	2021	2022	2023
İdare ve Vergi Mahkemeleri - Administrative and Tax Courts	173	146	160	167	179	205	186	169	168
Bölge İdare Mahkemeleri - Regional Administrative Courts	27	61	64	70	87	126	141	151	168
Danıştay - Council of State	381	359	749	579	464	668	462	540	377

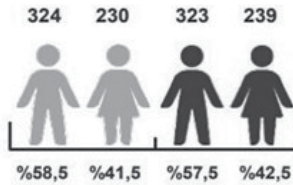
#### Adalet teşkilâtı hâkim ve savcı sayıları, 2022-2023

Numbers of judges and prosecutors in the organization, 2022-2023

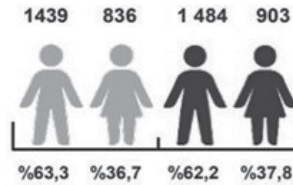


#### Hâkim sayıları

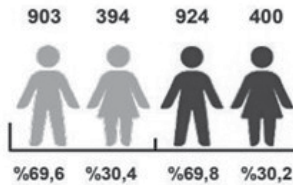
Numbers of judges



#### Danıştay Council of State



#### Bölge Adliye Mahkemeleri Regional Courts of Justice



#### İdare ve Vergi Mahkemeleri Administrative and Tax Courts



#### Merkez Teşkilâtı Central Organization





**EXECUTIVE  
PERSPECTIVE:  
PRACTICAL ISSUES  
IN ENFORCEMENT  
OF ADMINISTRATIVE  
AUTHORITY**

## **ADMINISTRATIVE DECISION-MAKING: CURRENT STATE OF LEGAL IMPLEMENTATION, PROBLEMS AND SOLUTIONS**

**Sunjid Dugar<sup>1</sup>**

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<sup>1</sup> Associate Professor, Chair, National Human Rights Commission of Mongolia, (Ph.D.).



## ADMINISTRATIVE DECISION-MAKING: CURRENT STATE OF LEGAL IMPLEMENTATION, PROBLEMS AND SOLUTIONS

**SUNJID DUGAR,**

*Associate Professor, Chair, National Human Rights Commission of Mongolia, (Ph.D.).*

### I. Principle of rule of law

The 1992 Constitution of Mongolia established the principle of separation of powers, dividing legislative, executive, and judicial authorities. This reinforced the fundamental concept that each branch must operate within the legal mandates assigned to it. The implementation of state activities within the framework of the rule of law, as outlined in Article 1.2 of the Constitution of Mongolia, reflects the core principle of the rule of law. These principles are categorized into two types: substantive principles and formal principles.<sup>1</sup> Main elements of the formal principles include following principles - adherence to the law by government organizations and government officials, judicial impartiality and separation of state power. The principle of a substantive legal state is the recognition of fundamental human rights and freedoms under the law. This principle is characterized by the fact that not only administrative bodies but also legislators themselves are directly bound by it.

It is emphasized that the mutual control and influence of state powers must remain within the bounds of the law.

Limiting the concentration of state power in the hands of a single institution helps to prevent the abuse of power. To achieve this, it is essential to implement a system where state institutions monitor and hold each other accountable. (Articles 20, 25.1, 38.1, 38.2, 41.1, 47.1 of the Constitution of Mongolia) In short, it aims to create a guarantee for the protection of human rights by neutralizing the centralization of state power in a rule of law. Effect of the rule of law principle is recognized as the distribution of powers among state institutions and organizations according to their functions, the procedures for public participation in decision-making, and the regulation of amendments to the Constitution. The principle of the rule of law shall be interpreted and applied in conjunction with the principles of democracy, justice, equality, human rights, freedom, and securing a national unity stipulated in Article 1.2 of the Constitution of Mongolia.

The state executive authority carries out functions that cover all aspects of life. In this context, there are no sectors or areas that are not covered, such as economic, social security, health, legal, education, agriculture, farming, food, production,

<sup>1</sup> Hanns Seidel Foundation, *Administrative Proceedings in Mongolia: Handbook for Judges*. 2004, 111.



services, construction, and energy. Therefore, the administrative organization, which has the main responsibility of implementing the executive power of the state and enforcing the law, has its own characteristics, and according to the principle of decentralization of state power... to fulfill the state law and manage the economic, social and cultural development?... administrative bodies enjoy the power to "set the norm". For example, it established administrative normative acts of which the enforcement is binding by the public and such norms established by the administrative organization must meet legal requirements such as being based on the law, approved by the subject authorized by the law, and not setting norms that violate the provisions of the law or exceed the law. Moreover, in accordance with the administrative dispute preliminary resolution procedure, complaints regarding administrative acts would be filed to the upper level administrative body/official or to the administrative body which made the decision.<sup>3</sup> Thus, when handling complaints, the above-mentioned administrative organization also enjoys a certain amount of "control" or the right to review the disputed act. In addition, the fact that an administrative organization has powers and structures defined by law, has employees, a budget, and the power to make decisions increases the possibility of excess or abuse of power by the executive authority of the state. The need to "control" naturally arises. Because there are four types of control: diversified, domestic, public and judicial. The court reviews whether a decision is

<sup>2</sup> Constitution of Mongolia (1992), art. 38.2.

<sup>3</sup> General Administrative Law (2015), art. 92-99, Law on Administrative Procedure (2016), art. 54.1.3.

made in compliance with the principle of adherence to the law and bound by the mandate provided by law.

## II. Concept and importance of General Administrative Law

The law regulating the unified relations of administrative activities should play an important role in the practical implementation of the provision "... the rule of law is the fundamental principle of activities of the state" stipulated in Article 1.2 of the Constitution of Mongolia. According to the concept of the GAL<sup>4</sup> mentioned that for more than 20 years since the adoption of the Constitution of 1992, the lack of the fundamental law governing administrative organizations-one that integrates the operational rules of state executive authorities and ensures coordination among them-resulted in administrative activities that were often inconsistent, incoherent, and arbitrary.

Out of the 420<sup>5</sup> laws currently in force in Mongolia, 250 grant administrative organizations and officials the authority to make decisions within their designated mandates. However, these laws lack provisions that establish fundamental principles, general rules, and obligations for decision-making within the legal mandate. As a result, executive authorities and officials often make arbitrary decisions that restrict citizens' constitutional rights and, in the process of implementing the law, violate human rights, freedoms, and legal interests. There is no clear understanding or regulation on how the principles of separation of powers, the rule of law, equal

<sup>4</sup> Ministry of Justice and Home Affairs, *Concept of the General Administrative Law*, 2016.

<sup>5</sup> Ibid.



rights, and the protection of violated rights through fair judicial processes should be reflected in the activities of administrative organizations and officials, or how these principles should be implemented.

Therefore, by establishing fundamental law that regulates administrative activities, it would coordinate administrative activities in a unified manner, establish a preliminary dispute resolution procedure, create legal basis to follow in proceeding administrative disputes for administrative organizations and courts, standardize administrative procedures, regulate relations to prevent violations of human rights, freedoms, and legal interests, and set a common standard for basic communication between administrative organizations and citizens as proposed by the concept of the law. Following eight issues were reflected into the concept of the law as identified by the working group.<sup>6</sup>

1.To establish standards for the relationship between administrative organizations and citizens.

2.To make more accessible administrative services to citizens, reducing bureaucracy, corruption, and arbitrariness, while minimizing unnecessary procedures. Before making decisions that affect citizens' rights and legitimate interests, the administration will seek public input, consider their views, and uphold legal trust.

3.Administrative decisions would be made based on legal grounds, ensuring that they are justified by applicable laws and regulations. Relevant research,

important conditions, and legal grounds will be considered. When making an administrative decision, the administrative body is responsible for taking the necessary actions and thoroughly examining the evidence.

4.To regulate the principle of decision-making and basic relations of activities of the administrative organizations. To create an administration that serves its citizens by ensuring the rule of law, a fundamental principle of the activities of the state, would include any activities from the administration to the citizens must be bound by law and on the other hand, any decisions by the administrative organizations that affect the legitimate interest of the citizens must be based and justified on the law.

5.An administrative organization that is not specified by law will not issue administrative normative acts.

6.Administrative agreement shall be determined by law.

7.Administrative decisions (administrative acts, administrative norms acts, administrative agreements) are subject to full control.

8.Administrative officials are accountable for illegal decisions.

The significance of the General Administration Law lies in setting minimum standards and safeguards for administrative organizations wielding substantial state power, ensuring transparency and clarity for both citizens and the administration. In other words, it will establish the "rules of the game" for interactions between the administration and citizens.

<sup>6</sup> Tsogt.Ts., "General administrative law: development stage, concept, implementation, expected impact," legaldata.mn, 2019, 21-22, <https://legaldata.mn/buteel/pdf?id=652>.

### POSITIVE IMPACT OF THE GENERAL ADMINISTRATIVE LAW<sup>7</sup>

Administrative organizations	Citizen, Legal entity
<ul style="list-style-type: none"><li>- Administrative activities will become more transparent and easier to comprehend.</li><li>- Law implementation will be improved.</li></ul>	
<ul style="list-style-type: none"><li>- Common administrative standard is set;</li><li>- Operational principle becomes clear;</li><li>- Rights and obligations become clear;</li><li>- Administration will become more responsible for their action;</li><li>- Administration will be under control of the law.</li></ul>	<ul style="list-style-type: none"><li>- Become more closer to citizens;</li><li>- Inform to citizen;</li><li>- Listen to citizen;</li><li>- Ensure citizens' participation;</li><li>- Citizens' trust in administration will improve.</li></ul>

### III. New regulations of the General Administrative Law

The law aimed to constitute basic legal rules to be applied in the activities of the administrative body /Article 1/ when communicating with citizens and legal entities by means of issuing administrative act /Chapter 4/ and administrative normative act /Chapter 6/, and concluding administrative agreement /Chapter 5/.

Article 4 defines the scope of application of the general administrative law, determines the order of applicable legislation, and specifies eight separate principles to be followed in administrative activities. Following new principles, namely, to be based on law, in making administrative decisions that may affect the rights and lawful interests of others, authorities must notify those affected in

<sup>7</sup> Sunjid.D., *General Administrative Law: Concept and Application*, Handbook, 2017.

advance and ensure their participation to protect their legal interests, to protect legal faith, to be effective, to be consistent with its purpose and actual conditions, and its decision must be fully justified were added to the law when making a decision by any administrative bodies.

In particular, this concept, "Proportionality" in English, "Verhältnismäßigkeit" in German, which can be understood as considering and deciding if it is balanced and appropriate decision, is expressed that the administrative decision and administrative activities must be necessary, appropriate and balanced in relation to the goal being pursued.<sup>8</sup>

The scope of subjects belonging to administrative organizations has been broadened beyond the framework of previously applicable legal provisions. Section 5.1 outlines the characteristics of these subjects, while Section 5.2 defines the individual or organization responsible for the consequences of decisions made by non-permanent administrative bodies. This regulation represents a new amendment to the law.

Substantive requirements to issue administrative acts /Article 37, 39, 40/, administrative normative acts /Article 59, 60.1/, and administrative agreements /Article 52, 53/ were set forth in the law and procedural requirements to issue these acts were identified in the Chapter 3, Article 38, Article 41-49, Article 54-58, Article 61-72 in the law.

The General Administrative Law introduces new regulations governing

<sup>8</sup> Sunjid.D., Hanns Seidel Foundation, *Interpretation on the General Administrative Law of Mongolia*, 2017, 54-62.



the relationship between the planning and implementation of administrative decisions. This emphasizes the importance of comprehensive planning, organization, and the prompt execution of administrative decisions.

The law further elaborates provisions related with preliminary resolution of complaints, compensation for damages caused by the administrative decisions and accountability of officials who made those decisions.

#### **IV. Amendments to the General Administrative Law**

Since its implementation on July 1, 2016, the law has been amended 16 times. Legal terms and other relevant changes mostly made to the law due to the changes and amendments to the other relevant laws including the Law on State and Official Secrets, the Law on Standardization, Technical Regulation, Conformity Assessment Accreditation, the Law on Infringement Procedure, the General Tax Law, the Law on the National Human Rights Commission of Mongolia, the Law on Protection of Personal Information, the Law on Transparency of Public Information, the Law on Public-Private Partnership, and the Law on Courts.

However, General Administrative Law was amended to include five chapters of regulations with special substantive and procedural significance. I would like to elaborate further the contents of these changes below.

1. In 2017, with the adoption of the Law on Infringement Procedure, "infringement procedure" was added to Article 3, Clause 3.1.4, which outlined relations where the

law was not applicable. However, in 2019, following a ruling by the Constitutional Court, this provision was amended and removed due to its violation of the Constitution. In Clause 3.1.7 of the same Article, it was changed to "Government decision with purpose to implement political decision of the Parliament of Mongolia" and explained "decision with purpose to implement political decision" as the Government decision, inseparable from the decision of the Parliament, and its purpose is to implement the decision of the Parliament that is made within its special power provided by the article 25 of the Constitution of Mongolia and determines state external, internal policy. The veto of the President of Mongolia was accepted as a whole in the Law on Amendments to the General Administrative Law approved by the Parliament on May 9, 2019. Discussions were held regarding which government decisions fall under the jurisdiction of the administrative court and which are subject to review by the Constitutional Court. The discussions referenced the government's decision to schedule a regional horse race and the sale of shares owned by the Russian Federation in Erdenet Mining Corporation to a legal entity by government decision. Additionally, the explanation of Clause 3.1.7 of the General Administrative Law (GAL) has been amended and explained. Article 3.4 was revised correctly while Article 3.3 which states "This law shall regulate the relations other than those regulated the activities of administrative body under separate law" in the first version was revoked in later revision.

2. Article 5 of the law identified administrative bodies and Clause 5.3



further clarified that “the Constitutional Court of Mongolia, the National Human Rights Commission of Mongolia, all levels of courts, and prosecutors shall be deemed as an administrative body in connection to their decisions made within their administrative functions whilst decisions made under their exclusive mandates to review crimes and legal disputes, in accordance with the powers prescribed by law, shall not be regarded as administrative decisions.” This clause was amended twice. The final version was amended by the law dated on May 16, 2024, and will be enforced from the day of the first session of the Parliament established by the 2024 regular election of the Parliament.

3. Article 37.1 of Article 37, which defines an administrative act, states that “Administrative act means a verbal and written order or action issued by an administrative body to regulate a specific case within the framework of public law, which has direct outward legal consequences” and the 15th conclusion of the Constitutional Court, dated November 21, 2018, ruled that the section “other than infringement procedures” violated the Constitution which was recognized by Resolution No. 88 of the Parliament of Mongolia dated December 6, 2018, and the clause was left as the first approved version.

4. Clause 47.1.6 of Article 47, which defines cases of the obvious illegality of an administrative act, previously stated that ‘there was no legal basis for encroachment on the rights and legal interests of citizens and legal entities.’ However, this phrasing caused ambiguity regarding whether claims,

even if past the statute of limitations, could be appealed to the court on this basis. After legal review, the provision was revised to: ‘there was no legal basis for issuing the administrative act.’

5. Clause 59.1 of Article 59 regarding administrative normative acts uses the term ‘directed outward.’ This is explained as referring to actions or decisions that have legal consequences for citizens and legal entities, in contrast to those concerning only the internal organization and regulation of the organization. Clauses 60.3-60.6 of the Article 60 were added as well. 60.3. In case of renewal or amendment of the act of administrative norms, transitional regulations may be included if it is deemed necessary to protect the rights and interests of the person whose rights and obligations arise according to the act of administrative norms. 60.4. Acts of administrative norms shall not be applied retroactively, except as specifically provided by law. 60.5. When making changes to the act of administrative norms, it shall be included in the original text of the act of administrative norms. 60.6. In the event of the revocation or revision of the law authorizing the adoption of an administrative normative act, or if there are changes to the content of the authorized provision, a draft administrative normative act must be developed concurrently in accordance with the Law on Legislation. Clause 62.3.1 of Article 62 was revoked. Article 64, Clause 64.2 states that “Acts of administrative norms approved by the President and the Government /Government Resolutions/ shall be submitted to the Parliament.” Article 64.6: “Acts of administrative norms approved by the People’s Representative



Council shall be submitted to the competent authority for review and registration within five working days after the end of the veto period specified in the Governor's law." Article 67, Clause 67.1 Comment: In the "Compendium of Administrative Normative Acts", the full text of the administrative normative act of up to 40 pages, and in the case of the administrative normative act of more than 40 pages, the decision approving the administrative normative act is placed in the unified legal database. If the administrative organization that approved the administrative normative act with more than 40 pages makes a request, it can be published in full in the "Administrative Normative Acts' Compilation" at the expense of that organization. Article 67.2 states that "The administrative normative act shall come into force upon its publication in accordance with Article 67.1 of this law." The period of effective date may be specified differently in the administrative normative act.

## V. Administrative decision-making and current state of law implementation

A. The GAL Implementation Impact Study Report<sup>9</sup> identified several common violations and cases of non-implementation. Notably, as of 2018, 34 first-instance court cases were decided based on Clause 4.2.6 of Article 4 of the GAL, with the majority concluding that the administrative organizations had failed to adhere to this principle. This suggests that the principle outlined in Clause 4.2.6 of Article 4 of the GAL may not be effectively implemented, potentially due to a lack of thorough

understanding of its content, along with other related legal provisions. The report further noted that to effectively implement Article 8.1 of this chapter in practice, it is essential to improve coordination among the relevant legislation and clarify the substantive laws which includes specifying the circumstances and legal grounds under which an authorized person may transfer powers explicitly granted by law to others.

Moreover, Article 13.1 of the law has not been sufficiently implemented in practice. This is due in part to the lack of initiative by the authorities and their weak commitment to effective implementation of the law. On the other hand, officials have expressed that ensuring the rights of participants in the decision-making process also leads to increase in the organizational expenses. Therefore, it is necessary to analyze the annual report of the organization and determine the reasons for the difficulties in the implementation of the provision.

Article 24.1 and 24.5 of the law have not been implemented adequately in practice. There is a lack of understanding regarding the evidence relevant to the decision-making process, particularly the need to evaluate such evidence through a research-based, analytical, and estimation-driven approach. The procedural activities outlined in Articles 24.1 to 24.5 of the law are not being carried out by administrative bodies, particularly in disputes related to land.

When examining the indicators of the objectives of the evaluated sections and clauses, it becomes evident that the provisions of the law are not being applied at all, despite there still being practical

<sup>9</sup> Legal Education Academy, Hanns Seidel Foundation, *Evaluation Report on the Effects of Implementation of the General Administrative Law*, 2018.



consequences. This includes Articles 11.4, 13.4, 24, 25, 27.3, 27.7, 28.2, 32, and 33 of the GAL, respectively. This is not due to the lack of understanding and non-applicability of the provisions of the law, but to the lack of initiative and the will of the administrative authorities to implement them. For example, the collection and evaluation of the evidence specified in the GAL specified in Article 25 of the GAL is not being carried out sufficiently by the administrative organizations. It is observed that sufficient evidence is not provided for administrative decisions, with evidence being gathered solely through opinions from citizens. A review of decisions reveals a lack of research, analysis, or methodology to assess the actual situation. No experiments are conducted, and administrative decisions are made solely through meetings at the workplace.

Research indicates that, in practice, administrative bodies are not familiar with or do not understand Articles 37.7, 48, 49, and 50 of the GAL. Therefore, it is essential to clarify the legal regulations in this area.

The legalization of the concept of administrative agreements is significant. In practice, administrative bodies are using administrative agreements to perform their functions. However, the provisions of the GAL concerning administrative agreements are rarely applied to these agreements.

With regard to the administrative norms stipulated in Article 59 of the GAL, there is the right of independent decision-making granted by the Constitution to the People's Representative Assembly and the functions delegated to it by law. Therefore, it is necessary to distinguish between these two

characteristics of the act of administrative norms issued by the Assembly and apply this provision of the GAL. It was believed that the provisions of Article 59 and 60 of the Law on the Rights of the People's Representative Assembly, which were included in the study, contradicted the provisions of Section 2 of Article 62 of the Constitution, or the mandate of the People's Representative Assembly.

The purpose of legalizing the execution of administrative decisions, as outlined in the Chapter 8 of the GAL, is significant. However, based on the situation of the researched organization, the regulation regarding the execution of GAL decisions is not applied in practice. Furthermore, the reason the GAL's decision execution regulation does not achieve its intended goals is that the administrative body is unaware of this provision. Since the GAL came into force, there have been no disputes regarding decision execution, and court rulings on this matter have been infrequent. It is proposed to clarify that the regulation in the Chapter 8 of the GAL aims to define the procedure for executing all types of administrative decisions. In this context, it is suggested to amend the sections that focus on administrative acts.

In practice, the regulation of the Chapter 9 of the GAL is not effectively applied in higher level organizations, except for the organizations with specific purpose is to handle complaints of the GAL. The reason why the regulation of this chapter of the law does not fully achieve its goal is that there are many parallel legal regulations and insufficient manpower, budget and time for handling complaints.



Failure to solve the problem of making the state not financially burdened is leading to an increased number of irresponsible decisions of the public officials which results in a higher risk of harming citizens and legal entities. Thereby, the process or provision to compensate any damages resulting from the decision made by officials back to the state must be implemented in reality.

Some articles and clauses of the General Administrative Law regulating relations related to damages and compensation should be amended and legislated in a more transparent way (for example, sections 39.1 of the Civil Service Law and 239.4 of the Customs Law should be harmonized with Section 103.1 of the GAL) and it is necessary to ensure coherence between legislation (for instance, 104.2-104.4 of the GAL) which lacks sufficient regulation to decide the real-life scenario. It reported that the implementation of the law related with the compensation related to the loss incurred to citizens and legal entities caused by the legal operations of the administrative body is insufficient and unclear, the concept is too broad to understand and implement. Since the implementation of the General Administrative Law, there has been no comprehensive calculation or research on how to compensate "loss caused to citizens and legal entities by the lawful activities of administrative organizations". Therefore, we are submitting recommendations such as improving administrative legal regulations and drafting relevant legislation. There are no court rulings under the Article 107 of the GAL presently.

**B.** "Comparative study of the theory of determining the scope and limits of

the provisions on the transfer of the right to set standards to be generally followed by law to administrative bodies, and the interrelationship between acts of law and standards" report carried out under the request of the MOJHA in April 2024, it was informed that 437 laws are permanently in force, 2,357 acts of administrative norms are registered in the state registration, and 850 acts of administrative norms are not registered in the state registration.<sup>10</sup> A total of 305 laws of Mongolia have given the right to approve acts of administrative norms through its 2503 clauses. According to the conclusion of the policy research team, it is appropriate to legislate the requirement to transfer the right to set norms through the Law on Legislation. The number of laws being passed without clear provisions on procedural regulations and without defining the scope of authorization has been increasing. As a result, there is a growing tendency to fill these gaps through the approval of administrative normative acts. However, this approach leads to inconsistencies between administrative normative acts and creates opportunities for issuing such acts arbitrarily, as well as a lack of monitoring and accountability. If this situation is not addressed, human rights violations may increase and the principle of separation of powers outlined in the Constitution may be affected.

On the one hand, there is a violation of establishing and enforcing an administrative normative act on matters not specifically authorized by law, and on the other hand, there is a violation of the rights of people

<sup>10</sup> Ministry of Justice and Home Affairs, National Human Rights Commission, "Administrative Norms Act and Human Rights" (Ulaanbaatar, Mongolia, Apr 24, 2024).



and legal entities due to non-approval or non-action of administrative normative acts on matters authorized by law. For example, according to Article 5.2 of the Law on Water Contamination Fees adopted in 2012, "The state central administrative body in charge of environmental issues shall approve the procedure on setting amounts of contaminants in wastewater and method of calculation based on the volume of wastewater and content of contaminants in cooperation with the state central administrative body in charge of finance issues", however, this procedure remained unapproved for nine years. In 2019, an NGO filed a public interest claim in court, arguing that approximately 8 billion MNT could have been collected annually if the procedure had been implemented. The procedure was finally approved in 2021 through a joint order by the Minister of Environment and Tourism and the Minister of Finance.<sup>11</sup>

**C.** Administrative decisions are intended to be based on legal principles. However, due to the duplication of laws and violations of legal provisions, issues in applying the law arise, which can result in the infringement of the interests of individuals, legal entities, and the public. For example, according to the 2023 National Audit Office's "Compliance, Effectiveness, and Land Allocation of the Law on Specially Protected Areas" performance audit report, the following violations were identified. Parliament Resolution No. 23 of 2013, City Council Resolution No. 198 of 2015, Resolution No. 60 of 2013 of

the National Council for Standardization were all approved in violation of provisions regarding the protection of biological diversity of Article 6 and Article 21 of the Convention on Biological Diversity of which Mongolia becomes a party as well as the Law on Specially Protected Areas. Amendments to Parliament Resolution No. 23 of 2013, City Council Resolution No. 198 of 2015, and the MNS6426:2013 standard approved by the National Council for Standardization allowed the construction of high-rise apartments, houses, and office buildings for citizens and legal entities within the restricted area of the Bogdkhan Mountain Strictly Protected Area.<sup>12</sup> As of 2022, this area included 2,207 houses, 2,207 residential apartments, 349 public apartments, 2,556 residential apartments, 25 tourist camps, and a population of 43,050.

However, due to the lack of specific regulations regarding the criteria and selection for granting land use permits to citizens and legal entities in the permitted areas of specially protected areas, "fairness and equity shall be ensured with respect to ownership, possession and use of land" principle outlined in the Article 4.1.3 of the Land Law is not achieved.

The Ministry of Environment and Tourism stipulated that certain parts of Protected Areas and National Parks could be used by citizens and legal entities based on contracts. However, the governors of provinces, the capital, and districts exceeded their authority by issuing possession certificates to 967 citizens and legal entities, and ownership certificates to

<sup>11</sup> Minister of Environment and Tourism and Minister of Finance, *Order No. A/406/226, December 23, 2021*. <https://legalinfo.mn/mn/detail?lawId=16389922967291>.

<sup>12</sup> National Audit Office, *Compliance, Effectiveness and Allocation of Protected Areas Law: Performance Audit Report, 2023*, 16.



1,293 citizens and legal entities. This action violates the regulations of the restricted zone and oversteps the rights outlined in the Law on Specially Protected Areas.

There is a discrepancy between research and data on citizens and legal entities using land by organizations such as the Ministry of Environment and Tourism, the General Department of Taxation, the Department of Land Management, Geodesy, Cartography, and the Department of Capital and District Land Management. It is related to the inconsistency of the work in implementing the activities specified in 4.1.1 of Article 4, 9.1. of Article 9, 23.2.21. of Article 23, and 26.2. of Article 26 of the Law on Land, and insufficient fulfillment of the legal obligations.

In Bogdkhan Mountain Strictly Protected Area, the Ministry of Environment and Tourism and Capital and district governors have granted land to 2,286 citizens and legal entities, and as of 2022, 42 legal entities are operating in accordance with their intended purpose, primarily in the fields of travel and tourism.

Due to the insufficient implementation of the Law on Specially Protected Areas, residential areas have been created in protected areas, and the goal of environmental reservation has not been achieved.

Some provisions of the Law on Specially Protected Areas are not drafted in a clear and understandable way. It is necessary to create a legal regulation to notify to the Ministry of Environment and Tourism of changes in the state register of legal entities operating in specially protected

areas.<sup>13</sup>

**D.** There are violations in which the administrative bodies do not properly implement the law.

As stated in the report on the assessment of the consequences of the implementation of the General Administrative Law, about 1,000 claims are submitted to the administrative courts per year, and 50 percent of the claims were upheld. The main grounds for the court to invalidate the decision of an administrative organization as illegal are violation of decision-making procedures, failure to meet legal requirements, violation of notification and registration procedures, and non-application of legal regulations. For example, during city planning, it was not determined whether the land affected by the planning had an existing owner. Decisions were made without securing any agreement with the landowner regarding replacement or compensation for the land.

Another example:<sup>14</sup> where the plaintiff has the right to use land adjacent to and surrounding the land of other parties who still hold usage rights and are actively operating, the surrounding area has been entirely developed into a public settlement zone. The plaintiff's 5 hectares of land, located in the midst of this developed zone,

<sup>13</sup> Court decision number: 128/ШШШ2021/0728, 2021.11.04 Requirements of the claim: Partial plan of Industrial-4-unit neighbourhood in the eastern zone of the general planning of Ulaanbaatar city, approved by clause 1.10 of Resolution No. 63 dated April 18, 2017 cancelling the planned part of the highway alignment coinciding with the plaintiffs' property, [https://shuukh.mn/single\\_case/8461?start\\_date=&end\\_date=&id=1&court\\_cat=3&bb=1](https://shuukh.mn/single_case/8461?start_date=&end_date=&id=1&court_cat=3&bb=1).

<sup>14</sup> Court decision number: 221/MA2020/0167, 2020.03.04, [https://shuukh.mn/single\\_case/3358?start\\_date=&end\\_date=&id=2&court\\_cat=3&bb=1](https://shuukh.mn/single_case/3358?start_date=&end_date=&id=2&court_cat=3&bb=1)



cannot realistically be restored to its natural state or have its use revoked without causing negative impacts. Therefore, the argument that revoking the plaintiff's usage rights will restore the original natural appearance, eliminate negative effects, and protect the interests of other citizens or the public is unrealistic and unfeasible. Consequently, the disputed act did not achieve its intended purpose and did not align with the actual conditions. Thus, the court of first instance's conclusion regarding non-compliance with the principles of administrative action specified in Article 4.2 of the General Administrative Law is reasonable. Additionally, according to Resolution No. 23 of 2013 by Parliament, the general plan for the development of Ulaanbaatar until 2020 and the development trend document until 2030 were approved. This plan designated the New Yarmag area as a residential and public business zone, leading to the cancellation of its protected area status within the "Artsat am" nature reserve. Resolution No. 198 of 2015 by the Assembly of Representatives of the Capital, which pertains to the zone where the ban was lifted, approved the general plan and partial plans for certain locations in accordance with the aforementioned development plans. The Department of General Planning then approved the general plan for the 4th-10th and 16th khoros of Khan-Uul District, including the disputed land rights, designating the 4th khoroo as part of the "Artsat am" public residential area within the Bogdkhan Mountain Nature Reserve. As a result, the legal situation changed, removing the original legal violation of the act granting the plaintiff land use rights. However, the

controversial act has not been justified without considering these changes.

We can mention many such examples where law is not being applied uniformly or realistically.

During the pandemic of 2020-2022, the rights of citizens were violated due to illegal administrative decisions, for example, on December 7, 2020, a person who came from Arkhangai province to enter Ulaanbaatar through the "Emeelt" road transport inspection post on December 6, 2020, brought herself with a rapid test result indicating that she was not infected with the coronavirus. (There was no PCR test machine in Arkhangai Province) This means that she wasn't tested by the PCR but a rapid test and was in a bad health condition and had to be taken to a hospital for urgent medical care. Official letter No. 3581 dated December 5, 2020 of the Emergency Response Commission of the Capital directed the officers who were on duty at the post to allow only citizens who have not been infected with the coronavirus through the PCR test. Thus, due to the fact that there was only one mobile testing machine among the inspection post, and a total of 10 hours of waiting, the doctor was ordered to follow the instructions of letter No. 3581, which was not given permission by the Emergency Response Commission of the Capital, and a person's life was lost without receiving medical care.<sup>15</sup>

Following a decision by the Capital's Emergency Response Commission to resume commuting, the Emergency Response Commission of Dornogovi

<sup>15</sup> National Human Rights Commission, *20th report on the situation of human rights and freedoms in Mongolia*, 2021, 10.



province imposed additional restrictions, including prohibiting vehicles which passed other cities from entering the province. Meanwhile, the Minister of Education and Science permitted in-class practice sessions with up to 20 students, while the Governor of the Capital prohibited gatherings of more than five people. Officers and experts who were allowed to work during the general preparedness curfew were not permitted to travel by car without a QR code, and a pregnant woman on her way to the hospital to give birth was denied travel during the curfew. Additionally, when medical care for non-coronavirus-related conditions was needed, public transport was unavailable, and private vehicle movement was restricted, making it difficult to reach hospitals. For example, a cancer patient had to walk with his children to get to a check-up, and a mother had to walk a long distance carrying her baby to reach the hospital. In another instance, a citizen was told they couldn't pass through a roundabout near their home because the curfew had started.

A more recent example involves the "Digital Nation" event. The State Emergency Response Commission permitted the event in an official letter (No. 1325, dated August 27, 2021), but the Capital City Emergency Response Commission later prohibited the same event in a letter (No. 539, dated September 1, 2021). These are just a few examples of inconsistent decision-making.

In an official letter dated February 9, 2024, the Traffic Management Center, Locally Owned State Enterprise, informed the General Department of Development of People with Disabilities that, under

"Procedures for setting restrictions on the movement of vehicles" approved by the first appendix of the Decree No. 2020 A/1037 of the Governor of the Capital, cars carrying disabled children will not be subject to restrictions. Therefore, as of March 1, 2024, the unrestricted license plate issued to 382 vehicles will be canceled and deregistered. It remains unclear whether the real conditions and needs of parents with disabled children were properly assessed and considered.

It is doubtful whether the decision was made according to the actual conditions of the General Administrative Law and the situation was considered. There is a dispute over whether the permission to build a building on the bank of the river, which is called a "corrupt apartment" by the public, was legally granted, and whether the purpose for which the permission was originally granted was changed, but it has not been resolved to this day.

**E.** Cooperation and coordination between administrative organizations is weak.

A lack of coordination among administration remains a critical issue, in particular in the fields of land planning, construction, green zone, road, and lighting related rules and regulations.



**Case:** *On May 31, 2024, a mother of a child with autism shared on her social media about the difficulties in accessing state care services. She explained that her child first needs to be diagnosed by the National Mental Health Center, followed by checkups with a pediatrician and a mental health doctor at the district health center. The district mental health practitioner then issues a referral for care. However, the National Mental Health Center, despite providing the initial diagnosis, does not issue the necessary certificate for admission to care.*

*After receiving the referral, the mother must submit it to the Family Health Center, where a doctor is responsible for presenting the case at the monthly doctors' meeting, as outlined in the regulations. However, the date of this meeting, the required documents, and the procedures for discussion are unclear and not communicated.*

According to Article 3.1.19 of the Law on Education approved on May 3, 2002, "daycare service" refers to a service outside the school to provide a care, protection and growth of a child in a healthy and safe environment based on a contract between an educational institution and/or a citizen at the request of a parent or guardian. Section 18.5 of Article 18 stated that the general requirements for the service will be approved by the central state administrative organization in charge of education. General requirements for day care services have been approved by Order No. A/152 of the Minister of Education, Science and Sports dated March 27, 2020. However, the General Education Law approved in 2023 removed the aforementioned regulation and did not provide a provision on day

care services at all. Also, the order of the Minister of Education, Science and Sports No. A/152 was revoked. It is not clear which government agency will be in charge of overseeing the day care center.

During the pandemic of 2020-2022, the lack of understanding and uncertainty of information and instructions were contributed to the human rights violations, for example, a citizen who died after waiting 10 hours from Arkhangai province to enter Ulaanbaatar through the "Emeelt" road transport inspection post, the police and emergency services working at the check-in area for citizens who came to seek emergency health care were not given clear information about the decision and instructions to regulate the curfew, and due to the lack of information exchange and work coordination between organizations, in which cases citizens can be admitted and how to be admitted. There were repeated problems such as the lack of clear instructions and long hours waiting for the decision of the higher level. According to the information about the incident of a citizen commuting by bus in February 2021, the officers on duty gave false information to the passengers of the bus, such as the road was blocked and there was a theft on bus and passengers were held on the bus from 11:00 a.m. to 5:30 p.m. People were isolated in a closed and stuffy environment, and their work was interrupted. In the meantime, the passengers of the bus got upset, insulted and hit a citizen named "Yu", and some passengers defended him, causing a conflict and argument among the people on the bus. As a result, "Yu" broke the window of the bus, and when he got out of the bus, the police officer who



was guarding him handcuffed him. He said he was left outside until the National Center's Rapid Response Team arrived at 5:00 p.m.<sup>16</sup> In particular, the policies and decisions of the State Emergency Response Commission, their implementation, and information related to medical care and services are not known to the public. It can be seen from the activity report of the "119" call center that there was a lack of information about the location, schedule, method and form of obtaining test results, and procedures for obtaining medical care and services during the curfew.<sup>17</sup>

## VI. Conclusion

The adoption of the General Administrative Law was a step forward in terms of the fundamental regulation of public law and a new development stage in the development of administrative law. It has been eight years since the law came into effect. In short, the eight objectives outlined in the concept were not fully achieved, and there are problems in the implementation of the law.

First of all, one of the main reasons is the duplication and gaps of laws and regulations. The principles, substantive and procedural requirements for decision-making stipulated in the General Administrative Law are not fully followed. Additionally, ineffective decisions are being made due to the uncoordinated functions of administrative institutions, lack of attention to detail, and an unsystematic hierarchy. There remains the issue of illegal decisions being influenced by the skills and political connections of government officials

responsible for making administrative decisions.

When an administrative body makes a decision on a specific case or issue, it must adhere to the principles of the supremacy of law, legality, consistency with purpose, appropriateness to the actual situation, and justification. It should also evaluate the effects and consequences of the decision on individuals, legal entities, and specific groups. Ensuring adherence to and actual implementation of the GAL remains a critical issue.

In conclusion, the adoption of the General Law on Administration marks a significant step forward in administrative decision-making and has established the foundation for unified regulation. However, when making decisions, it is essential to:

- Formulate decisions with specificity, avoiding overgeneralization, to ensure coordination between different sectors
- Consider all multivariate factors to capture the full picture
- Study the impact on the rights of social groups and individuals affected by the decision
- Objectively assess the situation
- Adhere to the principles and legal requirements outlined in the law

To achieve this, there is a need for substantial improvements in the system, laws, attitudes, knowledge of civil servants, leadership, and available resources.

<sup>16</sup> National Human Rights Commission, *supra* note 16. 27.

<sup>17</sup> National Human Rights Commission, *supra* note 16. 110.

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# THE ENACTMENT OF THE GENERAL ACT ON PUBLIC ADMINISTRATION IN SOUTH KOREA AND ITS IMPACT ON ADMINISTRATIVE PRACTICE

**Eun Sang Rhee<sup>1</sup>**

- I. Introduction
- II. The enactment process, significance, limit, and main contents of the GAPA
- III. Changes and impacts on administrative practice since enactment and enforcement of the GAPA
- IV. Future challenges of the GAPA
- V. Conclusion

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<sup>1</sup> Professor, Seoul National University School of Law, (Ph.D.).



## THE ENACTMENT OF THE GENERAL ACT ON PUBLIC ADMINISTRATION IN SOUTH KOREA AND ITS IMPACT ON ADMINISTRATIVE PRACTICE

**EUN SANG RHEE,**

*Professor, Seoul National University School of Law, (Ph.D.).*

### I. Introduction

It has been more than three years since the General Act on Public Administration (hereinafter 'GAPA')<sup>1</sup> was enacted on March 23, 2021, and has been in full force in South Korea (hereinafter 'Korea'). At this point, it is meaningful to recall the purpose and meaning of the original enactment of the GAPA, review the changes in public administrative practice that have occurred since the enactment of the GAPA, and explore the future development of administrative law in Korea. It is a great honor for me to have the opportunity to present on the codification of substantive law governing public administration and the development of public administrative practice in Korea at this important and meaningful international conference commemorating the 20th anniversary of the Administrative Court of Mongolia.

This paper first examines the process of enactment, significance, limit, and main contents of the GAPA (Chapter II). Next, it

analyzes the changes and impacts on public administrative practice since the enactment of the GAPA, focusing on the executive branch and briefly including the legislative and judicial (court) branches (Chapter II). Finally, it briefly discusses the future challenges of the GAPA (Chapter IV).

### II. The enactment process, significance, limit, and main contents of the GAPA

#### A. How the GAPA was enacted

#### 1) Lack of unified substantive law governing public administration and attempts to codify it

Whereas general laws governing administrative procedures and administrative litigations have been enacted and enforced in Korea, substantive law governing public administration has long been based primarily on uncodified sources, such as general principles of administrative law which are formed from academic theories and precedents, and exist in a scattered system of various individual statutes. Unlike other areas of law, such as civil law and criminal law, which have a unified substantive law and general rules, the lack of unified and codified substantive law governing public administration has made

<sup>1</sup> In Korean research papers or articles, as seen in the references, the English notation of "행정기본법" is variously used as "General Act on Public Administration", "Administrative Basic Law", "Basic Public Administration Act", and so on. But in this paper, it is written as "General Act on Public Administration" according to the Korea Legislation Research Institute's English notation of the Korea' laws and regulations.



it difficult to unify regulations and improve the system for various similar administrative systems stipulated in individual statutes. In particular, even for systems with similar names and contents, there has been much confusion in practical interpretation and application due to slightly different provisions in individual statutes. As a result, it has been pointed out that the lack of a codified general substantive law in public administrative law areas not only causes difficulties in understanding and redressing rights and interests for the public who encounter administrative law, but also hinders the realization of the rule of law due to the instability of the legal basis<sup>2</sup> for public officials who enforce the law in practice.<sup>3</sup> As a result, discussions and calls for the codification of unified substantive law that can specify general principles of administrative law and systematize common administrative systems scattered in individual statutes continued.

In July 1987, the bill for the Administrative Procedures Act was first prepared as a general law on administrative matters by containing substantive law provisions, such as restrictions on the revocation or withdrawal of dispositions, and delegated

legislation on administrative compulsion, administrative investigations, information disclosure and personal information protection, as well as administrative procedures. However it was abandoned without being submitted to the National Assembly.<sup>4</sup> The Administrative Procedures Act, which was enacted on December 31, 1996, and enforced on January 1, 1998, was organized around the 'procedure' of administrative dispositions to the exclusion of substantive content due to differences of opinion between academics and administrative ministries and the lack of accumulated precedents. In the subsequent amendment process, there were discussions to add substantive elements, but in the end, the amendments were limited to strengthening administrative procedures.<sup>5</sup> In addition to the Administrative Procedures Act, the codification of administrative law has progressed through the enactment of laws that are equivalent to general laws, such as the Framework Act on Administrative Investigations, the Framework Act on Administrative Regulation, the Administrative Litigation Act, the Administrative Appeals Act, and the Civil Petitions Treatment Act, but there are still no unified statutes that encompass the general rules of administrative law in terms of substantive law.

## 2) Enactment of the GAPA

The enactment of the GAPA, which codifies the general rules of substantive law across the administrative sphere, was promoted at the initiative of the Ministry of Government Legislation. The initiative

<sup>2</sup> Chae, Hyangseok/ Ha, Myeong-Ho, "The Legislative Process and Main Contents of (General Act on Administration)", *Journal of Legislation Research*, No60, (Korea Legislation Research Institute, 2021), 3. "For a view pointing out the problem that public officials tend not to accept academic theories and case law as binding interpretations or guidelines in their practice, which leads to uncertainty about the consistency of administration by applying academic theories and case law."

<sup>3</sup> Chung, Ha-Joong, "Eine kleine Studie zum Entwurf des Verwaltungsgrundgesetzes", *Ministry of Government Legislation*, (June 2020), 7.

Joung, Youn Boo, "A Study on the Appropriateness of Deliberation in the Codification of Administrative Law - Focusing on the Process of Enacting General Act on Public Administration", *Hongik Law Review*, Vol. 24, No.1, (February 2023), 637.

<sup>4</sup> Chae, Hyangseok/ Ha, Myeong-Ho, *supra* note 2. 4.

<sup>5</sup> *Ibid.*

was the President's directive<sup>6</sup> at the cabinet meeting on February 12, 2019, and in response, on July 2, 2019, the Minister of Government Legislation reported the 'GAPA Enactment Plan' to the cabinet, and a task force was established within the Ministry of Government Legislation to prepare basic materials by preparing subject-specific reference materials and practical draft articles.<sup>7</sup> On September 5, 2019, the Advisory Committee on Administrative Legal System Innovation was formed and launched by appointing 50 experts representing each field, including academia (constitutional law, administrative law), the legal profession (judges, lawyers, researchers at the Constitutional Court of Korea), and the executive branch (Office of the Chief Cabinet Secretary, Ministry of the Interior and Safety, Ministry of Justice, and Ministry of Government Legislation), distributed by region, gender, and age. From September 2019 to February 2020, the Advisory Committee on Administrative Legal System Innovation discussed the draft of the GAPA in three subcommittees,<sup>8</sup> and

<sup>6</sup> Chung, Nam-cheol, "Main Contents and Meaning of Enactment of the Framework Act on Administration in Korea", *Ministry of Government Legislation*, Legislation No.693 (June 2021), 46-47. "The gist of the directive was that it is necessary to fundamentally think about how to solve problems collectively through general and principled regulations, rather than by developing hundreds of individual statutes for each issue that improves public inconvenience."

<sup>7</sup> Chae, Hyangseok/ Ha, Myeong-Ho, *supra* note 2. 5.

<sup>8</sup> Chae, Hyangseok/ Ha, Myeong-Ho, *supra* note 2. 5-6. "The first subcommittee was in charge of general rules, general principles of administrative law, and legislative activities of government, the second subcommittee was in charge of disposition, and the third subcommittee was in charge of administrative actions other than disposition. A steering committee (consisting of the chairperson of committee, the chairpersons of each subcommittee, and the chairpersons of major academic organizations) was established to review and coordinate the discussions of

from March 2020 to June 2020, the bill for the GAPA was proposed for legislation, and public hearings, briefings, and consultations with related organizations were conducted in earnest. On July 8, 2020, the bill was submitted to the National Assembly, and from November 2020 to February 2021, the drafting review of bill and the resolution of the Judicial Affairs Committee were held. On February 26, 2021, the plenary session of the National Assembly voted on the bill and it was sent to the government, and on March 23, 2021, the 'GAPA' was promulgated as Act No. 17979. Over a period of about two years, academia, the legal profession, and the executive branch worked together to enact the GAPA, which contains general provisions of the administrative law in terms of substantive law.

#### **B. Significance of the enactment of the GAPA**

First and foremost, the significance of the enactment of the GAPA is that the rules of substantive law covering the entire administrative field have been codified. Through this, the GAPA is expected to serve as a 'general law' on public administration. Previously, there was no codified general substantive law in the field of administrative law to serve as a guiding principle and standard, which made it difficult for frontline officials and the public to understand the complex administrative law system. In addition, individual statutes often stipulated similar

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the subcommittees, and senior professors of administrative law were invited to meet as advisors to report on the discussions of the subcommittees and to receive comprehensive advice. For a detailed account of the discussions of each subcommittee and the changes in topics at each stage."



systems differently, resulting in the need to amend hundreds of statutes to improve a single system. By specifying the general principles of administrative substantive law established by academic theories and precedents, the GAPA codifies the administrative substantive law,<sup>9</sup> and is expected to contribute to building a unified administrative law system. In addition, by systematizing and regulating the common matters of similar administrative systems, it is expected to enable the efficient promotion of regulatory innovation.<sup>10</sup>

The enactment of the GAPA can also be viewed as laying the foundation for the reform and development of administrative law in Korea.<sup>11</sup> The general principles of administrative substantive law and the standards of application and interpretation common to administration in general, which are the main regulatory contents of the GAPA, are not the contents of theories and precedents per se, but 'administrative law dogmatics'<sup>12</sup> as systematized jurisprudence

on administrative substantive law. The administrative law dogmatics is not fixed or immutable, but can be viewed as the product of a continuous process of legal interpretation that is subject to change as statutes, theories, and precedents change.<sup>13</sup> While the administrative law dogmatics is primarily based on the GAPA, it also contributes to the amendment of the GAPA by supplementing its regulatory content after it is enacted or by examining new matters that need to be amended.<sup>14</sup> In addition, the administrative law dogmatics presents more detailed and systematic legal theories than the existing legal theories for each type and area of administrative action, thereby easing the burden of interpretation of individual administrative statutes and regulations in practice and influencing the legislation and interpretation of individual administrative statutes and regulations. Through this, the administrative law dogmatics plays a driving role in administrative law reform for the realization of the rule of law.<sup>15</sup> It forms the court rules, procedures, and disciplines that should be respected in general, leading to the enactment and codification of the GAPA. It also systematizes the content of the regulations for the interpretation and application of the GAPA. Each

<sup>9</sup> For example, The Principle of Rule of Law in Administration, art. 8, Principle of Equality, art. 9, Principle of Proportionality, art. 10, Duty of Good Faith and Principles of Prohibition of Abuse of Authority, art. 11, Principle of Protection of Trust, art.12, Principle of Substantial Relations Between the Ends and the Means, art. 13.

<sup>10</sup> For example, it outlines the calculation of time periods (art. 6, 7), standards for application of law (art. 14), revocation of dispositions (art. 18), withdrawal of dispositions (art. 19), sanctions (art. 22, 23), deemed authorization and permission (art. 24-26), penalty surcharges (art. 28, 29), and administrative compulsion (art. 30-33).

<sup>11</sup> Chung, Nam-cheol, *supra* note 6. 63.

<sup>12</sup> Sun, Jeong-Won, "The birth and development of Legal dogmatics ('rechtsdogmatik') in administrative law", *Administrative Law Journal*, No. 72 (November 2023), 8. "Administrative law dogmatics' can be defined as a set of legal doctrines or legal propositions composed through the systematic organization of administrative laws, administrative precedents, and theories for the interpretation and application of administrative statutes and regulations."

Park, Jeong Hoon, "Theory and Practice in

Administrative Law", *System and Methodology of Administrative Law*, (Parkyoungsa, 2005), 5-6. "Administrative law dogmatics consists of concepts and logical systems to reduce the burden of practice, and contains value judgments and benefit quantification for various issues, and establishing such legal dogmatics is not only the task of the academic discipline in charge of theory, but also the task of practice".

<sup>13</sup> Sun, Jeong-Won, "The birth and development of Legal dogmatics('rechtsdogmatik') in administrative law", *Administrative Law Journal*, No. 72 (November 2023), 8, 16.

<sup>14</sup> Sun, Jeong-Won, *supra* note 12. 14.

<sup>15</sup> *Ibid*, 14, 16.



administrative department and local government applies and enforces individual administrative statutes and regulations, respecting the provisions of the GAPA and administrative law dogmatics, thereby leading to the reform and development of administrative law. In other words, it is expected that the development of administrative law dogmatics, which became the basis for the enactment of the GAPA, will influence the amendment of the GAPA and the legislation, interpretation, and application of individual administrative statutes and regulations, and vice versa, the enactment and amendment of the GAPA and the legislation, interpretation, and application of individual administrative statutes and regulations will further promote the development of administrative law dogmatics, creating a "virtuous cycle" of administrative law reform and development.<sup>16</sup>

Furthermore, the significance of the enactment of the GAPA is often viewed as the "beginning of the enactment of a (unified) general administrative substantive law code" that consolidates the major individual statutes on administration into a single code.<sup>17</sup> The enactment of the

GAPA is both a process and a result of the consolidation of administrative law theories developed in Korean administrative law academia and precedents, and the success of this codification of administrative substantive law and the goal of enacting a unified code of general administrative law is expected to open up new discussion horizons in administrative law.<sup>18</sup>

### C. Limit of the GAPA

However, the GAPA cannot be considered a complete set of administrative substantive law rules covering all areas of public administration. This is because the GAPA still needs to be improved to be able to recognize the status of a comprehensive general administrative law code that encompasses the Administrative Procedures Act, the Framework Act on Administrative Investigations, the Framework Act on Administrative Regulation, the Administrative Litigation Act, the Administrative Appeals Act, the Civil Petitions Treatment Act, which are statutes that are equivalent to general laws.<sup>19</sup> Since the GAPA was limited in time and effort to be enacted as a complete law from the beginning, it was first drafted based on the contents established through academic theories and precedents and the common matters and systems established in individual statutes, and in order to minimize conflicts with existing laws such as the Administrative Procedures Act,

<sup>16</sup> Sun, Jeong-Won, *supra* note 12. 23-24. "For a similar view that the enactment of the GAPA will contribute significantly to the development of administrative general law and administrative law dogmatics in the future". Chung, Nam-cheol, *supra* note 6. 63. "For a view that emphasizes that administrative law reform can be realized through the formation and development of administrative law dogmatics, and that administrative law dogmatics are the driving force for the development of the basic principles of administrative law and the jurisprudence of administrative action."

<sup>17</sup> Park, Jeong Hoon, "The General Act on Public Administration and the Tasks of Administrative Law: Recognition, Operation, and Innovation" (Proceedings of the 260th Annual Conference of the Korea Administrative Law and Practice Association, Apr, 2021), 3-4.

Hong, Jeong-sun, "Main Contents and Implications of the Submission of the Administrative Basic Law to the National Assembly" (Proceedings of the 2020 Administrative Law Forum, Oct, 2020), 27.

<sup>18</sup> Chung, Nam-cheol, *supra* note 6. 46.

<sup>19</sup> Rhee, Eun-Sang, "Direction of Legislative Improvement for the Codification of an Integrated General Administrative Law", *Administrative Law Journal*, No.67 (March 2022), 4.



the regulatory contents were focused on matters with legal gaps and systems that can be generalized.<sup>20</sup> In the end, it was inevitable that the GAPA was enacted by separating the substantive and procedural parts of the general principles of Administrative Law, leaving the latter to be governed by the Administrative Procedures Act, and focusing mainly on the former, but even if it was an inevitable measure in reality,<sup>21</sup> it is not a desirable legislative situation and needs to be improved in the future.<sup>22</sup> Therefore, it is expected that the discussion on the integration of the GAPA and the Administrative Procedures Act will continue to be discussed as a future issue.<sup>23</sup>

#### D. Main contents of the GAPA

The main contents of the GAPA are divided into the following categories according to the legislative purpose of each provision: (1) provisions to improve the predictability of law enforcement, (2) provisions to expand the remedies for people's rights, (3) provisions to promote active administration and regulatory innovation, and (4) provisions to improve the efficiency and uniformity of administration.<sup>24</sup>

<sup>20</sup> Myeong-Ho, *supra* note 2. 4.

<sup>21</sup> The division between the GAPA (enacted, led by the Ministry of Government Legislation) and the Administrative Procedures Act (enacted, led by the Ministry of the Interior and Safety) is likely due to the fact that the two statutes are enacted, led by different administrative ministries.

<sup>22</sup> Myeong-Ho, *supra* note 2. 55.

<sup>23</sup> Kim, Dae-in, "A Study on the Relationship between (Framework Act on Public Administration) and (Administrative Procedure Act)", *Journal of Legislation Research*, No.59 (Korean Legislation Research Institute, 2020), 59-60. "For articles that consider the need to integrate the GAPA and the Administrative Procedures Act in the future and further expand their contents". Rhee, Eun-Sang, *supra* note 19. 7-15.

<sup>24</sup> Rhee Jean Soo, "Significance and Evaluation of Enactment of 'General Act on Administrative Law'", *Journal of Legislation Research*, No.59 (December 2020), 5-11. "These classifications are in accordance with the typology and classification criteria set forth on pages 28-32 of the (Commentary to the General Act on Public Administration), published by the Ministry of Government Legislation on December 2021. In addition, the categorization of each provision of the GAPA is based on the following three views: (1) general provisions of administrative law, (2) provisions for expanding the remedy of people's rights, and (3) provisions for the legislative function of the administration".

Kim, Chan-hee, *Constitutional Considerations on the General Act on Public Administration*, (Constitutional Research Institute, 2024), 8-9. "Also, based on the meaning or function of each provision of the GAPA, it is divided into (1) provisions that are the basis for the interpretation of the law, (2) provisions that are prescribed to establish the legal basis for subordinate laws or systems such as orders and rules, and (3) provisions that are guidelines for individual legislation related to administration, (4) provisions that are general grounds and standards for the system stipulated in many individual laws, (5) provisions that specify existing theories, precedents, and practical practices, and (6) provisions that introduce new systems to expand opportunities for people to seek redress for their rights."



## 1) Improving law enforcement predictability for the public

### a) Codification of legal principles of administration

#### **Article 8 (Principle of Rule of Law in Administration)**

Any administrative action shall not contravene a statute, and if it restricts the rights of citizens, imposes

obligations on citizens, or has material impacts on the life of citizens, it shall have a statutory basis.

#### **Article 9 (Principle of Equality)**

Administrative authorities shall not discriminate against citizens without reasonable grounds.

#### **Article 10 (Principle of Proportionality)**

Any administrative action shall comply with the following principles:

1. It shall be effective and appropriate to achieve administrative purposes;
2. It shall be taken to the minimum extent necessary to achieve administrative purposes;
3. The infringement of citizens' interest due to an administrative action shall not be greater than the public interest it intends to uphold.

#### **Article 11 (Duty of Good Faith and Principles of Prohibition of Abuse of Authority)**

(1) Each administrative authority shall perform its duties in good faith under statutes or regulations, etc.

(2) No administrative authority shall abuse its administrative authority or exceed the scope of its authority.

#### **Article 12 (Principle of Protection of Trust)**

(1) An administrative agency shall protect a citizen's legitimate and reasonable trust in administration, except where the public interest or a third party's interest is likely to be significantly undermined.

(2) An administrative authority shall not exercise an authority if citizens have good cause to believe that the authority would not be exercised since the administrative agency has not exercised the authority for a long time despite opportunity to do so: Provided, That the same shall not apply where public interest or a third party's interest is likely to be significantly undermined.

#### **Article 13 (Principle of Substantial Relations Between the Ends and the Means)**

In taking an administrative action, an administrative authority shall not impose on a party obligations unrelated in effect to the administrative action.

In Chapter 2, the GAPA stipulates the general principles of administrative substantive law, including the principle of the rule of law (Article 8), the principle of equality (Article 9), the principle of proportionality (Article 10), the duty of good faith and the principles of prohibition of abuse of authority (Article 11), and the principle of protection of trust (Article 12). As the general principles of administrative substantive law can serve as a measure for judging the illegality of administrative action, it is expected to provide clarity

of the underlying law not only as a rule of law but also for public officials who enforce and apply the law in practice, and contribute to increasing predictability for the public.<sup>25</sup>

<sup>25</sup> Ministry of Government Legislation, *Commentary to the General Act on Public Administration*, (2021), 28.



b) Clarification of grounds for revocation or withdrawal of dispositions

**Article 18 (Revocation of Illegal or Unjust Dispositions)**

(1) An administrative authority may retroactively revoke all or part of an illegal or unjust disposition: Provided, That it may prospectively revoke such disposition if there is good cause, such as that a party's trust has a value that deserves protection.

(2) Where an administrative authority intends to revoke a disposition that grants rights or benefits to a party under paragraph (1), it shall compare the disadvantages to the party resulting from the revocation and the public interest attained by the revocation, taking into account the balance of hardships between them: Provided, That the same shall not apply in any of the following cases:

1. Where the disposition has been obtained by fraud or other improper means;
2. The party was aware of the illegality or, due to gross negligence, was not aware of it.

**Article 19 (Withdrawal of Legitimate Dispositions)**

(1) Where a legitimate disposition falls under any of the following, an administrative authority may prospectively withdraw all or part of the disposition:

1. Where it is subject to any of the grounds for withdrawal set forth in statutes;
2. Where it is no longer necessary to uphold a disposition due to an amendment to a statute or regulation, etc. or changes in circumstances;
3. Where revocation is necessary for material public interest.

(2) Where an administrative authority intends to withdraw a disposition under paragraph (1), it shall compare the disadvantages to the party resulting from the withdrawal and the public interest attained by the withdrawal, taking into account the balance of hardships between them.

In the case of administrative dispositions that impose duties on parties to the dispositions or restrict their rights or interests, there have been many cases where the public has been disadvantaged by the passive attitude of the administrative authorities in not revoking or withdrawing the dispositions themselves, even though the dispositions were originally defected or no longer necessary due to changes in circumstances. The lack of legal grounds for ex-officio revocation or withdrawal may have played a part in this passive and rigid attitude of public officials, but the GAPA stipulates the requirements and effects of

revocation of illegal or unjust administrative dispositions and withdrawal of legitimate dispositions. In addition, by specifying the legal doctrine that has been established through academic theories and precedents on the issue of protecting the public's trust due to the revocation or withdrawal of beneficial administrative dispositions, the GAPA has contributed to the protection of the public's interests and legal stability by providing a behavioral norm for the public administration's interest and prudent revocation or withdrawal of administrative dispositions.



## 2) Expanding people's rights remedies

### a) Introducing a limitation period for sanctions

#### **Article 23 (Limitation Period for Sanctions)**

(1) An administrative authority may not impose a sanction (referring to suspension, revocation, or withdrawal of authorization or permission; cancellation of registration; or imposition of penalty surcharges in lieu of closure of a business office or suspension of business; hereafter in this Article the same shall apply) for a violation after five years from when the violation of a statute or regulation, etc. ceases to occur.

(2) Paragraph (1) shall not apply to any of the following circumstances:

1. Where the party has obtained authorization or permission or filed a report by fraud or other improper means;
2. Where the party was aware of the illegality in obtaining authorization or permission or filing a report or, due to gross negligence, was not aware of it;
3. Where the limitation period expires due to evasion, obstruction, or refusal of an administrative authority's investigation, entry, or inspection without good cause;
4. Where a failure to impose a sanction causes or is likely to cause serious harm to the safety or life of citizens or to the environment.

(3) Notwithstanding paragraph (1), where a sanction is revoked or withdrawn on the grounds of a ruling on administrative appeal or a court ruling, an administrative authority may impose a new sanction in line with the purport of such ruling until one year (in the case of a collegiate administrative agency, two years) elapses from the date the ruling becomes final and conclusive.

(4) Where other statutes provides for any shorter or longer period than those referred to paragraphs (1) and (3), such statutes shall apply.

If an administrative agency fails to impose sanctions for a long period of time even though there is a violation or default of an obligation under a law, the violator is in a state of legal instability. This situation was previously resolved through the 'doctrine of forfeiture of rights' recognized through academic theories and case law, but there were not many cases recognized

in case law, so the effectiveness of the remedy was questionable. The GAPA is expected to contribute to the protection of public trust and legal stability by establishing a provision on a limitation period for sanctions. It is also expected to have the effect of urging public officials to dispose of sanctions within a reasonable period of time.



b) Expanded opportunities for raising objections to disposition

**Article 36 (Raising Objections to Disposition)**

(1) Any party who has an objection to a disposition imposed by an administrative authority (referring to a disposition subject to administrative appeal under the Administrative Appeals Act pursuant to Article 3 of the same Act; hereafter in this Article the same shall apply) may raise an objection with the relevant administrative agency within 30 days from the date he or she receives such disposition.

(2) Where an administrative authority receives an objection under paragraph (1), it shall notify the person who has raised the objection of the results thereof within 14 days from the date it receives the objection: Provided, That if it is impossible to give notice within 14 days due to any unavoidable cause, the period may be extended once by up to 10 days, being counted from the day following the expiration date, and the objector shall be provided notice on the ground for such extension.

(3) Even after raising an objection under paragraph (1), a person may file an administrative appeal under the Administrative Appeals Act or administrative litigation under the Administrative Litigation Act, regardless of raising the objection.

(4) A person who intends to file an administrative appeal or administrative litigation after receiving the results of an objection may do so within 90 days from the date of receiving the notice of the results (referring to the date following the expiration of the notification period under paragraph (2), if there is no notice of the results within the notification period under the same paragraph).

(5) Even where other statutes set forth procedures for raising objections and other procedures equivalent thereto, matters that are not set forth in those statutes shall be governed by this Article.

(6) Except as provided in paragraphs (1) through (5), matters necessary for the methods and procedures for raising objections and the like shall be prescribed by Presidential Decree.

(7) This Article shall not apply to any of the following cases:

1. Matters regarding dispositions such as a disciplinary action under statutes or regulations on the personnel management of public officials;
2. Decisions of the National Human Rights Commission of Korea on petitions under Article 30 of the National Human Rights Commission of Korea Act;
3. Matters implemented subject to resolution by the Labor Relations Commission under Article 2-2 of the Labor Relations Commission Act;
4. Matters implemented in accordance with statutes and regulations on criminal affairs, criminal administration, or preventive orders;
5. Matters regarding entry into and departure from the country, refugee recognition, naturalization, and reinstatement of nationality of aliens;
6. Matters regarding the imposition and collection of administrative fines.

The objection system, which was introduced in various individual statutes to provide people with the opportunity to easily raise objections to the disposing administrative agency at the preliminary stage of administrative proceedings or administrative appeals, varied in name, such as 'objection', 'appeal', and 'review', and had different rules. Above all, there was a lot of confusion regarding the objection system, with supreme court decisions differently in each case as to whether the

period for filing an administrative appeal or an administrative lawsuit is suspended during the objection period. The GAPA clarified the objection system as a general remedy and set the starting point of the filing period for administrative appeals and administrative lawsuits as the date of notification of the result of the objection, thereby eliminating legal confusion and expanding the remedies for people's rights and interests.



## c) Introducing re-examination of disposition

**Article 37 (Re-Examination of Dispositions)**

(1) Even where a disposition (excluding sanctions and administrative compulsion; hereafter in this Article the same shall apply) has become uncontestable through administrative appeal, administrative litigation, or any other litigation (excluding cases where a court rendered a final decision), a party may file an application with the administrative authority that has imposed the disposition to revoke, withdraw, or amend the disposition, in any of the following cases:

1. Where the facts or legal relations that form the basis of the disposition change to the advantage of the party;
2. Where there is new evidence that would have brought a decision more favorable to the party;
3. Where there arise reasons equivalent to grounds for retrial referred to in Article 451 of the Civil Procedure Act, and other cases prescribed by Presidential Decree.

(2) An application under paragraph (1) may be filed only when the party has failed to argue the grounds referred to in the subparagraphs of paragraph (1) in the proceedings of the disposition, administrative appeal, administrative litigation, or any other litigation without gross negligence on his or her part.

(3) An application under paragraph (1) shall be filed within 60 days from the date the party has become aware of the grounds referred to in the subparagraphs of paragraph (1): Provided, That no application may be filed later than five years after the date of disposition.

(4) An administrative authority upon receipt of an application under paragraph (1) shall notify the applicant of the results of re-examination of the disposition (including whether re-examination has been conducted as well as decisions to uphold, revoke, withdraw, or amend the disposition, or the like) within 90 days (180 days in the case of a collegiate administrative agency) after the receipt of the application, in the absence of special circumstances to the contrary: Provided, That if such notice cannot be made within 90 days (180 days in the case of a collegiate administrative agency) due to any unavoidable cause, the period may be extended once by up to 90 days (180 days in the case of a collegiate administrative agency), being counted from the day following the expiration date, and the grounds for extension shall be notified to the applicant.

(5) A decision to uphold a disposition out of the results of re-examination of dispositions under paragraph

(4) may not be appealed through administrative appeal, administrative litigation, or any other means of litigation.

(6) No revocation under Article 18 and withdrawal under Article 19 by an administrative authority shall be affected by re-examination of a disposition.

(7) Except as provided in paragraphs (1) through (6), matters regarding methods and procedures for reexamination of dispositions and the like shall be prescribed by Presidential Decree.

(8) This Article shall not apply to any of the following cases:

1. Matters regarding dispositions such as a disciplinary action under statutes or regulations on the personnel management of public officials;
2. Matters implemented subject to resolution by the Labor Relations Commission under Article 2-2 of the Labor Relations Commission Act;
3. Matters implemented in accordance with statutes and regulations on criminal affairs, criminal administration, or preventive orders;
4. Matters regarding entry into and departure from the country, refugee recognition, naturalization, and reinstatement of nationality of aliens;
5. Matters regarding the imposition and collection of administrative fines.
6. Where the application is exempted by an individual statute.



Article 37 of the GAPA introduced a system that allows for a re-examination of a disposition that can no longer be contested through contestation procedures due to reasons such as the expiration of the filing period, or when the facts or legal relations on which the disposition was based later become favorable to a party, subject to certain requirements. As

a retrial against a court's final judgment in civil and criminal cases is also permitted if certain requirements are met, this system is expected to expand the rights and remedies of the public as it guarantees the opportunity for re-examination of administrative dispositions from the perspective of justice and equity.

d) Establishing the legal basis for the statutory interpretation system

#### **Article 40 (Interpretation of Statutes or Regulations)**

(1) Anyone who has questions about the details of a statute or regulation, etc. may request the head of a central administrative agency having jurisdiction over the statute or regulation, etc. (hereinafter referred to as "competent agency") or the head of a local government having jurisdiction over municipal ordinances and rules to issue an interpretation of the statute or regulation.

(2) The head of a competent agency and the head of a local government having jurisdiction over municipal ordinances and rules shall be responsible for interpreting and executing respective statutes or regulations, etc. under his or her jurisdiction in compliance with the Constitution and the purport of the relevant statutes or regulations, etc.

(3) A person who has an objection to a competent agency or its interpretation of a statute or regulation may request an agency specializing in interpreting statutes or regulations to make an interpretation of a statute or regulation, as prescribed by Presidential Decree.

(4) Matters necessary for the procedures for interpreting statutes or regulations shall be prescribed by Presidential Decree.

Article 40 of the GAPA provides that anyone who has questions about the details of a statute or regulation, etc. may request the head of a central administrative agency having jurisdiction over the statute or regulation, etc. or the head of a local government having jurisdiction over municipal ordinances and rules to issue an

interpretation of the statute or regulation. This statutory interpretation system is expected to prevent unnecessary legal disputes and prevent damage caused by incorrect dispositions by resolving questions about the details of statutes and regulations in advance.



### 3) Promoting proactive administration and regulatory innovation

#### a) Specifying implementation of proactive administration in the law

##### **Article 4 (Implementation of Proactive Administration)**

(1) Administration shall be proactively conducted for the public interest.

(2) The State and local governments shall create all the conditions to enable public officials under their jurisdiction to proactively perform their duties for the public interest, and shall promote policies and measures related thereto.

(3) Specific details of policies for proactively implementing administration and facilitating active administration under paragraphs (1) and (2) and the like shall be prescribed by Presidential Decree.

In order to provide a legal basis for the already enacted Presidential Decree on the Operation Regulations for Proactive Administration, Article 4 of the

GAPA introduced provisions on proactive administration. It is expected that proactive administration will be applied to all areas of public administration.

#### b) Clarifying when a report requiring acceptance becomes effective

##### **Article 34 (Effects of Reports Depending on Acceptance)**

In the case of a report that requires notification of specified matters to an administrative agency as prescribed by a statute or regulation, etc., if a statute expressly provides that such report requires acceptance (excluding cases where acceptance is provided as an internal affairs process of an administrative agency), such report shall take effect only upon the acceptance thereof by the administrative authority.

Theories and precedents have divided 'reports' into two types. One is a 'self-contained report', which becomes effective when the report arrives at the administrative receiving agency, and the other is a 'report requiring acceptance', which becomes effective when the administrative authority accepts it. However, interpreting and distinguishing between the two types of reports based on the contents of individual statutes was very difficult for

the public as well as officials in charge of law enforcement, causing confusion in the field. To solve this problem, Article 34 of the GAPA stipulates that a report can be recognized as a report requiring acceptance only if the law specifies that acceptance is required. This is expected to ease regulations on reporting and increase the transparency and predictability of the reporting system.<sup>26</sup>

<sup>26</sup> Ministry of Government Legislation, *supra* note 25. 31.



#### 4) Promoting administrative efficiency and uniformity

##### a) Clarifying standards for application of law

###### **Article 14 (Standards for Application of Law)**

(1) Except as otherwise provided in statutes or regulations, etc., a new statute or regulation, etc. shall not apply to facts or legal relationships that have been completed or terminated before the statute or regulation, etc. enters into force.

(2) A disposition made at the request of a party shall comply with the statutes or regulations, etc. as at the time the disposition is imposed, except as otherwise provided in statutes or regulations, etc. or except where there are special circumstances that make it impracticable to apply statutes or regulations, etc. as at the time the disposition is imposed.

(3) With respect to the establishment of an act violating a statute or regulation, etc. and sanctions for such act, the statutes or regulations, etc. as at the time such act is performed shall apply except as otherwise provided in statutes or regulations, etc.: Provided, That if the act ceases to be a violation under statutes or regulations, etc. due to an amendment thereof after such act is committed or if the standards for sanctions become lenient, the amended statutes or regulations, etc. shall apply except as otherwise provided in the relevant statutes or regulations, etc.

Due to the frequent amendment of administrative statutes and regulations, there was no clear legal basis as to whether the law before or after amendment should be applied in the event of an amendment, and there was confusion regarding the criteria for applying the law due to different

judgments in different cases. In response, Article 14 of the GAPA was enacted to clarify the criteria for the application of the law, providing greater predictability and legal stability for the public and officials in charge.<sup>27</sup>

##### b) Systematization of similar or common systems

###### **Article 24 (Standards for Deemed Authorization or Permission)**

(1) The term “deemed authorization or permission” in this Section means that a person who has obtained an authorization or permission (hereinafter referred to as “primary authorization or permission”) shall be deemed to have obtained various other authorization or permission related thereto (hereinafter referred to as “relevant authorization or permission”), as prescribed by statutes.

(2) Where a person intends to obtain deemed authorization or permission, he or she shall also submit documents necessary for obtaining the relevant authorization or permission when applying for the primary authorization or permission: Provided, That if it is impossible to submit the documents simultaneously due to any unavoidable cause, the documents may be submitted not later than the deadline separately prescribed by the administrative authority authorized to grant the primary authorization or permission.

<sup>27</sup> Ministry of Government Legislation, *supra* note 25.



(3) The administrative authority authorized to grant the primary authorization or permission shall consult with the relevant authorizing or permitting administrative authority before granting the primary authorization or permission.

(4) Upon receipt of a request for consultation under paragraph (3), the relevant authorizing or permitting administrative authority shall submit its opinion within 20 days from the date of receipt of such request (excluding the period required for the procedures prescribed in the proviso of paragraph (5)). In such cases, consultations shall be deemed held if no opinion on consultations is submitted within the period prescribed in the former part (referring to the extended period if the period for submitting an opinion is extended in accordance with the statutes or regulations governing processing of civil petitions).

(5) Upon receipt of a request for consultation under paragraph (3), no relevant authorizing or permitting administrative authority shall respond to such request for consultation in violation of the relevant statutes or regulations: Provided, That the procedures necessary for related authorization or permission, such as deliberation and hearing of opinions, shall be conducted only when it is expressly prescribed by statute that the relevant procedures are required even in the case of a deemed authorization or permission.

#### **Article 25 (Effect of Deemed Authorization or Permission)**

(1) Matters consulted on pursuant to Article 24 (3) and (4) shall be deemed to have obtained relevant authorization or permission when the primary authorization or permission has been obtained.

(2) The effects of deemed authorization or permission shall be limited to the relevant authorization or permission set forth in the statutes governing the primary authorization or permission.

#### **Article 26 (Follow-Up Management of Deemed Authorization or Permission)**

(1) In the case of a deemed authorization or permission, the relevant authorizing or permitting administrative authority shall be deemed to have granted the relevant authorization or permission directly and shall take necessary measures, such as management and supervision, pursuant to relevant statutes or regulations.

(2) Where a change in a primary authorization or permission is made after granting such authorization or permission Articles 24 and 25 and paragraph (1) of this Article shall apply mutandis mutandis.

(3) Except as provided in this Section, methods of deemed authorization or permission and other necessary details shall be prescribed by Presidential Decree.

#### **Article 28 (Standards for Imposing Penalty Surcharges)**

(1) An administrative agency may impose a penalty surcharge on a person who violates his or her obligation under statutes or regulations, etc., as a disciplinary measure for such violation, as prescribed by statutes.

(2) The following matters regarding penalty surcharges shall be clearly prescribed in statutes that form the basis of penalty surcharges:

1. Persons imposing and collecting charges;
2. Grounds for imposition;
3. Upper limits;
4. In cases of collecting additional charges, matters relevant thereto;
5. Where default may result in compulsory collection of a penalty surcharge or additional charge, matters relevant thereto.





The deemed authorization or permission system, which considers the obtaining a primary authorization or permission as the obtaining other authorization or permission related thereto, as prescribed by statutes, was introduced in various individual statutes to ease regulations and improve public convenience. However the content of the regulations varied slightly, and there were no clear principles and standards regarding compliance with the procedural requirements of related authorization or permission, post-management and supervision, etc. To solve this problem, Article 24 of the GAPA provides general regulations on the standards for deemed

authorization or permission, with Article 25 on the effect of deemed authorization or permission and Article 26 on the follow-up management of deemed authorization or permission, enabling unified and systematic regulation and law enforcement, and increased administrative efficiency.

In addition, the system of penalty surcharges and charges for compelling compliance, which had been operated in various individual statutes with slightly different contents, will be systematized and the efficiency of law enforcement and administration will be improved by making general provisions in the GAPA.

c) Establishing the legal basis for contracts under public law

**Article 27 (Conclusion of Contracts under Public Law)**

(1) Where it is necessary to achieve administrative purposes to the extent not violating statutes or regulations, etc., administrative authorities may enter into a contract concerning legal relations under public law (hereinafter referred to as "contract under public law"). In such cases, a contract shall be prepared, clearly stating the purpose and details of the contract.

(2) In selecting the other party to a contract under public law and stipulating the contract, the administrative authority shall take into consideration the public interest of a contract under public law and the interests of any third party.

Article 27 of the GAPA establishes the legal basis for contracts under public law, which are a representative form of non-authorized administration. It stipulates the permissibility and limitations of contracts under public law, the form of written contracts, and the obligation to consider the public interest and the interests of third parties involved in the contracts under public law. In addition, the modification, termination, and invalidity of contacts under public law, the introduction of contracts under public law as a substitute for disposition, and the provision of compensation for damages in the event

of termination of contracts under the public law due to public interest were also considered but ultimately deleted in the legislative process.

**III. Changes and impacts on administrative practice since enactment and enforcement of the GAPA**

**A. Legislative areas**

1) Establishment and activities of the National Public Administrative Legislation Committee

Following the enactment and enforcement of the GAPA, the National Public Administrative Legislation



Committee was established pursuant to Article 39 (2) of the GAPA and Article 14 of the Enforcement Decree of the GAPA in order to improve the legal system in the field of administration and establish consistent standards for the application of laws. The National Public Administrative Legislation Committee is responsible for (1) introducing and improving standards that are commonly applied to statutes and regulations, (2) conducting surveys and analyzing the impact of statutes and regulations, and (3) responding to the advice of the Minister of Justice on matters deemed necessary for the legal system. The Committee is composed of 50 members for a term of two years, including the co-chairpersons (the Minister of Government Legislation and the civilian chairperson). The Committee is organized into three subcommittees: the subcommittee on the operation and amendment of the GAPA, the subcommittee on the improvement of the administrative law system and the amendment of statutes and regulations, and the subcommittee on legislative standards and legislative impact analysis. It is significant that specialized committees have been established and are operating on a permanent basis, covering not only the current status and amendments to the GAPA, but also the drafting standards for the administrative law system and the overall issues related to legal system improvement and legislation. It is expected that the systematization and uniform regulation of the administrative law system will be possible.

### **Emergence of a new government legislation model led by the Ministry of Government Legislation**

The GAPA was prepared and promoted by the Ministry of Government Legislation. It was appropriate for the Ministry of Government Legislation to take the lead in preparing and promoting the legislation, as the GAPA is a law that can be commonly related to the work areas of various ministries and stipulates general rules of administrative substantive law for the entire administrative field, requiring advanced legal knowledge and legal work experience.<sup>28</sup> In the case of government legislation, the ministries in charge of the bills usually drafted the bills themselves and went through the process of finalizing the bills after review by the Ministry Government Legislation. Since **the Ministry of Government Legislation, as the Central Administration Organization specialized in legislation, mainly in charge of supervising and supporting the government's legislative activities of each administrative department,**<sup>29</sup> there were very few cases where the Ministry of Government Legislation took the lead in preparing and drafting the bills. It is hoped that the new model of government

<sup>28</sup> Rhee, Jean Soo, *supra* note 24. 20-21.

<sup>29</sup> Presidential Decree on the Organization of the Ministry of Government Legislation, art. 2. "The duties of the Ministry of Government Legislation are to examine bills and treaties to be presented to the Council of Ministers, examine prime ministerial decrees, sub-decrees, and directives and rules, prepare bases for legislation in accordance with the orders of the President and Prime Minister, supervise government's legislation activities, assist in the development of legislation, interpret statutes and regulations (statutory interpretation), review and consult bills proposed by the National Assembly, support for autonomous legislation, manage and provide national legal information, and manage other affairs related to the legal system."



legislation, in which the Ministry of Government Legislation leads and multiple ministries jointly participate in the drafting of bills that have a wide scope of impact common to multiple executive branches and require advanced legal knowledge and legal work experience, will be utilized more frequently in the future.

## B. Administrative area

1) Establishment of a behavioral norm in administrative practice

The GAPA contains provisions that function as a legislative guideline,<sup>30</sup> behavioral norm,<sup>31</sup> and adjudicatory norm.<sup>32</sup> Among them, the enactment of the GAPA is significant in that it establishes a 'behavioral norm' that applies to public officials on the front lines of administrative practice.<sup>33</sup> Prior to the enactment of the GAPA, the general principles of administrative law, which serve as a measure for judging the illegality of dispositions, were generally only an unwritten or uncodified source of law recognized by academic theories and precedents, which led to legal instability in the enforcement and application of

the law in practice by public officials. However, after the enactment and enforcement of the GAPA, the general principles of administrative substantive law (Articles 8-13 of the GAPA) were codified through a legislation enacted by the National Assembly, so the general principles of administrative substantive law are now established as the de facto behavioral norm for public officials. If a public official violates the general principles of administrative substantive law set forth in GAPA in applying and enforcing the law, he or she may be subject to disciplinary liability for "breach of the duty of good faith", which refers to the duty to comply with the law.

In addition, Article 17 of GAPA, clearly stipulates that an administrative authority may attach subordinate clauses (referring to conditions, deadlines, encumbrances, reservation of the rights to withdrawal, etc.) where it has discretion in imposing a disposition, thereby encouraging public officials in charge of discretionary authorization or permission to move away from their rigid and passive attitudes and practices of easily rejecting applications. Although precedents prior to the enactment and enforcement of the GAPA had ruled the same, there was still no explicit statutory basis for this, so suspicions could be raised that discretionary authorization or permission with subordinate clauses attached was a preferential treatment without statutory provisions. However, with the enactment and enforcement of the GAPA, the discretionary authorization or permission with subordinate clauses attached can now be activated flexibly

<sup>30</sup> General Act on Public Administration, art. 22(1). "stipulates the matters to be prescribed by the law based on which sanctions are imposed.", art. 5(2). "provides for efforts to enact or amend other laws." Art. 38. "provides for legislative activities of the administration."

<sup>31</sup> The Documentation of Contracts Under the Public Law, art. 27(2) "the documentation of contracts under the public law", art.27(2) "as a norm on the form and procedure of individual administrative action, the effectiveness of disposition", art. 15 "subordinate clauses", art. 17 "ex-officio revocation or withdrawal of dispositions", art. 18, 19. "as a norm on the substance of individual administrative action."

<sup>32</sup> The General Principles of Administrative Law, art. 8-13 "the standards for exercising discretion", art. 21 "and the reports requiring acceptance", Art. 34 "which serve as a measure for judging the illegality of dispositions."

<sup>33</sup> Rhee, Jean Soo, *supra* note 24. 18-20.





and to contribute to the protection of the public's administrative rights and interests through the proper and prompt exercise of their right to a trial, reflecting the progress made in administrative proceedings since the opening of the Seoul Administrative Court on March 1, 1998.<sup>37</sup> The Regulations on Administrative Litigation, like the GAPA, codifies the principles of administrative law established by precedents and specifies the accumulated practice of administrative litigation. The Regulations on Administrative Litigation was drafted, promulgated, and enforced not long after the enactment and enforcement of the GAPA, which succeeded in norming and codifying the principles of administrative law. Although the Regulations on Administrative Litigation differs from the GAPA in terms of the competent entity for enactment, the subject matter, and the content, it is similar to the GAPA in that it codifies the established precedents and practices in the field of administrative law, and can be considered a major change in the field of administrative trial practice since the enactment and enforcement of the GAPA.

### **Changing adjudicatory norm**

While the enactment and enforcement of the GAPA did not immediately change the face of administrative trials, more than three years later, there is a growing trend of claims of illegality of administrative actions based on the provisions of the GAPA. In other words, in most cases where general principles of administrative law are claimed as grounds for the illegality of an administrative action, theories and

precedents are still cited as the basis for the general principles, but as the enactment and enforcement of the GAPA has become known, more and more cases have been filed citing the relevant provisions of the GAPA when invoking the general principles of administrative law as grounds for the illegality of an administrative action. Furthermore, among the lower court cases, there are cases in which the illegality of a sanction was argued and accepted by the trial court by invoking the purpose of the five-year limitation period for sanction provisions in Article 23 of the GAPA, even though the violation did not occur at the time of the enforcement and application of the GAPA. Also there are cases of judgment regarding Article 14 of the GAPA which stipulates the standards for application of law.

## **IV. Future challenges of the GAPA**

**A.** Amendments to the GAPA to improve and overcome its limit

Although the GAPA has been enacted and enforced, it is still incomplete as a general law on public administration. At the very least, in the future, it will be necessary to consider supplementing the regulations through amendments to the GAPA on matters that have been discussed since the drafting stage. Representative examples include the succession of business licensee status, succession of the effects of sanctions, and conversion and cure of defective dispositions. Furthermore, among the contents of provisions stipulated in the GAPA, the following should be considered to be supplemented in order to protect the rights and interests of the public and improve the appropriateness

<sup>37</sup> National Court Administration, *Commentary to the Supreme Court Regulations on Administrative Litigation*, (2023), 1.



of administration: improvement of the system for re-examination of dispositions, clarification of the right to apply for ex-officio revocation or withdrawal, observance of the principle of reservation of laws when attaching subordinate clauses to discretionary dispositions, and supplementing the contents of general law to administrative compulsion.<sup>38</sup> In addition, in order to better protect the rights and interests of the public, future amendments to the GAPA may include provisions on the delegation, entrustment, and agency of authority, clarification of grounds for invalidity as grounds for defects in administrative actions, and the effects of defects in administrative procedures.<sup>39</sup>

#### B. Toward a unified codification of administrative law

The enactment and enforcement of the GAPA is the starting point, and the preparation of an 'integrated general administrative code' is being discussed as a future legislative issue.<sup>40</sup> According to the purpose of enacting the GAPA, it focuses on the 'unified regulation' of the general principles and fundamentals of administrative law and the 'systematization' of administrative law. In this regard, it is possible to discuss the enactment of a 'General Administrative Code' that would cover all major individual statutes in the field of administrative law, including the Administrative Procedures Act, the Administrative Appeals Act, the Administrative Vicarious Execution Act,

and the Framework Act on Administrative Regulation.

There is a discussion that the Administrative Procedures Act and the GAPA should be unified.<sup>41</sup> In the current legislative situation, both the Administrative Procedures Act and the GAPA must be examined for "procedural matters" related to administration, resulting in a "division of regulations" regarding administrative procedures.<sup>42</sup> To date, the GAPA has been enacted in a way that avoids overlapping with the existing regulations of the Administrative Procedures Act,<sup>43</sup> but it is

<sup>41</sup> Kim, Dae-in, "A Study on the Relationship between (Framework Act on Public Administration) and (Administrative Procedure Act)", *Journal of Legislation Research*, No.59 (2020), 60.

Kim, Yong-wook, "Evaluation of the 'Framework Act on Public Administration'", *Inha Law Review*, Vol. 24, No. 2 (June 2021), 181-184.

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Chae, Hyang-seok/ Ha, Myeong-Ho, "The Legislative Process and Main Contents of (General Act on Administration)", *Journal of Legislation Research*, No.60 (2021), 49.

<sup>42</sup> For example, the separation of self-contained reports (Administrative Procedures Act, art.40) and reports requiring acceptance (GAPA art.34) is problematic.

<sup>43</sup> For example, seven issues that were discussed during the drafting stage of the GAPA, which is under the jurisdiction of the Ministry of Government Legislation (in other word, the Ministry of Government Legislation is the department in charge of matters related to the drafting of bills during the enactment and amendment of the GAPA), such as affirmation, publication of the facts of violations, administrative plans, unified publication of standards for authorization and permission systems, ensuring public participation in public administration, innovation if administrative affairs, and cooperation among administrative authority, were transferred to the amendments to the Administrative Procedures Act, which is under the jurisdiction of the Ministry of the Interior and

<sup>38</sup> Rhee, Eun-Sang, "Toward the Realization of an Integrated General Administrative Code", *Administrative Law Research*, No.67 (March 2022), 26-29.

<sup>39</sup> Ibid 29-31.

<sup>40</sup> Rhee, Eun-Sang, *supra* note 19. 1-39.



expected that the two laws will be amended in a "mutually competitive" manner in the future. At least some of the subjects regulated by the Administrative Procedures Act and the GAPA are common to both, such as the protection of trust (Article 4, paragraph 2, of the Administrative Procedures Act; Article 12 of the GAPA) and reports (Article 40 of the Administrative Procedures Act; Article 34 of the GAPA), duty of good faith (Article 4, paragraph 1, of the Administrative Procedures Act; Article 11, paragraph 1, of the GAPA), and the establishment and publication of disposition standards and standards for sanctions (Article 20, paragraph 1, of the Administrative Procedures Act; Article 22, paragraph 1, of the GAPA).<sup>44</sup> Legislative improvement for these subjects is requested as a priority.

There is also a discussion that the Administrative Appeals Act and the GAPA should be integrated through the 'objection system'.<sup>45</sup> The objection system was enacted in Article 36 of the GAPA as a general system for autonomous administrative control of disposal agencies and as a way to redress the rights and interests of the public. It can be argued that the 'administrative appeals system' under the Administrative Appeals Act, which has a similar function to the objection system, should also be regulated together as an integrated general administrative law. If the Administrative Procedures Act, which functions as a prior control in administration actions, is also incorporated, it is expected that 'administrative procedures, objections,

<sup>44</sup> Safety, through consultation between the two ministries.

<sup>44</sup> Rhee, Eun-Sang, *supra* note 19. 9-13.

<sup>45</sup> Rhee, Eun-Sang, *supra* note 19. 15-25.

and administrative appeals' will be regulated at once in one unified law with an organic connection, thereby securing consistent regulations. In other words, each role and function can be linked to the timing and stage of administrative disposition. Specifically, 'administrative procedure' is responsible for preliminary remedies up to the imposing an administrative disposition, 'objection' realizes rights relief through administrative self-control against the administrative agency that imposed an disposition, and 'administrative appeal' provides quasi-judicial rights relief of an imposed administrative disposition through a separate Administrative Appeals Committee.

In addition, since the GAPA has been enacted to define and regulate each type of administrative compulsion, it will be possible to consider the direction of legislation to introduce specific regulations on administrative compulsion in earnest.

## V. Conclusion

In this paper, I have briefly discussed the process of enacting the GAPA, its significance, limit, and main contents, the changes and impacts on administrative practice since its enforcement, and the direction of future amendments to the GAPA and the promotion of integrated codification. As only three years have passed since the enactment of the GAPA, there are few statistics or data that can directly and objectively show the changes and impacts on administrative practice, making it difficult to provide more detailed descriptions and discussions. I would like to leave this aspect as a detailed research issue for future research.



It is hoped that this paper will provide a small opportunity to share comparative legal knowledge on the codification of administrative law and its application in Korea, and that it will lead to constructive discussions for the development of administrative law systems and practices in each country. I would like to conclude by once again congratulating the Mongolian Administrative Court on its 20th anniversary and wishing it great progress and achievements in the future.

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# IV

**JUDICIAL REVIEW  
PERSPECTIVE:  
APPLICATION OF  
ADMINISTRATIVE  
LAW IN THE  
ADMINISTRATIVE  
LITIGATION  
PROCEEDINGS**



## CHALLENGES IN THE APPLICATION OF LAW: HOW DO ADMINISTRATIVE COURTS IN MONGOLIA INTERPRET AND APPLY HIDDEN (UNWRITTEN) LEGAL PRINCIPLES?

**Batsuuri Mishig<sup>1</sup>**  
**Bodibileg Amarbayar<sup>2</sup>**

- I. Preamble
- II. Unwritten or hidden principles applied by administrative courts
- III. Judicial Activism
- IV. Conclusion

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<sup>1</sup> Justice, Supreme Court of Mongolia.

<sup>2</sup> Judicial Research Assistant, Supreme Court of Mongolia.



## CHALLENGES IN THE APPLICATION OF LAW: HOW DO ADMINISTRATIVE COURTS IN MONGOLIA INTERPRET AND APPLY HIDDEN (UNWRITTEN) LEGAL PRINCIPLES?

**BATSUURI MISHIG,**

*Justice, Supreme Court of Mongolia.*

**BODIBILEG AMARBAYAR,**

*Judicial Research Assistant, Supreme Court of Mongolia.*

### I. Preamble

Article 49.1 of the Constitution of Mongolia states that “the court shall be impartial and subject only to law”. Furthermore, the second part of the same article prohibits interference in judicial proceedings, ensuring the independence of the judiciary. However, while courts are protected from external influence, they are also bound by the law governing the relationships before them. This creates a dual obligation: the judiciary must adhere strictly to the intent of the legislature, which represents the will of the people, while also upholding the principle of checks and balances that reinforces the separation of powers.

The principle of “subordination to the law,” as stipulated in the Constitution, was incorporated into Article 6.1 of the Law on Court, stating that “upholding the rule of law is the fundamental principle for the organization and operations of the judiciary.” This principle is further elaborated in the laws governing the relevant legal proceedings. For example, Article 11 of the Administrative Procedure Law states that when adjudicating a case: the court shall apply Constitution of Mongolia, international treaties to which Mongolia is

a party, and other relevant legislation; If the laws under adjudication, or international treaties are not in conformity with the Constitution of Mongolia, proceedings shall be suspended and the court shall submit the relevant opinion to the authorized party; in the absence of legislation that could regulate the matter in issue, Court shall apply generally regulated legislation; if legislation other than the Constitution of Mongolia is in contradiction, the court shall apply the law that sets forth the most detailed regulations on the issue; without such a law, the court shall apply the most relevant and recent law. In addition, the Administrative Procedure Law provides that “the Court shall not refuse to apply a norm of legislation on the grounds that laws are in contradiction, unfair, or in contravention of public order and morality”. This provision supports the principle of “subordination to the law”.

The law must be clear, in other words, uncontroversial and readable by the average citizen. As a means of creating rights or privileges for a certain person, or assigning obligations, and imposing responsibility in case of violation, the law must be clear, and in this sense, this principle is a requirement



of the minimum form of legality.<sup>1</sup>

What if the provisions of the law are vague and unclear? The law is not just a collection of regulations, but norms built on the basic concepts and principles of the law, so if it is difficult to interpret and apply the regulations and norms, we refer back to the basic principles of the law. When considering the laws that are in force within the framework of public law, the law-maker specifies the principles of that law. For example, Article 4 of the General Administrative Law included general principles such as "the decision should be proportional to the objective and reality" or "principle of proportionality" and "principle of reasonableness", while some branch laws, for instance, in the Civil Service Law the "principle of merit" is legalized.

However, the law cannot predict all cases of complex social life, and moreover, it cannot rationally regulate them. In other words, if legal regulations are vague and the principles are not included in the said law, a problem will arise regarding which source to rely on to resolve cases that were unforeseen by the legislator or the court (when there is no judicial precedent). To elaborate further, the majority of the cases are relatively simple cases where there are no challenges in applying the law directly and the laws as well are very clear and simple. However, we must also consider how the court should resolve so-

called "hard cases"<sup>2</sup> where there is a lack of clarity in the content of the law and a lack of established precedent for consistent application.

In this regard, if there is no law regulating certain relationship, the court should decide in accordance with the content, general principles and ideals of the Constitution of Mongolia and has no right to refuse to proceed with the case on the grounds that there is no legal norm regulating the disputed relationship or that its existence is unclear, as specified in the Administrative Procedure Law. On the one hand, this is the legislator's solution to how judges should decide when there is "legal uncertainty" and on the other hand, it is their requirement to define and establish concepts in accordance with the content and ideals of the Constitution and apply them in deciding specific cases.<sup>3</sup>

With this, there will arise a question whether there are court decisions or practices that are decided in accordance with the "context, general grounds, and ideals of the Constitution". If so, what concept and content were established and applied in deciding cases by the administrative court. In this context, we have studied the court decisions of the last ten years and found out that several principles were applied for "hard cases" during the administrative case adjudication.

So, the purpose of our presentation is to look for an answer to whether there are cases where the court has applied a

<sup>1</sup> The requirements of the rule of law have been discussed in detail by researchers such as J. Raz, L. Fuller, and McCormick. M. Batsuuri, "Modern *Ius Naturale*" Some issues of modern natural law, Rule of law. UB, 2010, N. Lundendorj, Legal Studies, UB., 2011, O. Monkhsaikhan, Legal Philosophy, UB., 2022 can be read in detail. This principle is clearly stated in the Law on Regulation on Drafting and Submission of Law and Other Decisions of the Parliament.

<sup>2</sup> A. Marmor, *Interpretation and Legal Theory*, (Oxford University Press, 2005), 95; H. L. A. Hart, *The Concept of Law*, 2nd ed. (Clarendon press, 1994), 124.

<sup>3</sup> O. Munkhsaikhan. *Constitutional Review and Interpretation*, (National University of Mongolia, 2023), 299.



principle that is not explicitly stated in the law or is defined as hidden in a case with unclear legal conditions, and if so, how it was defined and interpreted and applied such principles and how consistent it were with the content of the will of the legislator. In other words, we studied whether it could be considered as "subordinated to the law" or it was a "judicial activism", a more theoretically controversial concept.

However, it should be mentioned that the research of this court decision was done by sampling the resolutions of the Supreme Court as its decision is final decision, and the principles mentioned in the decisions and judgments of the first and appeal courts were explained and applied quite a few times.

## II. Unwritten or hidden principles applied by administrative courts

The spirit and content of the Constitution are not only reflected in its regulations but also defined by the principles embedded within it. Section 2 of Article 1 of the Constitution of Mongolia states that "democracy, justice, freedom, equality, securing a national unity, and the rule of law are the fundamental principles of activities of the State." These principles were embodied in the public law legislations regulating the activities and legal status of state and government organizations and mandated the administrative organization to operate within the framework of these principles.<sup>4</sup>

At the same time, the content of the above fundamental principles was broken down and defined in more detail

<sup>4</sup> Law on the Government of Mongolia, Law on the Legal Status of Ministries and Agencies of Mongolia.

in the branch of law. In the legislation of public law, the principles of "rule of law", "justice" and "equality" are widely referred to. However, the principles are too general, and it is not clear which cases fall within the concept of the above-mentioned fundamental principle, but according to court decisions and practice, several concepts have been included in the content of the decision, or have been indicated directly.

These court-defined concepts are referred to as "hidden" or "unwritten" legal principles because the principles may be found in other laws, or in formal and informal legal sources such as legal custom, jurisprudence, and case law. However, it is named so because the law, branch of law, and other legal sources to resolve the said dispute do not directly indicate whether it can be used or not. It includes:

### 1. Protection of pre-existing interests

This principle was commonly used in public law, especially in administrative law, such as Minerals, Specially Protected Areas, and Civil Service Law. To put simply, the priority is given to those at the first of the queue.

While it is currently losing its place to the principle of "selection" or "equality of start", some relations including issuing special license of land, in particular, small plots of land for planting fruit and vegetables, granting of special licenses for minerals with widespread distribution and establishing land rehabilitation contracts are still being regulated under the protection of first to come principle. For example, Article 31.3 of the Land Law stipulates that "The land requested for possession shall



not overlap in any way with land territory” which provides a protection to those who applied, granted and got a contract first.

However, the law does not specify in detail how the court should deal with cases where there is no decision or certificate, but in reality, it is owned or used by others, or when several parties have applied for it first, or it has been granted to another person despite the first-to-come principle.

In this case, the court defined the “principle of protection of the pre-existing interest” and applied it in several cases within the framework of the “to be fair” principle prescribed in the Land Law. One of them, the court made the following conclusion in the case of H. Khishignyam vs. Governor of Khanbogd Sum of Umnugovi Province.

Article 27.4 of the Land Law stipulates that “Possessing land without a valid certificate shall be prohibited, but in the case of overlapping land disputes, or when the disputing parties argue that “the right to own land legally arose first”, its legal grounds including “whose interest was established first in the land” and “whether the land applied for ownership is currently in the actual possession of others with legal interests” are based on the principle provided in the Article 4.1.3 of the Land Law which goes “fairness and equity shall be ensured with respect to ownership, possession and use of land”. The court ruled that “by the disputed order of the Governor of Khanbogd Sum, dated May 17, 2019, No. A/137, the third party “Khanbogd Taihar” LLC purchased 4000 sq. Not only was the

land granted at the same time as the 1,500 sq.m. land that was allegedly acquired, but the land to be granted by auction was not held and the first price of the auction was calculated by paying the participating auction price, and it was obtained by order. “The failure to conduct a hearing as prescribed in the General Administrative Law with the participation of that person, and failure to provide an opportunity to participate in the auction does not comply with the principles stipulated in Article 4, Clause 4.1.3 of the Law.”<sup>5</sup>

However, applying this principle requires the following prerequisites to be met. Firstly, the land is eligible for ownership by citizens, that is, the land is planned to be owned by citizens and legal entities. Secondly, the person's interest in owning the land takes precedence over others if it was established first, or if their request for ownership was not resolved or was wrongfully denied due to the misconduct of a government body or official. Furthermore, it requires proof of actual possession or use of the land before anyone else claims possession or use.

2. “If it is not prohibited by law, citizens are allowed to act; however, for officials, any action is prohibited unless expressly permitted by law.”

Many researchers believe and accept that one of the concepts of the rule of law principle is that government organizations and officials should only exercise the rights granted by law<sup>6</sup>, but it is permissible for

<sup>5</sup> H v. Governor, 0008, 5-6 (SCM, 2022).

<sup>6</sup> Due to the fact that laws and regulations do not fully separate the rights that belong to people and the rights that belong to officials, the concept of human rights is applied to officials. It is considered



a person if it is not prohibited by law. It can be understood from the speech of Mongolia's first President, delivered on the day the Constitution was adopted in 1992, that "it embodies the democratic principle that citizens are free to act unless restricted by law, while government and organizations are prohibited from acting unless expressly permitted by law."<sup>7</sup> This principle was also explained and applied by the Constitutional Court of Mongolia in its Opinion No. 06 issued on May 23, 2007, "It is a universally accepted principle of the rule of law that any government organization or official is prohibited from doing anything other than what is allowed by law."<sup>8</sup> "It is significant that it opened up the possibility of accepting and applying other principles of the rule of law."<sup>9</sup>

Considering the sources of administrative law, although the General Administrative Law and other laws do not directly specify the content of this principle, it is formulated within the framework of the principle of "rule of law" and the court interprets and applies it in this context. For example, the court made the following conclusion in the case of the "Durvun Geegen Erdene" Cooperative vs. the State inspector of the Social Security Inspection

appropriate to use the formulation as the rights and freedoms that belong to a person in their natural context, but in the context of the powers that are directly transferred by the Constitution, they are not shared with others, and it is the powers granted by law to other government organizations and officials.

<sup>7</sup> P. Ochirbat, "Speech delivered on the occasion of the adoption of the Constitution of Mongolia", 238, 1992, 01, 13, in CD-ROM1.0

<sup>8</sup> Resolution related with the dispute over dismissal of Ts. Nyamdorj, Speaker of the Parliament on whether he violated the Constitution and if there are grounds for his dismissal, 06, Constitutional Tsets, 2007).

<sup>9</sup> O. Munkhsaikhan, *Review and interpretation of the Constitution*, UB., 2022, p. 473.

Department of the Inspection Department of Sukhbaatar Province.

"... Clause 6 of the Article 1.8 of the Law on Infringement Procedure determines the jurisdiction of the infringements and Clause 6.10 of the same article provides that Inspector of State Inspection Department would determine violations stipulated in the Article 10.17 of the Infringement Law while Clause 6.15 provides that Inspector of Social Security Department would determine violations stipulated in the Article 10.17 respectively. Court decided that the Law on Social Insurance provided a list of violations to be inspected by the Social Security inspectors. According to the above articles and provisions of the Law on Social Insurance, while the state inspector of social insurance is specifically given the right to investigate and impose responsibility for the violation of hidden or false declaration of social insurance premium income specified in Article 10.17 of the Law on Infringement, the state inspector of Specialized Inspection Department inspects the violation and imposed a responsibility. It does not comply with the principles of non-duplication of inspections specified in the Law on State Inspections, and inspections being carried out by inspection organizations and officials specially authorized by the law..."<sup>10</sup>

**NB:** Although the claim was dismissed, the court made the following conclusion in the case of "Erdenet Foods" JSC and the Head of the Tax Department of Orkhon

<sup>10</sup> D.V. State Inspector of Social Security Supervision, Sukhbaatar Province, Department of Professional Supervision, 333, 3-4 (SCM, 2019).

Province.

"... The functions and powers of any administrative organization are determined by law and administrative regulations, and the organization is required to operate within the scope of these defined powers. However, if it exercises powers not granted to it, or powers assigned to another administrative body by law or regulations, this is considered an 'overtly illegal administrative act.' This reflects the principle of legality, which holds that government bodies and officials may only act within the authority granted to them, while citizens are free to act unless explicitly prohibited by law."<sup>11</sup>

Additionally, a similar conclusion was made in the case related to the Geology and Mining Cadastre Department of the Mineral Resources and Petroleum Authority vs. the claim of "Munkhdalai Energy" LLC:

"... State organizations and officials to carry out activities permitted by law only within the scope of their rights and permitted by law are rooted in the legal principle of "respecting the rule of law", or "prohibition of government officials from doing things other than what is permitted by law, and allowing citizens to do things other than what is prohibited by law." In this case, the defendant is not given the right to refuse to accept the application ... On the contrary, he is given an obligation to accept the application as provided by the law or as stipulated in the Article 7.2 (7.1 in the cited disposition) and

<sup>11</sup> Erdenet Foods" JSC v. Head of the Tax Department of Orkhon Province, 340, 5-7 (SCM, 2022).

Article 31 (also in the cited disposition, Articles 32 and 33) of the Law. The court explained that they are provided a right to refuse extension of license if they do not comply with the conditions and requirements of verifying the minimum amount of expenses and paying special license fee required for legal and tax-paying entities established under legislation of Mongolia.<sup>12</sup>

According to the above, the terms "Rule of law", "Rechtsstaat" and "Respect for Law" are used in various ways for lawyers and researchers, but, the generally accepted principle that "citizens are permitted unless prohibited by law, and officials are prohibited except those permitted by law" is already established in the practice of administrative courts in the context of the principle of "rule of law" enshrined in the Constitution of Mongolia.

3. A more lenient penal law applies retroactively, but a more severe penal law does not apply retroactively (*lex mitior poenali retro agit* ба *lex severior poenali retro non agit*)

This principle, originating from ancient Roman law, has been reflected and developed in criminal law through the development of international law, and has also been reflected in the Criminal law of Mongolia. Article 1.9 of the Criminal Code of Mongolia specifically confirms this principle.<sup>13</sup>

<sup>12</sup> Geology and Mining Cadastre Department of the Mineral Resources and Petroleum Authority v. "Munkhdalai Energy" LLC Resolution, 21 of 02.06.2023, Resolution No. 21 of the Supreme Court dated 01/18/2016 and Resolution 111 of the Supreme Court dated 04/04/2016 with the same conclusion.

<sup>13</sup> Criminal Code of Mongolia (2015), art 1.9.1. A law decriminalizing an action or inaction, or mitigating



On the contrary, in Article 5 of the Civil Code, when the legislator regulates the issue of retroactive application of the Civil Law, the strict principle of non-retroactive application (*lex retro non agit*) is included unless the parties to the contract agree.<sup>14</sup>

The legislator did not give clear "directions" on how to apply this principle to other branches of law in the Administrative Law, except the Law on Infringement<sup>15</sup>. However, according to judicial practice, there are court decisions that interpret and apply this principle. It includes:

Case of D. Shombodon vs. Bayangol district social insurance department, the court applied the principle as follows:

"... The Social Insurance Department retroactively applied Article 3 of the Law on the Application of Social Insurance Laws which became effective from 1 Jan 1995 where it was legislated conditions to recognize social insurance coverage as insured during an unregulated period of service and deducted 3 years from the 20 years of service even

the penalty for it, improving the legal status of the person who has committed a crime shall be applied retroactively. 2.A law criminalizing an action or inaction, or increasing penalty for it, worsening the legal status of the person who committed a crime shall not be applied retroactively.

<sup>14</sup> Civil Code of Mongolia (2002), art 5.1. Unless stated otherwise in the Law, retrospective application of civil legislation shall be excluded. 5.2 In case the newly adopted legislation damages the rights and legitimate interests of either one or both parties to the contract, contract terms and conditions shall be valid. 5.3.If parties to the contract mutually agree, the newly adopted legislation with better terms and conditions shall apply.

<sup>15</sup> Law on Infringement (2017), art 1.4. 4. The law that is no longer considered a violation, mitigates the penalties and coercive measures, and improves the legal status of the person and legal entity who committed the violation shall be retroactively applied; 5. Laws that have been deemed a new violation, aggravated punishments and coercive measures, or worsened the legal status of the person or legal entity who committed the violation shall not be retroactively applied.

though it was confirmed through the employment book. The decision of the Social Insurance Department to establish his retirement in May 2007 was contradicting the fundamental principle of "non-retroactive application of laws that worsen the legal situation" and was regarded as an "inaction" by the defendant that is not changing the amount of monthly pension nor adding the period of service. Court ruled "the above laws on social insurance will apply to relationships that have arisen after the date of its adoption, and since the years of service for the plaintiff were calculated according to the decree of the Council of Ministers of the Republic of Mongolia that was in force at that time, there is no reason to retroactively apply the law that has worsened the legal status since then to the previous relationship."<sup>16</sup>

The court applied the above-mentioned principle when the legislator did not regulate the procedure during the transition of legislation, and it was clearly stated in the case of the Financial Regulatory Commission's examiners vs. complaint of "Monos Delgerekh" SCC.

Although the examiner fined the complainant 10,000,000 MNT in 2018, when the dispute was resolved by the court of first instance in 2019, the "Amendment to the Law on Infringements," approved on January 10, 2020, was not yet in force. However, as published in the State Information Journal No. 7(1109) on February 13, 2020, the law became

<sup>16</sup> D. Shombodon vs. Bayangol district social insurance department, 223, 4-5 (SCM, 2014).



applicable starting from February 23, 2020.

In cases where a penalty was imposed under the Law on Infringements but was not implemented or executed, the legislator specifically introduced the "principle of law application" to allow the retroactive application of regulations that "improve legal status." In this case, the court accepted the complainant's claim, filed with the administrative court to revoke the penalty notice issued on December 20, 2018. The examiner's penalty notice had not been executed due to the initiation of a case by Order No. 106, dated December 27, 2018.

Based on the principles of the Law on Infringements, the reviewing court should retroactively apply the law that improved the legal status of the complainant, and reduce the amount of the fine imposed in the penalty notice, the court decided.<sup>17</sup>

In other words, even though the law came into force after the first-instance court's decision, if the law was published and became effective before the hearing of the appeal or review court, the higher court set a precedent by applying the law retroactively.

However, it can be said that the discovery of new conditions in the General Administrative Law is in line with the public interest, or how this principle can be interpreted in the context of the introduction of new conditions and requirements in the public service is still a controversial topic among legal researchers

<sup>17</sup> Md v. Financial Regulatory Commission Inspector, 210, 3-4 (SCM, 2020).

and judges.

#### 4. Refraining from deciding political question<sup>18</sup>

The theory known as "Political question" is a doctrine of the court that, within the framework of the concept of separation of powers, it is inappropriate for the judiciary to deal with political problems, especially political issues of the legislative power that can be solved by majority rule. Each country has its own "Political Question" doctrine, which is called "political question" in the United States, "*acte de gouvernement*" in France, and "*Regierungsakte*" in Germany.

What exactly is considered a "political question" varies from country to country, but in general, issues that are decided by the majority rule, such as foreign policy, internal governance of the legislature, and electoral zoning, are understood as "political questions".

US Supreme Court decision on *Baker v. Carr*, 369 U.S. 186 (1962) sets forth the following criteria that are important in defining a "Political Question". These include: 1) the text of the Constitution legislates the specific political organization responsible for the issue; 2) The court cannot resolve the issue within the framework of established and appropriate criteria; 3) In order to solve the problem, it is necessary to respond to the policy issues; 4) Court decisions cannot be made without taking into account the decisions of other political authorities; 5) It is possible to be exposed to political statements criticizing the judiciary.

<sup>18</sup> It is also called "Respect for democratic principles and the principle of judicial self-restraint".



adhered to the procedures stipulated by law and whether the majority decision aligned with the "democratic principles" of the state. Particularly in the context of the governor's dismissal, the court cannot provide a judicial assessment<sup>23</sup> on policy (political) decisions, such as whether or not the governor fulfilled his obligations."

According to the above, along with the authentic interpretation of the legislator defined in the General Administrative Law in the context of "Political Decision", the court continues to apply the position that the administrative court does not review the content of the decision made within the scope of the mandate provided by the majority principle of the democratic institution.<sup>24</sup>

#### 5. The concept of double jeopardy (*Non bis in edem*)

This principle, which originated in Roman law, has the content of not imposing double liability for the same obligation. In Anglo-Saxon law, it is called "Double jeopardy". Article 14(7) of the International Covenant on Civil and Political Rights established this principle: "No one who has been finally convicted or acquitted of a crime or violation committed in accordance with the Criminal Procedure Law and related laws shall be held liable again for that violation."<sup>25</sup>

Section 6.2 of Article 6 of the Criminal Code of Mongolia affirms this principle: "A person who commits a crime shall be held criminally responsible for that crime only once", and this principle also governs the application of the Infringement Law.

Although the legislator has not specified the application of this principle in the legislation of some branches, the court has applied this principle in the administrative branch of law. For example, in the case of E. Oyunbold's claim against the organizing committee of the Naadam Festival (wrestling champion's use of doping), the court made the following conclusion regarding the implementation of the responsibility stipulated in the Law on Naadam Festival.

Article 14 of the Law on Naadam Festival states that "Liability to be imposed on persons who violate the law", in Article 14.1, "Wrestlers who violate the obligations outlined in this law shall be subject to one of the following punishments" and in Article 14.1.3, "the right to participate in the Naadam Festival will be suspended for up to 2 years", and in Article 14.3, "... if the test shows that the wrestler or archer has used stimulants, the title and place awarded in the Naadam Festival will be revoked". Considering the part that defines the legal responsibility, the wrestler is obliged to fulfill the duties specified in the "National Wrestling Rules" stipulated in Article 10, Clause 10.4 of the Law on Naadam Festival, otherwise, he will be liable for any of the 3 responsibilities (impose one by choosing from alternative sanctions

<sup>23</sup> Resolution No. 177 dated May 20, 2020 of the Supreme Court.

<sup>24</sup> This principle is also applied when controlling activities such as approving local budgets, determining the amount of fees for the use of land, water, and natural resources.

<sup>25</sup> Article 14.7 of the Additional Protocol to the Universal Declaration of Human Rights, Human Rights - Ministry of Foreign Affairs of Mongolia (mfa.gov.mn).



depending on the violation of duty) stipulated in Article 14, Clause 14.1 of the law, but if it is found that the wrestler has used substances or stimulants included in the prohibited list, according to Article 14, 14.3, the title and place awarded in the festival will be removed or absolute sanctions will be imposed. Legislators regulated these circumstances in detail with differences. Despite this, the organizing committee of the Naadam Festival imposed both the sanction of revoking the title as stipulated in Article 14.3 and an additional suspension of the wrestler's right to participate until July 12, 2021. It is argued that the two-year exclusion is unjustified and that applying a more severe sanction for a single violation, when the law specifies different penalties for different violations, is inappropriate."<sup>26</sup>

Moreover, this principle was explained and applied in the tax disputes related to the state tax inspectors of the Big Taxpayer Department of the Mongolian Tax Authority, claimed by "Baganuur" JSC.

"... tax inspectors, when determining the amount of tax to be charged, they violated this principle by calculating the total amount adding amount with previous year's penalty, due losses with next year's unpaid tax instead of adding previous year's unpaid tax plus next year's unpaid tax, which means that tax inspectors impose double penalty and due losses for the amount. The court ruled that "As a result, the responsibility was imposed three times

for the violation of 474,470,889.44 MNT in 2017 and twice for the violation of 51,293,784 MNT in 2018, which is directly inconsistent with the principle of "non bis in idem" legal justice<sup>27</sup>."

6. The right to protection must be lawful and fair (he who comes to equity must come with clean hands)

In continental law, one of the fundamental principles is "not to abuse rights". It is forbidden to use the rights granted by law against the purpose for which the rights were granted and against social values. Roman law was governed by the principle, and it was later codified in legislation of the continental law countries.

This principle has developed into an axiom (maxims of equity)<sup>28</sup> in English equity law: "he who comes to equity must come with clean hands"<sup>29</sup>.

In Article 1.1, and Article 3.1.3 of the Law on Administrative Procedure of Mongolia, the legislator specified the condition "if rights and legitimate interests have been violated", and in court practice it is applied and explained as if the rights and interests that arose, were lawful and fair. For example, in the case filed by B. Buyandelger and related to the Head of the General Department of Social Insurance (where the state inspectors intercepted the payment of social insurance premiums in excess of the law and the determination of a high pension), the court made the following conclusion.

<sup>27</sup> Baganuur" JSC v. Big Taxpayer Department of the Mongolian Tax Authority 18 (SCM,2024).

<sup>28</sup> Романов. А.К. Правовая система Англии. Москва, -2000, 113 с.

<sup>29</sup> К.Осакве, Сравнительная правоведение в схемах: общая и особенная часть. Москва, 2000. -43 с.

<sup>26</sup> E. Oyunbold v. Organizing committee of the Naadam Festival,398, 7-8 (SCM,2020).



"... to be more specific, the rights and interests of the claimant that the court demands to be restored, only if they are lawful, should be protected by the court, and the court should restore the violated legal rights and interests to their previous state<sup>30</sup>."

The similar conclusion can be found in legal disputes for cases including land disputes and civil service disputes. For example, *B.Tsetsegsaikhan vs. the Government of Mongolia*:

"... Judging from the above situation, B. Tsetsegsaikhan, who was temporarily appointed to a public administrative position without meeting the requirements of the law, is not subject to the guarantees granted to full-time government employees by the Law on Civil Service, in other words, the claimant's rights and legal interests have not been affected due to the disputed act. According to Article 106.3.1 of the Law on Administrative Procedures, if it is found that the administrative act is not only illegal, but also the plaintiff's rights and legal interests have been violated due to the act, the court shall annul the contested act. It has been proven that the rights and legal interests have not been violated, so there is no reason to satisfy the claim..." court decided.<sup>31</sup>

In other words, it was explained that it is unreasonable to demand a guarantee not to be dismissed from the civil service if he/she has been appointed to the civil service without going through the selection

<sup>30</sup> B. Buyandelger v. Head of the General Department of Social Insurance, 23,4 (SCM, 2021).

<sup>31</sup> B.Tsetsegsaikhan vs. the Government of Mongolia, 06, 5-7 (SCM, 2024).

process.

7. Not to worsen the legal situation of the complainant (*non reformatio in peius*)

The principle of the ancient Roman law, which is a guarantee of the risk that the legal status of the person who complained through the appeal and review procedure will not deteriorate, or in other words, that the complainant's legal status will not deteriorate, is now generally accepted, and not only in European law, but also in continental law.

This principle is not legislated in the Administrative Law of Mongolia, but it is still used in judicial practice, one of which is the case of "Ovoot Tolgoi Resources" LLC vs. "Erdenes Tavantolgoi" JSC, Tender Evaluation Committee of the "Erdenes Tavantolgoi" JSC, and Ministry of Finance.

"... Regarding the disputed act, the Ministry of Finance's Official Notification No. 11/2466 dated April 20, 2023 on Complaint Review, as concluded by the court of first instance... Complainant Ovoot Tolgoi Resources LLC filed a complaint with the Ministry of Finance not on 1 basis but the complaint was filed on 6 grounds, the Ministry of Finance is not directly accused of applying 55.3.2 in addition to 55.3.3 of Article 55 of the Tender Law. In addition, the purpose of preliminary administrative decision-making is not only the legality of the disputed administrative act (action), but also the compliance with the purpose (92.1, 95.1 of the General Administrative Law), however, the principle of not exceeding the scope of



the complaint or not worsening the legal status of the complainant will not be directly applied at this stage of review. More precisely, because it is possible to issue another administrative act from the competent authority for handling complaints (98.1.4 of the General Administrative Law), in principle, it is accepted that the legal status of the complainant may deteriorate (the principle of reformation in *peius* can apply)<sup>32</sup>...” court ruled.

In the above case, the court explained that the principle of not worsening the legal status of the complainant will be applied at the next stage of the court, but this principle does not apply to the preliminary administrative decision.

#### 8. Accept minor (non-consequential) errors in administrative procedures

As mentioned earlier, except for those indicated specifically, the administrative court reviews the entire content and procedure of decisions of administrative organizations and officials, and in doing so, it checks whether the entire administrative decision-making process followed the principle of "due process" or whether it followed the procedure specified in the General Administrative Law.

In the General Administrative Law, the procedures for administrative decision-making, such as not only determining the participant in the decision-making process, but also ensuring his rights in the decision-making process, collecting relevant evidence, establishing the situation, and conducting a hearing, are established.

<sup>32</sup> Ovoot Tolgoi Resources" LLC vs. "Erdenes Tavantolgoi" JSC, Tender Evaluation Committee of the "Erdenes Tavantolgoi" JSC, and Ministry of Finance, 77, 12 SCM (2023).

Reversal of inconsistent administrative decisions is common.

However, at the same time, the conditions for denying the legal basis of the act as a whole do not disappear, and the legal status of the plaintiff does not improve regardless of whether the procedural error is justified. In some cases, the case is resolved based on the principle of "recognition of minor (non-consequential) errors in the administrative procedure." An example of this is the case of B. Buyandelger's claim against the Head of the General Department of Social Insurance, the court made the following conclusion.

"... when the defendant issues a contested administrative act, the plaintiff must be informed and provided with an opportunity to make comments and proposals on this matter; It is found that the defendant did not notify citizen B. Buyandelger before issuing the above order, but this is not a reason to consider the order as illegal in its entirety, in other words, it is not possible to uphold claims made by the plaintiff and deny the illegal situation included in the order..."<sup>33</sup>

### III. Judicial Activism

So, in connection with the next objective of the paper, there will be a question regarding unwritten principles that whether it will be considered as "subordination to the law" or "judicial activism" - court is being too initiative when deciding cases where regulations are not transparently included in the law and branches of law as well as legislator's intent is not known whether it

<sup>33</sup> *supra* note 30. 5-7.



is applicable. For that matter, we need to find an answer to the question of "What is judicial activism". For example, what forms of judicial activism are displayed, and if it is difficult to define judicial activism, we intend to consider in detail what factors influence the emergence of judicial activism.

In 1947, the famous American historian A. Schlesinger classified the judges of the Supreme Court of the United States as "judicial activists" and "judicial self-restraint", which is considered the beginning of the understanding of "judicial activism".

Although he does not intend to elaborate on "judicial activism", he explained that "judicial activists" decide specific cases in accordance with their ideals of social good to bring about better outcomes for society, and compared legal sources, norms and sermons with empty vessels. He defined judicial activism as someone who believes that there is no right answer to any legal problem because he pays more attention to policy issues than to legal issues.<sup>34</sup> On the other hand, a "judicial self-restraint" was defined as a person who believes that there is an absolute correct answer to any legal norm, a judge's personal sense of justice is not important in resolving disputes, and he respects the will of the legislator more than the power of the judiciary.<sup>35</sup>

Subsequently, it was McWhinney who formally defined and criticized "judicial activism" in legal scholarship. He related "judicial activism" to the issue of constitutionality (judicial review, constitutionality) of certain laws and defined the annulment of laws on the

<sup>34</sup> Keenan D.Kmiec, "The Origin and Current Meanings of "Judicial Activism", 5 *California. Law Review* (2004), 1446-1447.

<sup>35</sup> Ibid 1448.

grounds of violation of the constitution as "judicial activism". Consequently, "judicial activism" was criticized on the grounds that judges have high legal skills and education, but lack the ability to solve social policy problems compared to legislators.<sup>36</sup>

Furthermore, there has been considerable discussion among researchers and experts on how to define judicial activism, and in summary, it can be considered that judicial activism displays itself in the following types.

1. Striking Down Arguably Constitutional Actions of Other Branches

In the sense that the Supreme Court of the United States exercises constitutional review, political policy decisions aimed at fundamental social issues must be reviewed for constitutionality. In this context, most scholars believe that overturning legislative and executive decisions represents the main content of judicial activism.<sup>37</sup> Of course, it is too biased to characterize all court decisions that overturn legislative and executive decisions as judicial activism. Consequently, there is controversy over exactly what legislative and executive overturning decisions constitute judicial activism, and some scholars believe that it is appropriate to define judicial activism as narrowly as possible. L. Graglia made the following explanation, which represents the main content of this definition. He said, "I understand that judicial activism is the act of judges disrespecting the policy decisions

<sup>36</sup> Edward McWhinney, "The Supreme Court and the Dilemma of Judicial Policy-Making", *University of Minnesota Law School. Review*. 837, 837-838, (1955).

<sup>37</sup> "Taking Over the Courts" The New York Times, November, 27, 2024.



of government authorities, which are not clearly prohibited by the constitution."<sup>38</sup>

It is believed that the main measure of judicial activism can be determined by "the extent to which the judiciary overturns other branches of government, especially congressional decisions."<sup>39</sup>

## 2. Ignoring precedent

For a country with precedent law, there are various types of precedents such as constitutional, common law, vertical and horizontal. Although the extent of compliance varies depending on the type of precedent, it is common to criticize judicial activism for changing, abrogating, or not following judicial precedents.

## 3. Judicial Legislation

The former president of the United States, George W. Bush, said that "we need judges who interpret the law, not judges who make the law," which is considered to be a type of judicial activism.

It is difficult to say in what cases the court has established the law and not interpreted the law, but Justice Stevens of the Supreme Court of the United States said, "Court law-making activity, which is an inevitable accompaniment to the handling of specific cases, belongs to the legitimate functions of the court, but creating law in any unnecessary and obvious case is judicial activism."<sup>40</sup>

Based on this, it is considered "judicial activism" to create concepts aligned with the legislator's specific concepts, and to establish norms beyond the approved framework.

## 4. Departures from Accepted Interpretive Methodology

Deviation from accepted or traditional methods of legal interpretation is sometimes referred to as judicial activism. However, it should be noted that there are different concepts of accepted methodology or traditional methodology of interpreting the law.

It is correct to apply the accepted method of interpretation of the law to the problem of interpretation of the law, but it is criticized as judicial activism to interpret the law by methods such as modern or pragmatic, rather than the ideas and history of the legislator.

## 5. Result-Oriented Judging

As said by Judge O'Scannlain "Judicial activism is not simply denying the decisions of other government authorities, but 1) the judge has an ulterior motive for making the ruling, and 2) the decision departs from some baseline of correctness"<sup>41</sup> represents this definition.

According to the above, the concept of "judicial activism" is a very complex and relative concept that can indicate different contents depending on the topic being discussed. In addition, it is almost impossible to provide a single understanding of "judicial activism" in the sense that it is closely related to the most fundamental issues of legal philosophy and theories of

<sup>38</sup> Lino A. Graglia, "It's Not Constitutionalism, It's Judicial Activism", *Harvard Journal of Law & Public Policy* Cambridge, 19, (1996), 293 (By judicial activism I mean, quite simply and specifically, the practice by judges of disallowing policy choices by other governmental officials or institutions that the Constitution does not clearly prohibit), 293, 296.

<sup>39</sup> Cass Sunstein, *supra* note 5, at 42-43.

<sup>40</sup> Florida v. Wells, 495, (SCOTUS.1989).

<sup>41</sup> "On Judicial Activism", Open Spaces, November 27, 2004. <https://open-spaces.com/articles/on-judicial-activism/>



legal norms. On the other hand, there is an ongoing debate whether to accept or reject judicial activism depending on how it is understood, but for the most part, the disapproval of judicial activism prevails.

Although this is the case, researcher Fuad Zarbiyev's identification and presentation of the factors to determine the presence of "judicial activism" in international law may be significant in our country as well.<sup>42</sup>

#### *1. The Conception of Judicial Function*

How judges and lawyers perceive and receive the function of the court affects judges' approach in handling cases. Judges can be seen only as judges of certain disputes (judges as dispute settlers), on the other hand, judges can be seen as enforcers of social values.

The more judges are seen as enforcers of social values and guardians of justice in the latter sense, the more room for judicial activism to emerge.

#### *2. The Degree of Determinacy in the System*

The more unified and clear understanding of what is considered law and how to interpret the law in a given legal system, the less room for judicial activism.

#### *3. The Existence of a Hierarchically Structured Judicial System*

In a tiered judicial system where decisions can be appealed, judicial activism can be considered rare.

#### *4. Prudential Doctrines about the Relationship between the Judicial and*

#### *Political branches*

Having a fixed mission about the judiciary and other state powers prevents the judiciary from becoming entangled in subtle political issues and eliminates the potential for judicial activism.

#### *5. The Mechanisms of Political Control*

The court has no choice but to consider the reaction from the political side. In that system, the more the court can understand and negotiate with other political actors, the less judicial activism will occur.

#### *6. The Legitimizing Function of Legal Academics*

The most important function of the court is to apply or appear to apply established and clear laws and regulations and legal principles. In this sense, researchers justify or criticize the court decision in the context of legal theory and research, which ensures the legality of the court decision.

#### *7. The Nature of Proceedings*

The advisory or inquisitorial structure of proceedings affects the judge's authority to interpret and apply the law. In the advisory structure, the judge is not subject to mandatory rules of procedure, so he has a wide discretion to interpret and apply the law.

#### *8. Discursive Constraints*

In a legal system that upholds the concept of rule of law, the judge will not decide the case at his own discretion.

#### *9. Social Legitimacy Considerations*

In addition to paying attention to the legal basis of their decisions, judges also need to consider the expectations of society. Social expectations may require

<sup>42</sup> Fuad Zarbiyev "Judicial Activism in International Law" *Journal of international dispute settlement* 3(2) (2012), 247-278.



judges to be activists.

It is understood following types/displays of judicial activism are identified by the researchers which include interfering in policy-making activities of law and norm-setting executive powers within legislative and delegated powers, while the law is clear and understandable, at the same time, creating new norms with different concepts and regulations, refuse to comply with certain applicable laws, and not following the established interpretations and standards of the higher courts that interpret and apply the law. In short, it could be concluded that this concept is disregarding the rule of law principle.

Furthermore, in accordance with the factors impacting emergence of the judicial activism proposed by Fuad Zarbiyev, following factors have key conditions in determining the existence of judicial activism: hierarchical judicial system, uniform law application, the legal maturity of the process and the clarity of the court's functions, rational and transparent distribution of powers, and open discussion and research by the public, lawyers, and researchers about court decisions.

#### IV. Conclusion

In this article, we aim to study how administrative courts use hidden principles in cases that are not regulated by the law, or "serious cases". These cases play a crucial role in defining the scope and limits of the fundamental principle that courts must adhere to the law, which poses challenges within the administrative law system. Also, in order to determine whether the application of hidden principles by administrative courts is related

to judicial activism, we intend to touch briefly on the types of judicial activism and the factors influencing the emergence of judicial activism. As a result, the following conclusions can be made.

Although the court is subject only to the law, it is necessary to review the cases that have created a challenge to the application of the law, the content of the law is unclear, vague or not regulated at all, in accordance with the ideals, values, and general content of the Constitution of Mongolia.

In this context, there are several cases where the administrative court applied the fundamental legal principles to the "serious cases" in accordance with its content and ideals and decided the case. This can be seen that it is the practical display of the "principle of rule of law" outlined in the Constitution of Mongolia. For example, we introduced the application of legal principles that are conceptualized in the Constitution of Mongolia, as well as international legal system, including principles such as "protecting interests that have arisen before", "citizens are allowed if not prohibited by law, for officials, any action is prohibited unless expressly permitted by law", "retroactive application of laws that have improved the legal status or non-retroactive application of aggravated laws", "not to decide political decisions", "not to impose double responsibility", "the right to be protected must be lawful and fair", "not to worsen the legal situation of the complainant", and "to accept minor errors in administrative procedures".

Furthermore, we discuss the types and the factors of judicial activism to propose



if the application of hidden principles that are not written in the legislation could be regarded as judicial activism or judicial arbitrariness. With this respect, we summed that judicial activism is to interfere in the actions of the executive power within the framework of legislative and delegated powers, which have the nature of law and norm-setting policy, while the law is clear and understandable, at the same time creating new norms with different concepts and regulations, in other words, to refuse to comply with certain laws in force, and non-compliance with established interpretations and norms of the higher court that interprets and applies the law. In other words, the court has deviated from the position and function of the court as set forth in the Constitution and this can be regarded as judicial arbitrariness.

From this perspective, the application of unwritten principles by the administrative court is neither arbitrary nor a deviation from the principle of the rule of law. Instead, it reflects the application of principles of a democratic legal state, which have already been recognized and established in jurisprudence. Therefore, this practice should not be classified as judicial activism but rather as an activity that falls within the framework of the "rule of law principle" outlined in the Constitution.

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## THE METHODS FOR ACCELERATING ADMINISTRATIVE CONTROLS

**Mechtild Klein<sup>1</sup>**

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<sup>1</sup> Vice President, the Bavarian Administrative Court



## THE METHODS FOR ACCELERATING ADMINISTRATIVE CONTROLS

**MECHTILD KLEIN,**

*Vice President, the Bavarian Administrative Court*

Dear Justice Munkhtuya Dashdorj,  
Presiding Justice of the Administrative  
Case Chamber of the Supreme Court of  
Mongolia

Honourable Administrative Court  
Judges,

Distinguished participants,

As Chief Deputy Judge of the Higher  
Administrative Court of Bavaria, I would  
like to extend my warmest congratulations  
on behalf of myself and on behalf of  
Ms. Andrea Breit, President of the Higher  
Administrative Court of Bavaria.

I am very sorry that I am unable to  
attend the Conference in person due  
to personal reasons. But thanks to the  
advance of modern technology, I am very  
happy that I have the opportunity to meet  
with you online.

I wish to express my sincere gratitude  
to Presiding Justice Munkhtuya Dashdorj  
of the Administrative Case Chamber of  
the Supreme Court and members of the  
Chamber for your warm invitation to the  
conference once again.

I am also grateful to the Hanns-Seidel  
Foundation for enabling me to participate  
in the conference. I would also like to  
thank the past and present colleagues of

the Foundation for their decisive role in  
the establishment of fruitful cooperation  
between Bavarian and Mongolian  
administrative judges for more than 20  
years.

I looked at the guest book of my court  
and saw that there were 19 visits from  
Mongolia over the past years to the Higher  
Administrative Court of Bavaria.

Mongolian court representatives visited  
our court for the first time on April 18, 2002,  
two months before the implementation of  
the first Administrative Procedure Law of  
Mongolia.

While preparing for this conference,  
I met the former Chief Justice Andreas  
Schmitz. He shared his fond memory of  
the exceptional professional knowledge  
of the Mongolian judges, as well as  
their unwavering passion for continuous  
learning.

We are proud of the hard work  
you've put into establishing and localizing  
the Specialized Administrative Court  
in Mongolia, and we are delighted to  
celebrate its 20th year anniversary with all  
of you today.

Ladies and Gentlemen,

The administrative court is crucial



for the development of the rule of law. Because it is this court that protects the rights of citizens from the illegal activities of government and administrative organizations.

There are many factors that influence the successful functioning of the administrative court and the positive change in the confidence of citizens who turn to the court to protect their rights. In this regard, it is crucial that the administrative court should obey the law and conduct its activities independently.

In addition, it is very important that the proceedings are carried out quickly and continuously. The longer the period of review of the case by the court, and the longer the citizen who turns to the court to protect his rights waits for the solution of his problem, the less acceptable the decision becomes.

Back in 1868, the then Prime Minister of England, William Gladstone, during a debate with members of the House of Commons, said "Justice delayed is justice denied". I would like to deliver today's speech in alignment with this content. The topic of my presentation today will be "Means for speedy conduct of administrative cases reviewed by courts".

Ladies and Gentlemen,

Laws and regulations are not immutable things carved in stone. It is natural that they are re-calibrated during use and adjusted to new social needs.

Taking our country as an example, the Administrative Procedures Act has undergone several changes since its entry into force in 1960. Over the past 65 years, the legislator has made significant changes

in many parts of the law to meet the needs of the future.

In the past, the reasons for changes in the Administrative Procedures Act were:

- Increased workload of administrative courts;

- Growing demand to implement large infrastructure projects, such as road and railway construction, large renewable energy infrastructure projects (liquefied natural gas terminals, wind power plants) which are trending today, without any errors, specifically in terms of economic policy and process;

- Legislator's initiative to conduct government activities more quickly and with less bureaucracy.

When reforming the law, German legislators have also paid attention to the rights of citizens who go to court to protect their rights.

Our legislators, when reforming the Administrative Procedure Act, aimed to significantly expedite the judicial process. Thanks to this, the proceedings were prevented from being prolonged for a long time, administrative activities were reviewed in a shorter period of time at the court stage, and citizens who turned to protect their rights were able to get legal certainty in a shorter period of time. On the other hand, all the steps taken by the legislators in order to speed up the judicial process in the past require taking into account the constitutional principle of "effective judicial protection".

Before presenting the two main means introduced in the past decades to speed up the judicial process, let me say a few words



about the principle of "effective protection of rights".

What is the meaning of the "principle of effective protection of rights" reflected in the German Constitution?

How much "leeway" does the legislature have in clarifying this vague legal term? What should the legislator pay attention to when normalizing the principle clearly by ordinary law?

The main idea of the principle, which is reflected in Article 19.4 of the Federal Constitution, means that citizens have the right to protect their rights by the most effective means possible, i.e. by state courts.

This was interpreted by the Federal Constitutional Court as "the right to appeal to a court to have one's case examined within the framework of the official judicial process and to issue a decision with binding consequences" (BVerfGE 107, 395 (401)).

The court is obliged to understand and interpret the claims of the person seeking to protect their rights from the point of view of effective protection of those rights. The court cannot turn the "principle of effective protection of rights" into an empty slogan (BVerfGE 96, 27 (39)).

Therefore, on the one hand, it is necessary not to impose too high requirements on claims made by citizens, and on the other hand, the court makes its decision within a reasonable time (BVerfGE 110, 77 (83), BVerfGE 55, 349 (369)).

In this regard, the legislator is responsible for ensuring the fast conduct of the judicial process with procedural legal norms.

In the past, the legislator introduced two major changes in the law, which somewhat fundamentally changed the way judges work, in order to ensure the speedy functioning of administrative courts. These changes were applied to opposition proceedings and appeals.

The German legislator, like the Mongolian legislator, included in the first version of the Administrative Procedure Law a provision to require a mandatory preliminary resolution before going to court.

Preliminary resolution process takes place within the administrative organization. Civil complaints will be reviewed by higher administrative bodies.

Preliminary resolution procedure is, in a sense:

1. Internal control of the administrative bodies,
2. Additional means of protecting civil rights,
3. Means to reduce the burden of administrative courts.

The question of whether or not to conduct the preliminary resolution procedure does not in any way affect the fundamental right of the citizen to "effectively protect his rights", so there is no need for the legislator to be wary of either scenario.

On the one hand, constitutional law accepts the exercise of the right to appeal to the administrative court as depending on the preliminary ruling (BVerfGE 35, 65 (73)).

On the other hand, the Constitution does not require the administrative act to



be subject to internal administrative review and preliminary resolution (BVerfGE 35, 65 (73)).

This is because the German constitution legislates the "principle of effective protection of civil rights" not to be provided by the administrative body, but against the decision of the administrative body.

The 6th amendment to the Administrative Procedure Act introduced a regulation that opened the possibility of broad interpretation and application of the law starting from January 1, 1997. By introducing the amendment, the Federal Legislature /Bundestag/ has empowered the states to decide on their own whether to partially or completely abolish the preliminary resolution procedure provided for in the Administrative Procedure Act.

In the beginning, Bavaria used this provision only for certain legal disputes. In much later pilot projects in 2004 and 2006, the Landtag, or parliament, of the state of Bavaria chose one of the state's seven provinces to abolish the preliminary resolution procedure entirely on a pilot basis.

In its report, the working group that conducted the pilot project provided a recommendation to maintain the preliminary resolution procedure in the province. According to the report: "Preliminary proceedings are more citizen-friendly in some sectors and often more expeditious."

In reaching this conclusion, the working group relied on the following empirical research:

The proportion of complaints/lawsuits filed against administrative acts did not

change during the trial period. Even after canceling the preliminary resolution procedure, the ratio remained at 2-3 promiles / 2-3 parts per 1000/.

However, the preliminary resolution procedure resulted in more satisfaction among the citizens. Citizens were less likely to file lawsuits after preliminary rulings. After the procedure, only about 25% of citizens filed a lawsuit.

However, after the abolition of the preliminary resolution procedure, the number of people who filed to the administrative court of first instance increased by 32% in the first year and by 18% in the second year.

Moreover, the "efficiency" aimed by the legislator has not significantly improved. The report said: "After the abolition of the preliminary resolution procedure, the average duration of the trial of the administrative court of first instance tends to increase."

Despite the findings of this pilot project, Bavarian state legislators decided in 2007 to significantly limit the preliminary resolution procedure.

Following this change, citizens were given the option to either to appeal to the administration against administrative decisions - albeit in very limited circumstances - or to directly appeal to the administrative court.

Some of the arguments put forward by the legislator in deciding to limit the preliminary resolution procedure were not very realistic.

One of the justifications mentioned was "in order for improving Germany's economic



capacity" and it did not correspond to reality. Because at the time, the economy of the state of Bavaria was positive enough to maintain the preliminary ruling.

One of the negative consequences of a significant reduction in preliminary resolution proceedings was that the costs of adjudication were much higher.

Moreover, according to the results of the research, on the one hand, the cost of administrative bodies intended for doing this task would be saved, but on the other hand, it will affect the cost of court personnel.

Therefore, as per the above facts, the results of the research show that it is more advantageous to maintain the preliminary resolution procedure as the "efficiency" hoped for by the legislator did not materialize in reality.

Ladies and Gentlemen,

Another major change was made following the adoption of the 6th amendment of the German Administrative Procedure Act. Permission was not previously required to file an appeal, but this change now requires it.

The purpose of this change was to reduce the burden on the appellate court while shortening the time it takes for the administrative court to finalize the case.

When introducing this change, the legislator referred to the principle of single-instance judicial review which implies that it is often sufficient to review a legal dispute at one level of court.

There is not always a serious need to review the decision of the first instance court by an upper level court that examines

the entire facts.

To obtain leave to appeal under this reform:

1. There are serious grounds for doubting the decision of the court of first instance,
2. The dispute is complex in terms of facts or law,
3. The dispute should be of fundamental importance,
4. The court of first instance made a decision that deviated from the practice of the decision of the higher court,
5. The trial court committed procedural error.

Leave to appeal will only be granted if one of these conditions is met.

However, from the perspective of procedural law, when it comes to filing a complaint with the court, there is a difference between the initial stage and the appeal stage.

It can be specifically mentioned that if the court of first instance deems the dispute to be of high practical importance, unprecedented, new and fundamental, and the support of the higher court is needed to resolve subsequent similar cases, it can appeal its decision. In the event that the court of first instance grants permission to appeal in this way, a citizen can file a complaint directly at the appeal stage without seeking permission. But such cases are rare in practice.

Often, a citizen will file an application for permission to appeal to the appeals court, and in that application, he will list the reasons why he considers it necessary to appeal. For this, it is necessary to study



the grounds of the first instance court's decision very well.

The Court of Appeals examines whether the grounds mentioned in the request really exist without holding an oral hearing, and makes a decision on whether or not to accept the appeal.

There is no constitutional issue in including a provision for accepting appeals on the basis of the granted permission. This is because the Constitution only guarantees the right to protect one's rights in a fair court, but does not guarantee the right to go through all stages of the court.

But on the other hand, there is a generally accepted principle that the possibility of appeal granted by the legislator should not be complicated by limiting it without any justification (BVerfGE 125, 104 (136)).

In other words, the Court of Appeals cannot arbitrarily narrow the scope of appeals or increase the requirements for granting permission. Appeals under the Administrative Procedure Act should not be rendered "ineffective" by the introduction of this permission by court principle.

The principle to appeal based on the permission by court introduced by the legislature has actually reduced the burden on the appellate court as intended.

In 2017 and 2020, when administrative court cases were significantly overburdened by large waves of immigration, this reform helped to prevent overcrowding in the appellate courts.

A major "accelerating factor" for the appeal by permission regulation is the lower number of oral hearings on appeal level.

But this arrangement has its drawbacks.

They include:

1. Judges of the Court of Appeal spend a considerable part of their working time on checking whether the grounds stated in the appeal are sufficient to grant permission to appeal.

2. The process of reviewing the dispute has been continued for a relatively long time following the court's permission to appeal. The reason for this is that the court would review the case whether to grant a permission to appeal or not and then actual appeal proceedings will take place. In addition, higher requirements are imposed on the appellant. It has been required to add grounds for appeal to court to his previous application for permission.

3. Looking at the court practice, not only in Bavaria, but throughout Germany, the first and appellate courts allow a fairly high percentage of appeals.

4. As a result of this regulation, the number of legal disputes that should be reviewed at the review stage has decreased.

In summary, the appellate approach by permission has been a very effective means of speeding up litigation.

Thanks to this procedure, it was possible to decide the case before the court in a shorter time.

Ladies and Gentlemen,

The Administrative Court is a court with unique functions. Because the cases decided by this court are a reflection of the problems faced by the state, society, politics, and legal sector of the country.

If the number of cases at the court increases rapidly, it is crucial to revise the procedural law and reform the



## NOT WHY, BUT HOW: APPLYING THE SHARP EDGE OF THE LAW IN ADMINISTRATIVE LAW JUDICIAL REVIEW IN SINGAPORE

Eugene K. B. Tan<sup>1</sup>

- I. Juridical basis of and normative philosophy for judicial review in Singapore
- II. Judicial Review and the Separation of Powers
- III. Judicial review and good governance
- IV. Conclusion: Judicial review and the promotion of the rule of law

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<sup>1</sup> Associate Professor of Law, Yong Pung How School of Law, Singapore Management University, Singapore. I am grateful to the Supreme Court of Mongolia for the invitation to and privilege of presenting an earlier version of this paper at the international conference on “Administrative Law Codification and Application: Interdependence” on 4 June 2024 in Ulaanbaatar, in conjunction with the 20th Anniversary of the Mongolian Administrative Court system.



## NOT WHY, BUT HOW: APPLYING THE SHARP EDGE OF THE LAW IN ADMINISTRATIVE LAW JUDICIAL REVIEW IN SINGAPORE

**EUGENE K. B. TAN,**

*Associate Professor of Law, Yong Pung How School of Law, Singapore Management University*

“The management and control of power, and, in particular, the endeavour to strike the appropriate balance between affording governments the ability to act swiftly and decisively in the public interest while providing for adequate safeguards against governmental excess, is an intensely difficult undertaking. There is no one model that is correct for all times and all places.”<sup>1</sup>

### I. Juridical basis of and normative philosophy for judicial review in Singapore

When one thinks of judicial review in Singapore, one often envisages a “David versus Goliath” scenario, where an individual (increasingly, corporate entities as well) alleges that the executive branch of the government had conducted itself in an unlawful manner, breaching a legal standard in its decision-making process or in the implementation of a legislation or a policy.<sup>2</sup> This alleged breach has resulted in

the applicant’s rights and interest, perhaps including constitutional rights, being compromised.<sup>3</sup>

Adjudicating on the constitutionality and legality of legislative and executive acts by the judiciary is, arguably, more critical in a one-party dominant nation-state. The public (mis-)perception leans towards that of the political branches controlling the levers of powers and dominating the fabric of societal life, including political governance. Oddly enough, the Singapore Constitution does not explicitly provide the judiciary with the power of judicial review.<sup>4</sup> However, like its more well-

traditional grounds of review define the test for the lawfulness of an exercise of administrative discretion”.

<sup>3</sup> Tan Seet Eng v. Attorney-General and another matter, 1 SLR 779, (2016).

Ramalingam Ravinthran v. Attorney-General, 2 SLR 49, (2012).

Vijaya Kumar s/o Rajendran and others v. Attorney-General, SGHC 244 (HC), (2015). “Constitution of the Republic of Singapore (1965), art. 15”.

Yong Vui Kong v. AG, 2 SLR 1189 (CA), (2011), “whether the court can review the President’s clemency power”.

Kay Swee Pin v. Singapore Island Country Club, 2 SLR 802 (CA), (2008), “whether rules of natural justice prevailed when a recreation club expelled a member”.

Chng Suan Tze v. Minister for Home Affairs, 2 SLR(R) 525 (CA), (1988), “legality of a preventive detention order on national security grounds under the Internal Security Act (1985)”.

<sup>4</sup> Constitution of the Republic of Singapore (1965), art. 4, 93 are commonly cited to indirectly support the judiciary in engaging in judicial review.

<sup>1</sup> Sundaresh Menon, “Executive Power: Rethinking the Modalities of Control”, *Duke Journal of Comparative & International Law*, vol 29 (2019), 276, 278.

<sup>2</sup> Tan Seet Eng v. Attorney-General and another matter, 1 SLR 779, (2016), paras 63, 99. “The Court of Appeal re-affirmed that the court’s role in judicial review should be limited to the “usual ambit of judicial review”, namely, “illegality, irrationality and procedural impropriety”. These



known constitutional law counterpart, judicial review of administrative actions has been and is an integral part of the legal landscape in Singapore today.<sup>5</sup>

Singapore courts recognise the central role of judicial review in constitutional law and administrative law in ensuring that the executive does not act beyond the scope of its legal powers. Singapore courts subscribe to “the notion [that] a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power”.<sup>6</sup> This “principle of legality” means that when carrying out their public functions and exercising statutory powers, including the discretionary powers granted to them by law, it is essential that public authorities do so legally. Where discretion is vested in the Executive by the Legislature, it remains a matter for the courts to decide what are the boundaries of the jurisdiction or power that is vested in the Executive; and whether the Executive has acted within the ambit of that jurisdiction or power. The courts, in the final analysis, are the arbiters of the lawfulness of actions including government actions.<sup>7</sup>

As Singapore’s apex court noted of the *raison d’etre* of judicial review: All powers

have *legal* limits; as such, there must be “recourse to determine whether, how, and in what circumstances those limits [have] been exceeded”.<sup>8</sup> This is congruent with the rule of law, which requires discretionary power to be controlled or regulated. As Peter Cane notes, “Central to the concept of making decisions and rules is choice or ‘discretion’... The essence of discretion is choice; the antithesis of discretion is duty. The idea of ‘decision-making’ implies an element of choice: duty does away with the need to make decisions”.<sup>9</sup> In a similar vein, Sedley J in *ex parte Dixon* remarked of the English context that “[p]ublic law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power”.<sup>10</sup>

As the engine of the rule of law, judicial review enables individuals and corporate entities to challenge and to restrain constitutional infringements and unlawful actions by the government. This includes laws promulgated by Parliament, routine administrative actions, such as the issuance of licences and permits, in which the decision-making process is challenged for unlawfulness. In the process, administrative law values such as lawfulness, fairness, rationality, due process, fair hearing, have a role to play in the public sector for they can improve public decision-making and regulation. This speaks to a system of accountability in government decision-

<sup>5</sup> In *Ng Chye Huey v. PP*, 2 SLR(R) 106, (2007) para 49, “the Court of Appeal held that the High Court’s power of judicial review was based on its inherent supervisory jurisdiction over inferior tribunals”. 53, “It had existed “historically at common law” and remains “very much a part of our judicial system”. The High Court’s supervisory jurisdiction is part of its original jurisdiction”.

*Citiwall Safety Glass Pte Ltd v. Mansource Interior Pte Ltd*, 1 SLR 797 (CA), (2015), para 60-79.

<sup>6</sup> *Chng Suan Tze v. Minister for Home Affairs*, 2 SLR(R) 525, (1988), para 86.

<sup>7</sup> *Tan Seet Eng*, *supra* note 2. paras 90-106.

<sup>8</sup> *Tan Seet Eng*, *supra* note 2. 1, “The apex court reiterated that the specific responsibility of pronouncing on the legality of government actions, and hence ensuring legal accountability, falls on the Judiciary”.

<sup>9</sup> Peter Cane, *Administrative Law*, 4th ed (Oxford: Oxford University Press, 2004), 185.

<sup>10</sup> *R v. Somerset County and ARC Southern Limited ex parte Dixon*, JPL 1030 (EWHC), (1997).



making.

To reiterate, administrative law judicial review in the common law tradition is not about a party aggrieved by the decision or action of a public body challenging the substantive correctness of the decision or action.<sup>11</sup> Rather, in invoking the supervisory jurisdiction of the court in administrative law judicial review, the court is asked to engage in “the review of the decision-making process, but not to review the decision itself”.<sup>12</sup> Put simply, the court is asked to review *how* a decision was made, including “the manner in which the power is exercised”.<sup>13</sup> In judicial review in administrative law, an aggrieved party may dispute the decision or action on the traditional grounds of illegality, procedural impropriety, or irrationality. Singapore courts have not shied away from assessing whether an impugned action or decision meets the requirements of “just administrative action”. Sundaresh Menon CJ noted the “enduring importance” of controlling executive power, including controlling governmental power of any form, as the “first project of constitutionalism, and it is a challenge that we all must confront”.<sup>14</sup> Yet, it is also necessary to temper the seeming exuberance for judicial review in dealing with executive decisions and actions that a legal person may disagree with. Judicial review is firmly in the realm of law, and not politics. It is not a means to relitigate the merits of governmental actions.

This essay is organised as follows: Part II

<sup>11</sup> This would be by appealing against the decision using the appellate route provided by the legislation in question or in common law.

<sup>12</sup> *Re Dow Jones Publishing (Asia) Inc’s Application*, 1 SLR(R) 418 (HC), (1988), para 20.

<sup>13</sup> Tan Seet Eng, *supra* note 2. para 99.

<sup>14</sup> Sundaresh Menon, *supra* note 1. 276.

considers the place and function of judicial review in the context of the separation of powers. The contribution of judicial review to good governance is examined in Part III. How judicial review contributes to the building of trust and confidence among the branches of government against the backdrop of the subtleties and complexities of executive power is discussed. Part IV concludes, emphasising that executive decisions and actions must meet the requirements of legality, legitimacy, and the rule of law enabling the sustenance of collaborative good governance benefitting the people, the government, and the country.

## II. Judicial Review and the Separation of Powers

Under Singapore’s constitutional framework and the separation of powers, each of the co-equal and coordinate branches of government (*ie*, the Legislature, the Executive (which includes the elected President and the Attorney-General), and the Judiciary) has a distinct role to play in the judicial review process. The Legislature is vested with the power to make laws.<sup>15</sup> In the exercise of its legislative powers under the Singapore Constitution, especially passing laws, including criminal laws, Parliament has to ensure that the proposed laws do not violate the Singapore Constitution. The Attorney-General’s Chambers (“AGC”) is an organ of state led by the Attorney-General of Singapore (AG). The AG plays an important role in upholding the rule of law in Singapore as the principal legal adviser to the Government in both domestic civil law (including advising

<sup>15</sup> Constitution of the Republic of Singapore (1965), art. 38.



on the legality of proposed and actual governmental actions) and international law and his office is responsible for the drafting of written laws.<sup>16</sup> The AG, in his capacity as the Public Prosecutor, is “the guardian of the people’s rights, including the rights of the accused”.<sup>17</sup> Judicial review proceedings against the government are brought against the AG who will represent the government in defence.<sup>18</sup>

<sup>16</sup> Constitution of the Republic of Singapore (1965), art. 35(7).

<sup>17</sup> *Gobi a/I Avedian and another v. Attorney-General and another appeal*, 2 SLR 883, (2020), para 93.

*Khor Soon Lee v. Public Prosecutor*, 3 SLR 201, (2011).

*Bachoo Mohan Singh v. Public Prosecutor*, 1 SLR 966, (2010).

<sup>18</sup> Government Proceedings Act (1956), §19(1), “provides that the relevant minister may publish in the *Government Gazette* a list of Government departments which are authorised departments for the purpose of suits brought against the Government”.

§. 19(3) “goes on to state that civil proceedings against the Government (which includes judicial review proceedings”.

§. 2(2) “shall be instituted against the appropriate authorised Government department, or, if none of the authorised Government departments is appropriate or the person instituting the proceedings has any reasonable doubt whether any and if so which of those departments is appropriate, against the Attorney-General”.

*Chee Siok Chin v. Minister for Home Affairs*, 1 SLR(R) 582 (HC), (2006), paras 23-27, “The High Court noted that as of the date of the judgment (7 December 2005), no list of authorised Government departments had been published. Thus, instead of instituting legal action against the Minister for Home Affairs and the Commissioner of Police, the applicant should have brought the action against the Attorney-General (‘AG’). Nonetheless, this was a procedural irregularity that could be cured by substituting the AG as the respondent. To date, the situation has not changed. Thus, judicial review proceedings should be brought against the AG”.

On the other hand, for statutory boards, judicial review applications are brought against them in their own names: see, for example, *Borissik v. Urban Redevelopment Authority*, 4 SLR(R) 92 (HC), (2009) and *Chiu Teng @ Kallang Pte Ltd v. Singapore Land Authority*, 1 SLR 1047 (HC), (2014), “where no objection was raised by the respondents. Statutory boards are generally required to engage their own legal representation to defend judicial review proceedings. However, pursuant to the Attorney-General (Additional Functions) Act 2014

Article 93 of the Singapore Constitution vests judicial power in a supreme court and in such subordinate courts as the law may provide. The General Division of the High Court adjudicates in administrative law challenges brought by applicants, with appeals going directly to the apex Court of Appeal. Administrative (and constitutional) law issues can come before the High Court in several ways. They may, for instance, arise in the course of civil or criminal proceedings. An applicant may also bring a case to the High Court against a public authority specifically to challenge a decision that aggrieves her, or to vindicate her constitutional and/or legal rights. In such situations, the remedies that are available to the applicant depend on the procedure used to commence the action.<sup>19</sup>

In this regard, Singapore courts are also mindful of the trinitarian imperatives of (1) the separation of powers in the three co-equal branches of Government/state, as

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(and subsequent Attorney-General (Additional Functions) Act (Amendment of Schedule) Orders, “relevant statutory boards” may request that they be represented in such proceedings by the AG, and the AG may do so provided certain conditions are satisfied.”

*Halsbury’s Laws of Singapore*, vol 1, (2021), 10.143 and 10.153-10.156.

<sup>19</sup> The procedure for applying for judicial review is set out in Order 24 of the Rules of Court 2021 (‘RC’). One must first be granted permission by the High Court in order to bring an application for judicial review, and before it grants leave the Court must find the existence of a proper public law issue and available grounds of review. In addition, leave may be denied where the applicant fails to satisfy some threshold issue such as standing or justiciability, or it is clear that granting a remedy would be futile in the circumstances. The leave requirement is thus intended to filter out groundless cases at an early stage and to prevent wastage of judicial time, and to protect public bodies from harassment, whether intentional or otherwise: *Public Service Commission v. Lai Swee Lin Linda*, 1 SLR(R) 133 (CA), (2001).

*Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd*, AC 617 (HL), (1982), 642-643.



provided for in the Singapore Constitution; (2) the Singapore Constitution providing levers of control of executive power through mechanisms for intra-branch control; and (3) the imperative for a self-regulating Executive, the astute application of judicial deference, and a robust approach to justiciability. In other words, in regulating governmental power, the need for judicial review is enduring but it is by no means the only mode of control. In fact, judicial review should be not be the first line “defence”. Otherwise, the exercise of judicial review would unnecessarily valorise the judicial role in regulating executive power.

In Singapore, the proper conception of judicial review is that it is the “sharp edge that keeps government action within the form and substance of the law”.<sup>20</sup> The Court of Appeal noted more than a decade ago that “(e)xtensive judicial intervention in the administrative process is by no means the only avenue by which good governance can be ensured. Some regulatory functions can be better performed by other institutions or organs of state”.<sup>21</sup>

Courts also have to abide by the rule of law and the constitutional stipulations on the exercise of state power among the various branches of government, each of which enjoys varying measures of autonomy from the Cabinet.<sup>22</sup> There is “hard diffusion” which involves the creation of independent executive offices, such as the Attorney-General’s Chambers, that are vested with exclusive authority

over certain vital executive functions. This insulation of aspects of executive power from the political centre of the Executive also preserves their apolitical nature. “Soft diffusion” involves the attenuation of executive power by giving more than one office in the executive branch a share in its exercise. The Elected Presidency would be a case in point.<sup>23</sup>

Judicial restraint recognises the public body’s expertise and institutional autonomy, and the demands of administrative efficiency require the courts to not interfere with regulatory policies and their implementation without a sound legal basis. As Chief Justice Menon reasons, “If all legal powers have legal limits, then it must follow that the judicial power, which too is a legal power, has constitutional limits”.<sup>24</sup> In Singapore, the judiciary recognises that it is not the role of the judicial branch to govern or to formulate policy, but simply to “say what the law is”.<sup>25</sup> In turn, among other things, this entails that judges impartially declare what the law is, “and make their decisions based only on what they understand the law provides, and not on their idiosyncrasies or personal preferences. It means, also, that the Judiciary must respect the prerogatives of the other branches”.<sup>26</sup>

In this regard, the statutory regime governing the exercise of the public power and discretion is the focal point in the judicial inquiry. As Attorney-General

<sup>20</sup> Sundaresh Menon, “The Rule of Law: The Path to Exceptionalism”, *Singapore Academy of Law Journal*, (2016), 413.

<sup>21</sup> Jeyaretnam Kenneth Andrew v. Attorney-General, 1 SLR 345 (CA), (2014), para 56.

<sup>22</sup> Sundaresh Menon, *supra* note 1. 276.

<sup>23</sup> The terms “hard diffusion” and “soft diffusion” are from Sundaresh Menon, *supra* note 1. 276.

<sup>24</sup> Sundaresh Menon, *supra* note 1. 294.

<sup>25</sup> Sundaresh Menon, *supra* note 1. 294.

To “say what the law is” is from the US Supreme Court case of *Marbury v. Madison*, U.S. 137, 177 (1803).

<sup>26</sup> Sundaresh Menon, *supra* note 1. 294.



VK Rajah (as he then was) noted, “[t]he statutory framework is crucial because it is the anchor point for gauging the legality of governmental action in any given situation. The statutory framework is also a disciplining force, because neither the executive nor the court can stray outside its boundaries. This allows for greater certainty and predictability”.<sup>27</sup>

Similarly, it is trite that the law operates in a societal context. In judicial review in Singapore, then Chief Justice Chan Sek Keong had indicated that judicial review was a “function of socio-political attitude in the particular community”.<sup>28</sup> He also espoused a “green-light” approach towards administrative law in Singapore wherein administrative law was not principally about stopping bad administrative practices but also about encouraging good ones: “in other words, seek good government through the political process and public avenues rather than redress bad government through the courts”.<sup>29</sup> This is in contrast to the “red-light” approach, where the courts exist in a combative relationship with the Executive and function as a check on the latter’s administrative powers. Then chief justice Chan noted that the difference in both approaches had manifested in the different doctrines of locus standi developed in each jurisdiction. He also cautioned against “seriously curtail[ing] the efficiency of the Executive in practising good governance”.<sup>30</sup>

He advocated the Singapore judiciary taking a green-light approach by which the judiciary can play their role in promoting the public interest by applying a more discriminating test of locus standi to balance the rights of the individual and the rights of the state in the implementation of sound policies in a lawful manner”.<sup>31</sup>

Beyond being a useful classification of administrative law, the Court of Appeal subsequently endorsed the green-light approach in administrative law judicial review, noting that the red/green-light theory of administrative law “highlights the integral role that the political and economic contexts of a jurisdiction play in determining which approach would be more suitable for a given jurisdiction”.<sup>32</sup> The green-light approach “finds expression in the courts being concerned only with the individual’s rights and interests, and not matters of public policy, which rightfully remains in the remit of proper political process. In this vein, judicial review finds its place as an avenue for parties to bring claims of legality to the courts, and not for the purposes of challenging the very merits of a policy decision”.<sup>33</sup>

However, the red/green-light theory of administrative law as applied in Singapore should not be mistaken for the judiciary shying away from adjudicating on the constitutionality and legality of legislative and executive acts when it is necessary to do so. Rather, we should see the judiciary’s understanding of its role as indicating its posture when it is asked to adjudicate in a judicial review. Prior to reviewing

<sup>27</sup> VK Rajah, “Judicial Review – Politics, Policy and the Separation of Powers”, (Guest lecture delivered at the Singapore Management University Constitutional and Administrative Law course, 24 March 2016).

<sup>28</sup> Chan Sek Keong, “Judicial Review – From Angst to Empathy” 22, *Singapore Academy of Law Journal*, (2010), 479.

<sup>29</sup> *Ibid* 480.

<sup>30</sup> *Ibid* 481.

<sup>31</sup> *Ibid* 481.

<sup>32</sup> *Jeyaretnam Kenneth Andrew v. Attorney-General*, 1 SLR, para 345 (2014), para 50.

<sup>33</sup> *Ibid* para 56.



an impugned administrative action, a court typically considers its institutional competence to deal with the particular issue, shows restraint where its competence is limited and affords the political branches the requisite “margin of appreciation” for their administrative actions.<sup>34</sup>

One area where the judiciary has adopted such a nuanced approach in adjudicating in the area of administrative law is with the concept of justiciability. Put simply, justiciability is concerned with whether a court has the jurisdiction to look into a particular dispute. Justiciability concerns are justified by the following limitations of the Judiciary viz limitations in the court’s role and limitations in the court’s institutional capacity. In the former, the separation of powers doctrine requires the court to avoid interfering with the exercise of administrative discretion when its aim is the pursuit of policy. For the latter limitation, the court should refrain from deciding matters that it lacks expertise in, such as national security and resource allocation decisions, which polycentric considerations (that is, matters having many centres of authority).

Generally, courts recognise provinces of executive decision-making that are immune from judicial review. They include matters of “high policy” such as the dissolution of Parliament, the conduct of foreign affairs, and national security. However, this does not mean that such issues are entirely non-justiciable. The degree of curial deference can significantly determine whether a matter is justiciable. The Singapore courts’ approach was previously limited to

objectively determining whether there was evidence that the impugned decision was made, for example, based on considerations of national security. The position then was one of greater deference by the court when the decision being reviewed was policy-laden or security-based.

Hence, it is not surprising that the Singapore courts recalibrated the appropriate deference when faced with a judicial review challenge, especially when it is premised on irrationality (or proportionality) and/or substantive legitimate expectations since they would be treading close to questioning the merits of an executive decision. *De Smith’s Judicial Review* puts it aptly:

The question of the appropriate measure of deference, respect, restraint, latitude or discretionary area of judgment (to use some of the terms variously employed) which the courts should grant the primary decision-maker is one of the most complex in all of public law and goes to the heart of the principle of the separation of powers. This is because there is often a fine line between assessment of the *merits* of the decision (evaluation of fact and policy) and the assessment of whether the principles of “just administrative action” have been met. The former questions are normally matters for the primary decision-maker, but the latter are within the appropriate capacity of the courts to decide.<sup>35</sup>

Notwithstanding the judiciary’s reluctance to engage in substantive review

<sup>34</sup> SGB Starkstrom Pte Ltd v. Commissioner of Labour, 3 SLR 598 (CA), (2016), para 55-58.

<sup>35</sup> Lord Woolf, *De Smith’s Judicial Review*, 8<sup>th</sup> ed, (London: Sweet & Maxwell, 2018), 11-004.

of administrative actions, recent domestic jurisprudence also points to judges carefully scrutinising an executive decision or action, including the evidential substratum, especially if it relates to a punitive measure being imposed.<sup>36</sup> In such a situation, a less deferential posture is adopted.<sup>37</sup> This is a powerful check on governmental functions in both commercial and non-commercial spheres. In order to protect a legal person from capricious and arbitrary executive action, the court has to robustly assess the legality of the impugned decision. Judicial review therefore enables the reviewing court to examine both procedural and, in limited situations, substantive aspects of governmental decision-making.

More recently, the courts have avoided “a highly rigid and categorical approach” in determining whether a matter was justiciable. It emphasised that the mere label of “high policy” was insufficient to constitute a bar to judicial review of the executive decision. A subject-matter area, *prima facie* non-justiciable, could still be justiciable depending on the real legal issue raised.<sup>38</sup> Thus, even within

traditional categories of non-justiciable issues, questions of “legality”, “rationality”, and “procedural propriety” could arise. In short, the Singapore courts eschew a strict categorisation of what is justiciable and what is not is.

Likewise, a court will review a decision by a public authority if it was unsupported by evidence, or if the evidence was not reasonably capable of supporting the decision.<sup>39</sup> This principle was manifested in the High Court decision in *Re Fong Thin Choo*.<sup>40</sup> This case concerned regulation 12(6) of the *Customs Regulations 1979* which stated that a customs officer could require the owner (or his agent) of goods to produce evidence that the goods in question had been exported or re-exported, and if the goods were not accounted for to the customs officer’s satisfaction or were found to have been illegally re-landed in Singapore, the owner was liable to pay customs duty on them.

Justice Chan Sek Keong (as he then was) observed that reg 12(6) was a precedent fact provision: that the customs officer exercising his power to require the owner to pay customs duty must establish that the goods in question were not exported. In turn, this required the court to determine whether the customs officer’s decision was justified by the evidence, and not merely whether there was some evidence on which he could have reasonably arrived at his decision. However, the court

<sup>36</sup> Tan Seet Eng is exemplary of this approach. *Re Fong Thin Choo*, 1 SLR(R) 774 (HC), (1991) was an early, if rare, example.

<sup>37</sup> Cf Jaime Arancibia, “The Intensity of Judicial Review in the Commercial Context: Deference and Proportionality,” in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Anne Scully-Hill, and Mark Ramsden, eds, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010), 287–299.

<sup>38</sup> See the development of the jurisprudence in the following cases: *Chng Suan Tze v. Minister for Home Affairs*, 2 SLR(R) 525 (CA), (1988), paras 87–94.

*Chan Hiang Leng Colin v. Ministry of Information and the Arts*, 1 SLR(R) 294 (CA), (1996), paras 28–36 and 44–45.

*Lee Hsien Loong v. Review Publishing Company Ltd*, 2 SLR(R) 453 (HC), (2007), para 81–98.

*Yong Vui Kong v. Attorney-General*, 2 SLR 1189 (CA), (2011), paras 33–36, 73–85.

*Tan Seet Eng v. Attorney-General*, 1 SLR 779 (CA),

(2016), paras 90–106.

<sup>39</sup> See *Secretary of State for Education and Science v. Tameside Metropolitan Borough Council*, AC 1014 (HL), (1977), “where the House of Lords held that a public authority’s decision may be judicially reviewed if it is unsupported by evidence or has been based on incorrect facts.”

<sup>40</sup> *Re Fong Thin Choo*, 1 SLR(R) 774 (HC), (1991).



did not dispose of the case on the basis of whether the precedent fact had been established since both parties in the case agreed to proceed on the basis that this was not a precedent fact scenario.

*Re Fong Thin Choo* signifies the importance of a public authority being on-side with the statutory regime under which discretionary power is exercised. Public authorities must ensure that they do possess the requisite legal authority to act and to do so in the manner required by the legislation. While this is not a novel point of law where administrative illegality is concerned, the case demonstrates that public authorities can sometimes elide the two broad categories of illegality: whether the public authority was empowered to make a decision, and where the public authority was properly empowered, did it properly exercise its discretion in making the decision. More importantly, *Re Fong Thin Choo* established that it is well within the institutional capacity of the judiciary to require, in appropriate cases, adequate justification of executive decisions, especially where it concerns the imposition of a customs duty and where the statutory framework so requires it.

### III. Judicial review and good governance

The co-equal branches of government negotiate the inherent constitutional tension between the administrative state's democratic legitimacy and the judiciary's role in public law to regulate the use of public power.<sup>41</sup> Democratic accountability certainly features prominently in making

<sup>41</sup> Lord Diplock, "Judicial Control of Government", *Malayan Law Journal*, (1979), Jonathan Sumption QC, "Judicial and Political Decision-making: The Uncertain Boundary", *Judicial Review*, (2011), 301.

a determination on issues of societal importance. This is also aligned with the democratic intent which necessitates determining which governmental branch is empowered by the law to execute a specific task. In 2010, then Chief Justice Chan Sek Keong noted, extra-judicially, that the judiciary could play a "supporting role by articulating clear rules and principles by which the Government may abide by and conform to the rule of law".<sup>42</sup> He asked rhetorically whether a perspective that views "the courts being locked in an adversarial or combative relationship with the Executive and functioning as a check on administrative power" was appropriate for Singapore.<sup>43</sup> For Chan CJ, courts do not serve as the "first line of defence against administrative abuse of powers".<sup>44</sup> Instead, they serve a facilitative function in developing good administrative practices even as it adjudicates in judicial review applications. This conception of judicial review is aligned with the green-light approach discussed earlier.

This attitude of a collaborative approach towards governance stems from the premise that good governance also requires each branch to check itself (intra-branch), in addition to a robust set of systemic checks and balances (inter-branch). Then Chief Justice Chan put it aptly, "[j]udicial review deals with bad governance but not bad government. General elections deal with bad government".<sup>45</sup> In similar vein, Chief Justice Menon has articulated that

<sup>42</sup> Chan Sek Keong, *supra* note 28. 480.

<sup>43</sup> Chan Sek Keong, *supra* note 28. 480.

<sup>44</sup> Chan Sek Keong, *supra* note 28. 480.

<sup>45</sup> Chan Sek Keong, *supra* note 28. 480, Chan CJ added: "In other words, seek good government through the political process and public avenues rather than redress bad government through the courts".



where courts give effect to the separation of powers doctrine by being “respectful of the constitutional roles of the other branches a culture of trust and respect will develop, and this will ultimately strengthen the effectiveness of the courts”.<sup>46</sup> In other words, Menon CJ recognises that courts must be guided by “*judicial modesty*, grounded in the recognition that judicial power, too, has its legal and constitutional limits, and that the scope for judicial intervention is not limitless”.<sup>47</sup>

The chief justice observed that nurturing a “self-regulating executive branch” is not only a factor of governmental attitudes but also of the judiciary “securing the respect of the other branches through honest, competent, and independent judgment that is respectful of the constitutional prerogatives of the other branches”.<sup>48</sup> The alternative of a clash between the branches results in “no side com(ing) out the victor”.<sup>49</sup> This means that the political branches also need to exercising “political deference” to the constitutional role of the judiciary. Ultimately, should courts lack judicial courage and abdicate their constitutional role, that can only lead to the “institutional irrelevance of the Judiciary” in the long run.<sup>50</sup> In such a scenario, the people are the poorer for it when the rule of law is severely compromised.

**A. Judicial review as a means to an end: Building trust and confidence**

<sup>46</sup> Sundaresh Menon, *supra* note 1. 301.

<sup>47</sup> Sundaresh Menon, “The Role of the Courts in Our Society – Safeguarding Society” (Opening Address at Conversations with the Community, 21 September 2023), <https://www.judiciary.gov.sg/news-and-resources/news/news-details/conversations-with-the-community-21st-september-2023>.

<sup>48</sup> Sundaresh Menon, *supra* note 1. 303.

<sup>49</sup> Sundaresh Menon, *supra* note 1. 303.

<sup>50</sup> Sundaresh Menon, *supra* note 1. 303.

While judicial review is usually conceived as an end in itself, it should also be a means to an end. In dealing with unlawful governmental action, judicial review can and should encourage good administrative practices and governance such that the Government, through upholding high standards of public administration and policy, can better abide by the rule of law. How judicial review is done therefore matters immensely.

The internalised trinitarian imperatives highlighted earlier result in Singapore’s approach to judicial review that is also sensitive to the politico-legal context.<sup>51</sup> Menon CJ elaborates on the judicial posture towards judicial review:

... courts should not see themselves as antagonists whose role is to obstruct governmental action, but rather as equal partners with the other branches in the common project to promote efficient administration and good and proper governance, which the Judiciary contributes to by upholding the rule of law. Second, it means that the Judiciary should not be diffident about performing its constitutional role when called upon to invalidate unlawful action. If courts conceive of themselves as neutral umpires whose role is merely – as [US] Chief Justice John Roberts has said – “to call balls and strikes”, then there is no need to shy away from saying what the law requires. When a

<sup>51</sup> To reiterate, the imperatives are (1) the separation of powers in the three co-equal branches of Government/state; (2) the Singapore Constitution providing levers of control of executive power through mechanisms for intra-branch control; and (3) a self-regulating Executive, with appropriate judicial deference and a robust approach to justiciability by the judiciary.



court strikes down an executive order for falling outside the boundaries of an enumerated power, there is no “conflict” between the branches per se, because an act that is taken without proper authorization is a nullity, which it is the court’s duty to call out.

The difference is between a paradigm of confrontation and containment informed by mutual distrust and self-preservation and one of partnership and cooperation within a framework of governance and legality.<sup>52</sup>

The nuanced approach to judicial review by the Singapore judiciary can be seen in its jurisprudence. Take the administrative law rule that public authorities do not fetter their discretion in decision-making. The fettering of discretion is strongly manifested, for example, through a rigid application of a policy, even where the policy was designed to structure the exercise of the decision-maker’s discretion in the first place. However, the jurisprudence also indicate that it is legitimate for public authorities to formulate policies and guidelines that are “legally relevant to the exercise of their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust”.<sup>53</sup> Often, these policies and guidelines enable the public authorities to engage in consistent decision-making by having like cases treated in like manner. This also entails that public authorities must readily depart from their policies and guidelines when necessary.

Another form of a public authority fettering its discretion occurs when

the public authority, as the holder of a specified statutory discretion, unlawfully delegates that authority to another entity. In either case, the court examines whether the public authority is cognisant of the purpose of statutory discretion: that the autonomy granted to the executive by the legislature is to decide what should be done in any given situation in order to fulfil the purpose of the enabling legislation.<sup>54</sup> In not doing so, the public authority would not have kept an open mind in exercising a statutory discretion, which runs afoul of the requirement of administrative fairness. In this line of cases, the applicants, which are commercial entities, felt hard done by the decisions of the authorities which obviously affected their business in terms of revenue or profits. In other words, the decisions made had a negative impact on the business.

For example, *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board*<sup>55</sup> underscores the legal proposition that the adoption of a general policy by a body exercising an administrative discretion is prima facie valid, subject to the policy not being *Wednesbury* unreasonable. This means that the adopted policy must not so outrageous in its defiance of logic or

<sup>54</sup> Several recent legislations have a specific provision stating the purposes of the legislation in question. See eg, s 5 of the Protection from Online Falsehoods and Manipulation Act 2019 (No. 18 of 2019); s 3 of the Active Mobility Act 2017 (No. 3 of 2017); s 3 of the Deep Seabed Mining Act 2015 (No. 6 of 2015); s 4 of the Early Childhood Development Centres Act 2017 (No. 19 of 2017); s 4 of the Organised Crime Act 2015 (No. 26 of 2015); s 3 of the Precious Stones and Precious Metals (Prevention of Money Laundering and Terrorism Financing) Act 2019 (No. 7 of 2019); s 4 of Shared Mobility Enterprises (Control and Licensing) Act 2020 (No. 8 of 2020).

<sup>55</sup> Eugene KB Tan, “Commercial Judicial Review in Singapore: Strategic or Spontaneous?”, *Singapore Journal of Legal Studies*, (2020), 448.

<sup>52</sup> Sundaresh Menon, *supra* note 1. 295-296.

<sup>53</sup> See *Halsbury’s Laws of England*, vol 1, *Administrative Law* (4<sup>th</sup> reissue), (London: Butterworths, 2001). Registrar of Vehicles v. Komoco Motors Pte Ltd, 3 SLR 340 (CA), (2008).



accepted moral standards that no sensible person who applied his or her mind to the matter could have arrived at such a view. The public body does not fetter its discretion when it is prepared to hear out individual cases or to deal with exceptional cases.

In this case, the applicant was a cruise operator which challenged the adoption by the then Singapore Tourist Promotion Board (STPB) and the Port of Singapore Authority (PSA) of a general policy, in the form of non-statutory guidelines, regulating cruises-to-nowhere (CNWs).<sup>56</sup> One guideline was that berths might not be allocated for CNWs if the operators had scheduled more than 30 percent of their cruises as CNWs over a three-month period. The guidelines were made known to cruise operators at a meeting. The plaintiff, however, argued that the PSA's power to control the use of its berths had to be exercised through subsidiary legislation.

The High Court held that the PSA had the discretion to decide which vessels could use the limited number berths. It then considered whether the PSA had fettered its discretion in enforcing the guidelines. Justice Judith Prakash held that as the PSA had the legal authority over berths for vessels, it could not abdicate its responsibility by taking orders from other statutory boards unless it was under a legal duty to do so. In other words, the PSA had to decide by exercising its own discretion, and taking into account relevant facts or evidence. This included receiving inputs such as advice, recommendations, relevant information from relevant stakeholders including the

<sup>56</sup> Such cruises were understood to be for gambling purposes which took place once the cruise ships entered international waters.

STPB, the Gambling Suppression Branch of the Criminal Investigation Department. The court found that the PSA did appropriately consider all relevant evidence and facts, that it was willing to consider exceptions, and it did not apply the guidelines in an inflexible manner. As such, the court did not find that the PSA had fettered its discretion. The court also recognised that different public authorities may and do work together on issues of mutual concern and could do so without acting unlawfully individually or jointly.

While Singapore courts are careful not to second-guess public policy and to grant the executive appropriate latitude in crafting and implementing policies, the courts will also ensure that any discretionary power is properly exercised. A useful illustration in this regard are decisions made in the furtherance of land use, in particular the national policy of discouraging land hoarding in Singapore applied by various public authorities.<sup>57</sup> Such a policy and decisions made in pursuant thereof have been challenged under administrative law. In this line of cases, the courts have adopted the judicial stance that such a policy is neither irrational nor unknown to property developers. More importantly, as the Court of Appeal noted in *City Developments Ltd v Chief Assessor*, “[s]uch a policy is premised on a very common-sensical notion (and which is in the public interest) of discouraging as well as preventing land hoarding in land-scarce Singapore”.<sup>58</sup> Further, this line of cases also

<sup>57</sup> Elgin Toh & David Ee, “Rule of Law and Urban Development”, *Singapore: Centre for Liveable Cities*, 1<sup>st</sup> ed (2019), <https://www.clc.gov.sg/docs/default-source/urban-systems-studies/uss-rule-of-law-and-urban-development.pdf>.

<sup>58</sup> *City Developments Ltd v. Chief Assessor*, 4 SLR(R) 150 (CA), (2008).



demonstrates the courts' sensitivity to the national concern of the scarcity of land and how it matters in public law litigation in Singapore. In addition, the courts demonstrate that policy- and decision-making in certain contexts must seek to balance the needs of the community with the interests of the individual or corporate entity.<sup>59</sup>

This was amply demonstrated in *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue*.<sup>60</sup> The facts are pertinent insofar as they establish why the plaintiff was so determined to obtain leave to apply for a quashing order and mandatory order. The plaintiff, an established company with considerable experience in property transactions, was until 26 February 1983, the owner of the land and property thereon situated at Mukim 25 Lots 498, 348 and 350 at 20–22 Geylang Road. The land was gazetted for acquisition under section 5 of the Land Acquisition Act and the declaration to this effect was published in the *Government Gazette* in February 1983. Compensation was awarded to the plaintiff based on the market value of the land as at

30 November 1973. The plaintiff continued in occupation of the land as a licensee in the following 22 years before challenging the acquisition, arguing that the land had "been left in substantially its original physical condition and has been licensed for the Applicants' occupation and use". The plaintiff was also prepared to return the compensation in return for the land. It also alleged ultra vires conduct as well as bad faith on the part of the government in the land acquisition.

However, as the court observed, the plaintiff failed to mention in the application that the market value of the land at the time of the proceedings was far in excess of the original compensation it had received. Justice Andrew Phang (as he then was) noted:

However, does that mean that s 5(3) of the Act [the *Land Acquisition Act* (Cap 152, 1985 Rev Ed)] cannot be questioned in any court? This is not an implausible proposition, having regard to the nature and policy of the Act itself. However, bad faith, particularly in the governmental context, does not sit easily in any (and, especially, the modern-day) context. In my view, and viewing the matter from the particular perspective of land acquisition in the Singapore context, it is imperative that a balance be found in the tension between ensuring that the purposes of the Act and the ensuing public benefit are achieved on the one hand and ensuring that there is no abuse of power on the other. In this regard, it is important to note that the Act was promulgated not only for the public

<sup>59</sup> The People's Action Party ("PAP") government of independent Singapore made a conscious decision to exclude the constitutional right to property when Parliament promulgated the *Singapore Constitution* in December 1965. The Constitution Commission of 1966 also agreed with this stance, recognising that Singapore was then only a small island of 225 square miles, and that more land would be required for public purposes as the population increased. As founding Prime Minister Lee Kuan Yew stated when moving the Constitution (Amendment) Bill, "... once we spell out that no law shall provide for the compulsory acquisition or use of property without adequate compensation, we open the door for litigation and ultimately for adjudication by the Court on what is or is not adequate compensation": see *Parliamentary Debates Singapore: Official Report*, vol 24 at col 435 (22 December 1965).

<sup>60</sup> 3 SLR 507 (HC), (2006), *Teng Fuh Holdings, (HC)*, affirmed by the Court of Appeal in, 2 SLR 568, (2007).

benefit but also because land is an extremely scarce and therefore valuable resource in the Singapore context. These are in fact inextricably related reasons. This being the case, it is clear why much more latitude and flexibility is given to governmental authorities. As a corollary, it is not the task of the courts to sit as makers of policy. This would in fact be the very antithesis of what the courts ought to do. But latitude and flexibility stops where abuse of power begins. Such abuse of power is most commonly equated with the concept of bad faith. At this point, the courts must – and will – step in. But, in the nature of both the concept itself, such abuse of power will not be assumed (let alone be found) at the slightest drop of a hat. It is a serious allegation. There must be proof. In proceedings such as these, there must be sufficient evidence, produced in its appropriate context, that establishes that a “prima facie case of reasonable suspicion” of bad faith exists.<sup>61</sup>

Similarly, in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*, the applicant, a property developer, challenged the amount it owed the Government for redeveloping a mixed-use site in Kallang.<sup>62</sup> This commercial judicial review concerned a dispute over the difference in the differential premium payable of about \$30 million. The applicant had leased from the state adjoining plots of land. In 2011, the applicant sought the permission of the Singapore Land Authority (“SLA”) for the change of use of the land for the purposes of redevelopment. As was

<sup>61</sup> Teng Fuh Holdings (HC), *supra* note 60. para 36.

<sup>62</sup> *Chiu Teng, Kallang Pte Ltd v. Singapore Land Authority*, 1 SLR 1047 (HC), (2014).

the case for state land, the leases provided that the land could only be used for the purposes specified in the leases. If the state (as lessor) decided to permit the change of use for the land, such as lifting of title restrictions, the lessee would have to pay a differential premium (“DP”), in respect of the change of use. This premium seeks to account for the enhanced value of the land as a result of the permitted change of use of the land.

The applicant had calculated the DP payable for two adjacent plots to be about S\$11 million. It had used for its calculation a table containing a “snapshot of rates” based on past prices. But the SLA calculated the premium based on a spot valuation - an assessment of the land’s value at the given time. Accordingly, SLA calculated the premium payable to be in excess of \$40 million. General guidance on the determination of DPs was provided in SLA circulars and on the SLA website, which referenced the Development Charge Table of Rates (the “DC Table”) as being the basis for the computation differential premiums. SLA’s assessment of the DP payable, however, was not based on the DC Table. The SLA had informed the applicant in November 2011 that a DP “equal to 100% of the enhancement to land value as assessed by the Chief Valuer will be levied for the lifting of title restrictions”.

In February 2013, the SLA informed the applicant that the SLA’s computation of the DP payable for lifting of the title restrictions was S\$41,183,989. The applicant sought clarification on how the DPs were calculated. The SLA stated that the DP was “assessed by the Chief Valuer



based on 100% enhancement in land value for the lifting of title restrictions". It further explained that "this case is different from conventional leasehold sites because [the Land was] formerly directly alienated to the former owner instead of through competitive tender". Clearly, the difference in DP computed by the applicant and the SLA was significant – to the tune of almost S\$31 million, or three times what the applicant had deemed it was liable for. The applicant applied to the High Court for leave to seek judicial review on the basis that the decision-making process was flawed in law. It sought a quashing order against the SLA's decision to assess the DP payable for the lifting of title restrictions at S\$41,183,989 "without reference to the Development Charge Table of Rates" and a mandatory order directing the SLA to assess the DP payable in accordance with the DC Table.

In this case, the applicant did not appeal against the SLA's assessment of the DP quantum payable.<sup>63</sup> It could not fault SLA's computation based on the spot valuation. Instead, they sought to challenge *how* SLA had assessed the DP payable. The applicant proffered the argument that the DP should be calculated based on the DC Table rather than on the spot valuation. It argued that it was irrational and unreasonable for SLA to assess the DP via a spot valuation instead

of relying on the DC Table. Furthermore, SLA's decision had deprived the applicant of its legitimate expectation that the DP would be assessed in accordance with the DC Table. As the applicant failed to show irrationality on the part of the SLA or to establish that a legitimate expectation had arisen on the facts of the case, the court dismissed its application for judicial review on these grounds.

This case is notable for Justice Tay Yong Kwang's acceptance of the doctrine of substantive legitimate expectations as a distinct head of judicial review in Singapore's administrative law.<sup>64</sup> The spirited attempt with which it sought to hold a public authority accountable in situations where it may have created legitimate expectations of a substantive kind (rather than a procedural one) is admirable. But this attempt to hold public authorities accountable also demonstrates that the more intrusive the nature of scrutinizing an administrative decision is, the more it would involve the courts reviewing the merits of executive action.

Unsurprisingly, in *SGB Starkstrom v Commissioner for Labour*, the Court of Appeal, in *obiter*, noted that courts lack the institutional capacity to review the merits of executive action. It would also

<sup>63</sup> Both the DP and the DC enable the state to reap the enhancement in land value arising from a higher value land use or an increase in intensity of land usage. For a summary of the key similarities and differences between the DP and DC, see Appendix B of Mayers Ng & Choy Chan Pong, "Land Framework of Singapore: Building a Sound Land Administration and Management System" *Singapore: Centre for Liveable Cities*, 1<sup>st</sup> ed (2018), <https://www.clc.gov.sg/docs/default-source/urban-systems-studies/uss-land-framework-of-singapore.pdf>.

<sup>64</sup> Chen Zhida, "Substantive Legitimate Expectation in Singapore Administrative Law", 26 *Singapore Academy of Law Journal*, (2014), 237.

Swati Jhaveri, "The Doctrine of Substantive Legitimate Expectations: The Significance of *ChiuTeng@Kallang Pte Ltd v Singapore Land Authority*", *Public Law* 1, (2016).

Swati Jhaveri, "Contrasting Responses to the 'Coughlan Moment': Legitimate Expectations in Hong Kong and Singapore" in Mathew Groves & Greg Weeks, ed, *Legitimate Expectations in the Common Law World*, (Oxford: Hart Publishing, 2017), 267.

risk blurring the separation of powers.<sup>65</sup> The court further observed that the central question was not whether the substantive legitimate expectations of individuals deserve protection. Instead, the issue was whether the executive or the judiciary ought to balance an individual's legitimate expectation against a countervailing public interest.

Of refreshing note is the court offering the view that the approach need not be a binary one of recognising a judicial power to enforce substantive legitimate expectations and holding that a public body could entirely disregard its clear representation. It opined that a suitable approach might lie in the range of possible measures between the two extremes. For example, a public authority could be required to confirm that it had considered the representation by an individual in coming to its conclusion that the public interest justified defeating any legitimate expectation. Alternatively, the court could require the public authority to furnish its reasons for defeating any legitimate expectation, which could then be assessed on the traditional grounds of irrationality, illegality, and procedural impropriety.<sup>66</sup>

<sup>65</sup> 3 SLR 598, (2016), paras 42, 55-63. See also Kenny Chng, "An Uncertain Future for Substantive Legitimate Expectations in Singapore: SGB Starkstrom Pte Ltd v. Commissioner of Labour (2016) 3 SLR 598" (2018) *Public Law* 192; Swati Jhaveri, "Localising Administrative Law in Singapore: Embracing Inter-branch Equality" (2017) 29 *Singapore Academy of Law Journal* 828. To be clear, the Singapore Court of Appeal did not definitively affirm or reject the doctrine of substantive legitimate expectations although it also made clear its reservations.

<sup>66</sup> Note the apex court's limited recognition of the doctrine of substantive legitimate expectations in the context of constitutional law judicial review in the unique circumstances surrounding the general non-enforcement of section 377A of the Penal Code 1871 in *Tan Seng Kee v. Attorney-General and other appeals* [2022] 1 SLR 1347 (CA). (Note

This case highlights that judicial review is also a function of socio-political attitudes of the community and that the courts are equally concerned about administrative justice for an individual vis-a-vis a corporate entity and the executive. *Starkstrom* suggests that the commercial realm cannot be excluded from the larger society of which is an integral part of. In extra-judicial remarks referencing the case, Chief Justice Sundaresh Menon opined that the rule of law cannot be divorced from "cultural substratum" on which Singaporean public law is built viz an emphasis on communitarian over individualist values. Communitarian values such as dialogue, tolerance, and placing the community above self, matter immensely.<sup>67</sup> Notwithstanding this emphasis on the communitarian ethos, the court's role is abidingly the "last line of defence" against any arbitrary exercise of power by the executive that is to the detriment of a private individual".

#### **B. Recognising the subtleties and complexities of executive power**

Most, if not all, judicial review cases in Singapore, including commercial judicial review ones, are brought against the executive exercising public functions and powers. In *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd*,<sup>68</sup> the growing trend of private bodies performing public functions was clear – just as a public body can act in more than one capacity.<sup>69</sup>

that s 377A has since been repealed vide the Penal Code (Amendment) Act 2022 (No. 39 of 2022), which came into force on 3 January 2023.)

<sup>67</sup> Sundaresh Menon, *supra* note 20. 413.

<sup>68</sup> *Yeap Wai Kong v. Singapore Exchange Securities Trading Ltd*, 3 SLR 565 (HC), (2012).

<sup>69</sup> Not all actions of statutory bodies are subject to judicial review. The court will have to examine whether a statutory body is, on the facts, performing a public duty pursuant to its statutory functions or acting in a capacity as a private



The apparent hybrid nature of the functions performed by decision-making bodies, such as the Singapore Exchange Securities Trading Ltd, means that the actions can have public law and/or private law dimensions. This reminds us of Sir John Donaldson MR's call for the courts to "recognise the realities of executive power" which can take many different forms whether it is the "subtlety and sometimes complexity of the way in which it [the power] can be exerted".<sup>70</sup>

As *Yeap* demonstrates, while the executive power often can be located to a specific source, often with statutory underpinning, there is the need to consider the nature of a power exercised to determine if public law applies to the body exercising the power. Judicial review was sought in this case in an attempt to negate a decision that could have adverse consequences on the applicant in seeking or continuing appointments as a company director.

The applicant, Yeap Wai Kong ("Yeap"), was a non-executive independent director of China Sky Fibre Chemical Ltd ("the company"), a company incorporated in the Cayman Islands and listed on the Singapore Exchange ("SGX"). He was also a member of the company's audit committee. In April 2011, the SGX required the company to furnish certain information after noticing discrepancies in its financial statements. This information remained withheld from

the SGX despite repeated requests. On 23 August 2011, SGX sent a "show cause" letter to the company and its board of directors stating that the company was in breach of the Listing Rules due to non-disclosure of information.<sup>71</sup> The letter indicated SGX's intention to issue a public reprimand and invited the company to show cause why relevant disciplinary actions should not be taken against it. This was followed by a document directive from the SGX requiring the company to deliver specific documents to the SGX. The SGX subsequently also ordered a special auditor to be appointed by the company but both directions were also not complied with. On 16 December 2011, the SGX publicly reprimanded all the directors of the company, including Yeap. Yeap then applied for and was granted leave to apply for a quashing order to overturn the SGX's public reprimand. Yeap argued that he was not accorded a fair and proper hearing by the SGX and that the "show cause" letter was not addressed to him as an individual company director.

The legal issues the case addressed were whether the SGX reprimand was susceptible to judicial review, and whether Yeap had been accorded a fair hearing as required by the rules of natural justice. On whether the SGX is amenable to judicial review in respect of the reprimands it issues, Justice Philip Pillai at the High Court applied the "nature of power" test. Under the test, the court could consider the factors such

party, such as an employer or party to a contract: *Public Service Commission v. Lai Swee Lin Linda* [2001] 1 SLR(R) 133 (CA) followed in *UDL Marine (Singapore) Pte Ltd v. Jurong Town Corp* [2011] 3 SLR 94 (HC). The court will examine the source of power with respect to the impugned transaction. If this is statutory, the decision is amenable to judicial review.

<sup>70</sup> *R v. Panel on Take-overs and Mergers; ex p. Datafin plc* [1987] 1 QB 815 at 838-839 (EWCA).

<sup>71</sup> Made by the SGX itself, the Listing Rules are not statutory in nature. They are subject to any requirements that are prescribed by the Monetary Authority of Singapore ("MAS") under the Securities and Futures Act. Any contravention of the SGX's Listing Rules does not result in the imposition of a fine on a listed company. However, SGX may punish in other ways such as through reprimanding a person or de-listing a company.

as the extent to which the decision-making body has been interwoven into a system of governmental regulation; whether there is and the extent to which there is any statutory recognition or underpinning of the body or the function in question; and the nature of the function. Thus, where the nature of the power the body exercises involves public law functions, or the exercise of its functions have public law consequences, then the body can be susceptible to judicial review. Yeap's case point to how bodies or entities carrying a public function have to pay attention to not just getting the decision "right" on its merits but also how they arrive at their decision to avoid a successful judicial review challenge.

#### IV. Conclusion: Judicial review and the promotion of the rule of law

"[Singapore's] approach has been informed by the belief that the various branches of government are equal partners in a common venture, which is to advance the best interests of the nation, but with differentiated responsibilities. This entails mutual respect for the boundaries of all the constitutional offices, including the court's own, and it has driven our belief that judicial review is most effective when an environment of trust and respect prevails such that the other branches pay careful heed to the Judiciary's view."<sup>72</sup>

Undoubtedly, Singapore has an omnipresent administrative state.<sup>73</sup>

<sup>72</sup> Sundaresh Menon, *supra* note 1. 304.

<sup>73</sup> As of July 2024, there are 16 government ministries, including the Prime Minister's Office, and 64 statutory boards. Information collated from the online Singapore Government Directory

Government ministries and statutory boards are staffed by a well-qualified professional bureaucracy imbued with an ethos of rational, scientific management.<sup>74</sup> Effectiveness, efficiency, and incorruptibility are the hallmarks of public administration in Singapore.<sup>75</sup> Public bodies and officials in the executive branch of the government routinely and increasingly exercise discretionary power in the implementation of various laws and government policies. The might of the administrative state notwithstanding, the subtle tension between executive fiat and judicial reason and supervision is ultimately managed and kept on an even keel by administrative law.

Where the exercise of statutory or other discretionary power by public authorities violates administrative law rules, public law remedies such as an order invalidating the unlawful act

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at [www.sgdi.gov.sg](http://www.sgdi.gov.sg).

<sup>74</sup> NC Saxena, *Virtuous Cycles: The Singapore Public Service and National Development* (New York: United Nations Development Programme, 2011). On the extensive reforms within Singapore judiciary in the 1990s to early 2000s, see Waleed Haider Malik, *Judiciary-led Reforms in Singapore: Framework, Strategies, and Lessons* (Washington, DC: World Bank, 2007).

<sup>75</sup> See eg, Neo Boon Siong and Geraldine Chen, *Dynamic Governance: Embedding Culture, Capabilities and Change in Singapore* (Singapore: World Scientific, 2007); Ho Khai Leong, *Shared Responsibilities, Unshared Power: The Politics of Policy-Making in Singapore* (Singapore: Eastern Universities Press, 2003); Chua Mui Hoong (with additional interviews by Ken Kwek), *Pioneers Once More: The Singapore Public Service, 1959-2009* (Singapore: Straits Times Press and Public Service Division, 2010); Loke Hoe Yeong, ed, *Speaking Truth to Power: Singapore's Pioneer Public Servants* (Singapore: World Scientific Publishing, 2020); Zhang Zhibin, ed, *Dynamics of the Singapore Success Story: Insights by Ngiam Tong Dow* (Singapore: Cengage Learning Asia, 2011); Simon S C Tay, ed, *A Mandarin and the Making of Public Policy: Reflections of Ngiam Tong Dow* (Singapore: NUS Press, 2006).



(a quashing order) or to compel the performance of a duty imposed on the public body (a mandatory order) are available in a judicial review action. Alternatively, a declaration, which is a private law remedy, may be sought.<sup>76</sup>

Judicial review has an established and secure role in the governance of Singapore. It promotes the rule of law as even executive powers can be challenged and reviewed for compliance with the law. A measure of this outcome is how public bodies and public servants are loathed to have their decisions judicially reviewed. This has the salutary effect of public bodies and public servants ensuring that their decisions and actions are in compliance with the law and respect the rights of people and organisations who are impacted by those decisions and actions. What follows is the secure foundation that executive decisions and actions sit on – legality, legitimacy, and the rule of law. This virtuous circle of collaborative good governance must be sustained for the good of the government, the people, and the country.

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<sup>76</sup> The remedies that the High Court may grant are discretionary. As such, the effective scope of the principles of judicial review depends very much on how the Court chooses to exercise its discretion in pursuance of its supervisory jurisdiction.



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## CONCEPT NOTE

### ADMINISTRATIVE LAW CODIFICATION AND APPLICATION: INTERDEPENDENCE

International Conference for 20<sup>th</sup> anniversary of the administrative court in Mongolia

**Conference date:** June 04, 2024, Tuesday

**Location:** Ulaanbaatar, Mongolia

**Background:**

The administrative court of Mongolia marks its 20th anniversary in June 2024. In the past two decades, contemporary administrative law and judicial review have been developed in relation to practice of this court. Not to surprise, the court and its practice has met with challenges but managed to stay in steady progress toward. The administrative law in Mongolia as a separate subject developed and studied since 1950s. However, establishment of the Administrative Court was a new paradigm in terms of the legality check on public authority from human rights viewpoint.

The conference brings the variety of foreign experts and scholars in addition to leading domestic administrative law practitioners, scholars together to address empirical and theoretical research on theme.

**Objective:**

The conference seeks to facilitate interaction between administrative law practitioners, researchers, and policymakers as well to provide relevant analyses, insights and research findings to exchange and discuss empirical evidence, theoretical frameworks and best practices.

**Topic:** While looking back the struggles and achievements over the last 20 years, the conference will cover topics concerning administrative law with a specific focus on the codification of administrative law and its application (interdependence).

Thus, the conference will focus on the following four areas, trying to knit them together therefore to determine and understand the current administrative law systemization:

- Theoretical Perspective (Current domestic trend and position, comparative practice, doctrines, and theories about administrative law codification);
- Legislative Perspective (The role of lawmakers in administrative law legislation and its codification);
- Executive Perspective (Practical issues in exercise and implementation of administrative authority);
- Judicial Review Perspective (Application of the administrative law).

**Conference Outcome:**

The conference aims to address domestic practice regarding the main topics, particularly, the role of academia, and its influence, if any, on the process of codifying the administrative laws



by Parliament; in turn, the codification issues arise from exercising administrative authority by executives; to reveal the effect of academia and codification of the administrative law to the judicial review or *vice versa*.

**Conference attendance:**

Practitioners involved in all aspects of administrative law and judicial review, including those in legal practice, judiciary, Government, and academia.

