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The Development of the Administrative Act Theory as an Expression of Values in Administrative Law

Lo sviluppo della teoria dell'atto amministrativo come espressione dei valori del diritto amministrativo

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Abstract Eng

The aim of the article was to identify the values expressed by the German theory of the administrative act that developed in the 19th century and in the first half of the 20th century. The predictability of the administrative act, ensured by the requirement of a statutory basis for such a measure, the need to verify the correctness of the act, implemented by the existence of judicial control of administration, and the stability of legal relations established by the administrative act, were of fundamental importance for the new relations between the state and the individual.

Keywords: Administrative act; legal basis requirement; judicial review of legality; stability of legal relations; Otto von Mayer

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Abstract Ita

Lo scopo dell'articolo è identificare i valori espressi dalla teoria tedesca dell'atto amministrativo, sviluppatasi nel XIX secolo e nella prima metà del XX secolo. La prevedibilità dell'atto amministrativo, garantita dall'esigenza di una base normativa per tale misura, la necessità di verificare la correttezza dell'atto, assicurata dall'esistenza del controllo giurisdizionale sull'amministrazione, e la stabilità dei rapporti giuridici instaurati dall'atto amministrativo sono di fondamentale importanza per i nuovi rapporti tra lo Stato e il singolo individuo.

Parole chiave: Atto amministrativo; requisito della base legale; controllo giurisdizionale di legittimità; stabilità dei rapporti giuridici; Otto von Mayer

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1. Notion of an administrative act

An administrative act is the classic form of public administration activity. According to one of the definitions in the Polish legal sciences, it is

> a formalised (undertaken as a result of proceedings) manifestation of the will of an administrative body, undertaken on the basis of the law and within the limits of its competence, directed to an identified person, in a specific case, producing legal effects in the scope of administrative law, and sometimes also in other branches of law[1].

An administrative act is a typical act of law application, giving concrete expression to the provisions of normative acts. Its purpose is to determine a specific legal and administrative relationship between an administrative authority and a citizen (another subject) in a formal and binding way, to legally establish the conditions for possible compulsory performance of obligations imposed (or stated) by the act, to legally allow a certain form of control, and to establish a certain relationship of trust subject to protection, which is expressed in making it difficult to revoke or amend a binding (final) act[2].

Keeping these aspects of the concept in mind, one must fully agree with the words of Rudolf Ihering (as cited by Jerzy Supernat), for whom the administrative act is «an administrative form that is the sworn enemy of arbitrariness and the twin sister of freedom»[3]. The development of the administrative act theory which deals with the sensitive encounter between the state and its bodies and the individual, is closely linked to the sphere of values in administrative law. In German public law doctrine, values of fundamental importance for the new relations between the state and the individual appeared gradually and referred to the predictability of the

[1] Błaś, 2004, p. 322.
[2] Łętowski, p. 185.
[3] Supernat, 2018, p. 462.

administrative act, ensured by the requirement of a statutory basis for such a measure, the necessity of verifying the correctness of the act by a judicial review of the administration, and the stability of the legal relationships created by the administrative act[4].

Reflections on administrative act in 19th century were not made within the separate field of administrative law as a long process of its emancipation from the constitutional law was still ahead. In the beginning an administrative act theory was totally immersed in general discussion concerning relations between state and individual. Only with time it gained autonomy on the field of administrative law[5]. Unlike in France, there was no radical break with the past legal framework in the German countries, but attempts were made to reconcile the freedom of administration with the freedom of the individual. Such approach was reflected in the language of the legal science, where the concepts inherent in cameralism still existed for a long time alongside the new legal institutions[6].

The concept of an administrative act first appears in German legal texts, specifically in the works of the Bavarian counsel Anton Kurz[7] and the Baden court clerk Freiherr von Weiler[8] in 1821 and 1826 respectively. The term was used in the context of the French model of administrative control. In doing so, Freiherr von Weiler criticised a broad understanding of this concept since it included also civil contracts concluded by the administrative authorities[9]. Both authors did not propose their own definition of an administrative act; a term that would be very rarely used until the end of the 19th century (terms such as order or warrant were used more frequently). Friedrich Franz Mayer was one of the first to address the issue of the administrative act in his book section titled *Formen polizeilichen Einwirkens*[10]. Despite significant terminological discrepancies in German public law doctrine, the institution of an administrative act within the meaning adopted today by §35 of

[4] The essential findings in this publication draw on the works of Markus Engert, 2002, and Görlitz, 1971.
[5] Engert, 2002, p. 22; Smyk, 2010, pp. 799-800.
[6] Sordi, 2019, pp. 26-27.
[7] Kurz, 1821, p. 46.
[8] von Weiler, 1826, p. 41.
[9] Engert, 2002, p. 51; Görlitz, 1971, p. 72.
[10] Mayer, 1862, pp. 114 ff.

the Administrative Procedure Act of 25 May 1976 (*Verwaltungsverfahrensgesetz)* appeared in the period up to 1918. What was lacking was a statutory regulation of the concept of an administrative act throughout the German Reich[11].

2. Requirement of a statutory basis for an administrative act

As mentioned before, one of the values introduced by the theory of the administrative act was the predictability of such an act, provided by the requirement of a statutory basis. Originally, a legal basis of the administrative act was not exactly defined. At the end of the 18th century, Günther Heinrich von Berg considered «the purpose of the police power» as the basis for the issuance of administrative acts but argued that the restriction of the freedom of subjects should «go no further than the proper purpose requires»[12]. According to Joseph von Sonnenfels, Professor at the Vienna University and a high official at the court of Maria Theresa and Joseph II, this purpose was to preserve security and to promote the welfare of the people[13]. Each holder of the police power, especially the ruler, was allowed to select and apply measures to achieve these goals «according to his own judgement»[14]. The rationale for interference was «legitimate reasons» and as far as well acquired rights are concerned, it could only occur on the basis of laws that had been passed with the participation of the representatives of the estates of the realm[15]. In Johann Friedrich Eusebius Lotz's opinion, a «reasonable belief that legal security is threatened» was sufficient for intervention by applying an act[16].

It follows that the ruler could forcibly encroach on almost all spheres of an individual's life in order to achieve a desired goal (*Wohlfahrt des Staates und Bevölkerung*). The issue of individual acts, which at the time were not subject to categorization in any formal and legal terms, suffered no significant restrictions.

[11] Engert, 2002, p. 180.
[12] von Berg, 1799, p. 88.
[13] von Sonnenfels, 1804, pp. 200 ff.
[14] von Berg, 1799, p. 86.
[15] Engert, 2002, p. 53.
[16] *Ivi*, p. 60.

In the second decade of the 19th century, opinions appeared that a statutory basis was desirable, though not necessary[17]. The octroyed constitutions of the German states from 1814 onward provided for a statutory basis in the case of restrictions on personal freedom and property, which created the demand for a more far-reaching requirement of a statutory basis for all administrative acts. Constitutional provisions were alluded to in the doctrine of law by, among others, Conrad Cucumus[18], who, in 1825, advocated the necessity of a statutory basis when constitutionally guaranteed rights (personal freedom, dignity and property) were interfered with by administrative orders; in 1828 Carl von Pfizer[19] expressed the view that executive acts could only result from the application of the statute and were also limited by it; in 1820, Robert von Mohl[20] adopted the requirement of enacting a law with regard to administrative powers, and in other cases, considered it desirable, and in 1838, Burkhard Wilhelm Pfeiffer[21] required a statutory basis for the issuance of police orders (citing a provision of the constitution of the Duchy of Hesse), with the prohibition against violating the law, even in states of emergency[22].

In the first half of the 19th century, a tendency appeared to replace the vague requirement of pursuing a police objective as a basis for applying administrative measures with the requirement of a specific statute provision. The scope of this basis application was being steadily extended (especially in the sphere of regulatory administration)[23].

In the second half of the 19th century, the demand for a statutory basis became more frequent[24]. For example, Karl Theodor von Inama-Sternegg wrote in 1870 that «the sum total of administrative activity, which is permissible under the rule of law, must also be legally standardised and ordered (the idea of the rule of law) »[25].

[17] For example, Behr, 1816, p. 93 and von Soden, 1817, p. 50.
[18] Cucumus, 1825, p. 223.
[19] von Pfizer, 1828, p. 4.
[20] von Mohl, 1829, p. 197.
[21] Pfeiffer, 1838, p. 558.
[22] *Ivi*, pp. 556 ff.
[23] Engert, 2002, p. 66.
[24] Stolleis, 1992, p. 410; Görlitz, 1971, p. 74.
[25] von Inama-Sternegg, 1870, p. 12.

In 1871, Joseph Pözl promoted the view that police activity as part of administrative activities is bound by law: «The police as well as the judiciary, are bound by laws and regulations issued in the constitutionally prescribed forms»[26]. However, many prominent representatives of the legal doctrine argued that a statute defines only the limits of executive power, while in the absence of statutes or other legal norms, the administration authorities operate on the basis of the purpose of a state[27]. Heinrich Albert Zachariä wrote in 1867 that a statutory basis was necessary for administrative acts imposing obligations *(für belastende Verwaltungsakte*), but an administrative authority may nevertheless act without it if the prevailing general interest (überwiegende *Interesse des Ganzen)*[28] requires it. On the other hand, Robert von Mohl acknowledged in 1866 that a certain amount of administrative arbitrariness is inevitable[29].

The breakthrough in the German administrative law doctrine is associated with Paul Laband, who, in his 1878 monograph[30], enumerated cases that require a legal provision for administrative intervention. They were, in fact, an exemplification of all administrative activities, thus contradicting his statement that administration is not clearly defined by law, but negatively limited[31]. Laband wrote that

> Every administrative order must be based on a legal provision that gives the government authority to demand performance, action or omission from the subject. It is binding without exception and is applicable not only to the demand for financial and military service obligations but to the same extent to all police orders and warrants[32].

That way, Laband established the principle in the German law that any act of public authority imposing obligations, especially an administrative act, requires a statutory basis. Admittedly, he did not use the term *Vorbehalt des Gesetzes*, which entered in the academ-

[26] Pözl, 1871, p. 206.
[27] For example, Zoepfl, 1863, p. 515; Bähr, 1864, p. 52; Grotefend, 1869, p. 187.
[28] Zachariä, 1867, p. 122.
[29] von Mohl, 1866, p. 42.
[30] Laband, 1878, p. 202.
[31] Engert, 2002, pp. 132 ff.
[32] Laband, 1878, p. 217.

ic circulation thanks to Otto von Mayer[33], and he did not formulate that principle in general terms.

The requirement of the statutory basis was excluded when administrative acts were issued with the consent of a party. In the case of the *Verwaltungsakte auf Unterwerfung*, the party's consent to the burden replaced the statutory authorization and expanded the "limits of law" that had been imposed on the state[34].

The development of the concept of binding the state administration by the law was best expressed in the statements of Otto von Mayer[35], who used the concept of the "primacy of the law" ("*Vorrang des Gesetzes*"):

> A state that has neither a statute nor an administrative act binding its administration is not a state under the rule of law. The state that has established both (institutions) is, as a state under the rule of law, more perfect or less perfect according to the degree to which it uses the above instruments and ensures their effectiveness.

In connection with the predictability of administrative acts, the belief remained that they were not valid in the event of severe defects. Among the rare statements in this regard is Robert Mohl's view of the invalidity of orders when their content was unconstitutional, expressed by him in 1829. In addition to defects of administrative acts, he emphasized also their unlawfulness, so he was an advocate of the concept of defect gradation in an administrative act[36]. In 1830, Carl von Rotteck went even further and denied the validity of orders that did not formally comply with the constitution and statutes or were contrary to higher obligations. In addition, he, in principle, accepted the freedom to revoke orders and provided for compensation only in the event of private right viola-

[33] Engert, 2002, p. 137.

[34] *Ivi*, p. 138; Görlitz, 1971, p. 75.

[35] Engert, 2002, p. 140; von Mayer, 1895, p. 72. According to J. W. Ochmański, 2004, p. 155, Mayer, whose work was widely regarded as "epoch-making", according to Forsthoff, the proper founder and classic of administrative law dogmatics, significantly influenced the way a whole generation of administrative law specialists thought about administrative law: «Fritz Fleiner, Gerhard Anschütz, Walter Jellinek, Richard Thoma, Ottmar Bühler or Otto Koellreutter wrote their early and often pioneering works under the influence of Mayer's brilliant textbook» (in the quotation references to Jellinek, 1929, p. 98-100 and Forsthoff, 1973, p. 51. The importance of Mayer's work is described by Lieb, 2003 and Becker, 2017).

[36] von Mohl, 1829, p. 280.

tion (which had begun to take over the function of well acquired rights (*die wohlerworbene Rechte*))[37].

3. Judicial control of administrative acts

The theory of an administrative act emphasized the need to verify its correctness by courts. The "outside" evaluation by administrative courts forced administrative authorities to respect the constitutional and statutory foundations of an administrative act. It could thus achieve greater stability, protecting trust in public authority and legal certainty[38]. According to Otto Bähr, administrative courts were an essential condition for the existence of the rule of law. Their establishment should be considered as an imperative of justice[39].

Judicial review of administrative actions could meet the demands of the legal doctrine requiring administrative authorities to observe the principle of proportionality when issuing administrative acts. This principle should be observed in the case of police orders and warrants, in particular, the prohibition of excessive intervention should be respected. According to Julius von Soden[40], police measures could be applied in such a way «that the intervention goes no further than necessary to prevent imminent danger of harm», and «that the intervention does not include any measures that would cause irreparable harm to the citizen in question». In particular, interference with subjects' well-acquired rights (*iura quaesita*), especially property rights, could be used only when there was no other way to achieve the police objectives[41]. The interference was *ultima ratio*[42] and, if it involved acquired rights, it entailed the payment of compensation[43]. The establishment of the Supreme Administrative Court in Berlin (*Oberverwaltungsgericht*, *OVG)* in 1875 was crucial in introducing the principle of proportionality. Within a few years, the court made the principle of propor-

[37] von Rotteck, 1830, pp. 106 ff.
[38] Engert, 2002, p. 174; Görlitz, 1971, p. 77.
[39] Bähr, 1864, p. 57; Tarnowska, 2019, p. 68.
[40] von Soden, 1817, pp. 58 ff.
[41] von Berg, 1799, pp. 88 ff; Svarez, 1960, p. 488.
[42] *Ivi*, pp. 90 ff.
[43] Refer to Adamczyk, 2017, in particular pp. 111-124.

tionality a permanent and significant constraint on the discretion of the administrative authorities, both by defining the legitimate objectives of the police authority and by reviewing the means used to achieve them[44]. The origin of proportionality in Germany can be traced back to the principle of necessity developed in OVG judgments. After the Kreuzberg decision of 14 June 1882 OVG examined whether the measures adopted by the police went beyond what was considered necessary for attaining a relevant objective[45]. Dealing with notion of "necessary measures" OVG stated that

> Ascertainment of the fair ratio between the consequences which might arise and the measures (deeds) selected for application was one of the conditions for the acknowledgement of the deeds of imperious institutions, i.e. of the police, as rightful. On the other hand, for the measure (deed) selected for application to be acknowledged as rightful, it should, as well, meet the second condition, i.e. the condition of efficiency, which meant that the chosen measure must assist in achieving the set objective[46].

In a judgment of 3 July 1886, the court dealt with police order addressed to an owner of a realty which obligated him to remove on public safety grounds a pole erected at the edge of the property. According to the court's view all that was necessary to protect the public was requiring the landowner to light the pole after the dark:

> the protection from accidents (...) is indeed the task of the police; this task and the authority finds its limit, however, in that the chosen measures may not extend farther than they must to meet the goal of eliminating the danger[47].

Similar developments occurred in other German states, which allows us to conclude that the principle of proportionality has contributed to ensuring individual freedom and the rule of law[48].

[44] Mathews, 2019, pp. 408-409.
[45] Jebens, von Meyeren, Jacobi, 1883, p. 353-384. See also Arai-Takahashi, 1999, p. 11.
[46] Panomariovas, Losis, 2010, p. 260.
[47] Jebens, von Meyeren, Jacobi, 1887, p. 428.
[48] Mathews, 2019, pp. 408-409.

4. Stability of legal relationships established by an administrative act

As mentioned before, one of the values resulting from the administrative act theory was the stability of the legal relationships established by such an act. In the first half of the 19th century, the administrative act was interpreted from the perspective of the authorities and their needs[49]. In principle, the act could be revoked in its entirety[50]. However, it is worth noting that, in 1808, Niccolaus Thäddeus Gönner argued that the acts of government officials should have "public credibility" (*öffentliche Glaubwürdigkeit*) because the officials act on behalf of the state and expect obedience. The concept of public credibility was linked to the binding force of orders. Thus, according to Gönner, there was a certain relation to administrative actions, as long as the official had local and material jurisdiction and met the formal conditions prescribed by law. Otherwise, the measures taken were invalid[51]. In addition to these not-quite-precise concepts, the author expressed the view that a contract had more binding force than sovereign acts[52].

In the first half of the 19th century, the acquired rights provided some relative stability, and it was these rights that were more protected than the act itself. The validity of the act was linked to its compliance with the constitution and statutes, while defects of acts, as a rule, were not graded[53].

After a period of divergent views, Otto Mayer confirmed the general binding effect of an administrative act on the state and its citizens in 1895[54]. The binding force of the act applied equally to citizens and the state if it was not revoked or the act was not exceptionally invalid (semblance of an act). The administrative act thus fills «the entire area of public administration with permanent legal relationships»[55]. However, he did not mean that administrative acts were not subject to change. On the contrary, he assumed

[49] Engert, 2002, p. 81.
[50] For example, Häberlin, 1797, pp. 134 ff; von Berg, 1799, p. 134 ff.
[51] Gönner, 1808, pp. 220 ff.
[52] *Ivi*, p. 194.
[53] Engert, 2002, p. 82.
[54] Mayer, 1895, pp. 94 ff.
[55] *Ivi*, pp. 99 ff.

that, in principle, these acts could be subject to amendment or repeal and unless a subjective right arose for the individual by virtue of the order, the act was a judgment (*Verwaltungsurteil)* or a legal provision opposed such amendment or repeal. In such cases, the binding effect went hand in hand with the inalterability of the act. In his understanding, a binding effect meant that administrative acts could not be altered at will, however, it was possible to amend or repeal them in a formal way. The binding force (*die Bindungswirkung)* was only the basis for the act's legal validity (*Rechtskraft)* occurring in certain situations[56].

The theories of legitimacy created during the liberal rule of law attempted to find indirect solutions, taking into account both the public interests upheld by the public administration and the well-acquired rights of the individual. There was no consensus as to whether subjective rights arose only when an individual obtained the right to demand a certain administrative act based on a legal provision or also on the basis of a discretionary act of the administration. Justifying the former position, it was pointed out that when the administrative body was bound by the legal provision while issuing the act, its revocation was also binding. For if it were otherwise, the individual's claim for the award of the act would be illusory and left essentially to the discretion of the administrative authority. In a broader sense, according to Otto von Mayer, «even without statutory provisions, those administrative acts are irrevocable, which creates public legal rights for those concerned»[57].

The issue of the binding force of an act and the consequences of its defects was developed in detail by Karl Kormann and Walter Jellinek in the first decade of the 20th century[58]. The development of the administrative act theory was then continued within the framework of the methodology developed by Otto von Mayer[59].

[56] Engert, 2002, p. 147 ff.
[57] Woś, 1978, p. 29-30; Stolleis, 1999, p. 214.
[58] Their theses were discussed by Kamiński, 2006, pp. 68-81.
[59] Stolleis, 1992, p. 411.

5. Administrative act in France

Different from German concept was French notion of administrative act (*acte administratif*) which covers every act of administration be it unilateral (*l'acte unilateral*), bilateral or multilateral (*un contrat administratif*), individual (*actes individuels*) or normative (*décret*, *arrété*). Only acts of legislature, courts and government are outside this group[60].

Unlike in German countries where doctrinal concepts slowly created the basis for legal solutions concerning administrative act, new administrative legal institutions in France were often created by the Council of State. Protection against arbitrary and illegal acts of public officers is mainly its achievements[61] although doctrine also demanded broadening scope of administrative courts' control[62]. The prefectural councils and the Council of State were entrusted with the task of resolving disputes between citizens and the state arising from property matters, excluding property disputes, mainly those arising from contracts concluded with the administration, as well as tax matters[63]. Thanks to liberal jurisprudence of the Council of State at the turn of the 19th and 20th centuries almost every unilateral act of an administrative officer or authority could be judicially attacked and annulled for illegality and excess of power[64]. In the beginning annulment was pronounced only for incompetence and vice of form on the part of the act attacked. During the July monarchy violation of the law was admitted as a ground for annulment, and in the end after 1872 misuse or abuse of power (*detournement de pouvoir*) began to be a sufficient ground for nullification[65]. Legality meant not only conformity with the let-

[60] Ricci, 2018, p. 50; Cabillac, 2023, p. 20. Differences between German and French perception of administrative act should be a subject of separate study to verify the thesis that «there is a common core between European administrative laws that has evolved over time and that it relates not only to generic ideals that can be found in every civilized legal system in one way or another, such as justice, but also to some precise requirements of administrative fairness and propriety» (Cananea, 2023, pp. 14-15).

[61] Garner, 1915, p. 637.

[62] In 1907 the Council of State decided that ordinances of the chief of state could be objects of recourse in annulment for excess of power which the juristic thought of France had long demanded (Garner, 1915, p. 649).

[63] Izdebski, 2001, p. 79; Witkowski, 2007, p. 51.

[64] Garner, 1915, p. 638.

[65] Garner, 1915, p. 644.

ter of the law but also harmony with its spirit and purpose[66]. As far as the "governmental acts" are concerned only few acts remained free from judicial control. They dealt with international relations and the maintenance of a state of martial law[67].

6. Conclusions

Summing up the development of the administrative act theory in the period up to 1933, Axel Görlitz emphasizes the following aspects:

1) the administrative act expresses the public administration activity as opposed to the activity of the parliament (statutes, bills) and the courts (judgments); the requirement of a statutory basis guarantees the «political conduct of the public administration» by the parliament;

2) the administrative act guarantees that the administration's interference with civil rights will take place only under the explicit statutory authorization; the principle of the statute primacy makes the public administration subject to scrutiny, susceptible to change but at the same time, it exempts it from accountability; it determines that the parliament has a monopoly on law-making and that public administration performs actions of executive nature;

3) the administrative act separates the state sphere from the civic sphere; it makes the public administration predictable, but at the same time, the public administration enjoys freedom within the framework of the law;

4) the administrative act guarantees fairness of the public administration's actions in two aspects: firstly, it is interpreted in the context of subsuming facts to the norm, and secondly, it can be subjected to judicial review[68].

The construction of the administrative act became one of the central issues in the German administrative law doctrine of the 19th and first half of the 20th centuries. The development of the administrative act theory was influenced by the idea of the constitutional state under the rule of law based on the separation of

[66] *Ivi*, p. 646.
[67] *Ivi*, p. 657.
[68] Görlitz, 1971, p. 78 ff.

powers and legality of the state machinery. This evolution was an expression of a variety of values in administrative law which are important for the public administration itself (among other things, the authority and power, the effectiveness of its actions), as well as for the citizens (among other things, social justice and the protection of individual rights). The theory of the administrative act took into account these values, trying to reconcile the interests of public administration with the needs of citizens and society. From the point of view of the addressees of administrative actions, it has become a tool for ensuring accountability and transparency of administrative authorities. A review of the breakthroughs in the evolution of the administrative act theory related to the consolidation of such features as the predictability of the act, the possibility of subjecting it to judicial scrutiny and the stability of the legal relationships established by the act, presented in this paper, points to the strong connection between the theory and the sphere of values in administrative law.

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