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Administrative Law Reform in Estonia: Legal Policy Choices and Their Implementation

The years that have passed since the reestablishment of Estonia's independence are characterised by reforms of the legal system, preparation for them, and their implementation. All these activities have stemmed from a single underlying idea — to develop a legal order appropriate to a democratic state based on the rule of law. Reforms in public and private law as well as in penal law were finalised ten years after the entry into force of the Constitution of the Republic of Estonia. The same applies to administrative law. The Riigikogu has prepared and passed important legislation relating to the general part of administrative law, such as the Administrative Procedure Act, State Liability Act, Substitutive Enforcement and Penalty Payment Act, and Administrative Co-operation Act. The preparation of the administrative law reform was accompanied by the drafting of a new Code of Administrative Court Procedure, which has now entered into force and has a significant role in protecting the rights and freedoms of individuals and ensuring lawful administration.

These Acts have been in force for over two years, and we may already draw the first conclusions, assess their quality, and predict possible future developments. In order to grasp the essence of the administrative law reform, it would be appropriate to recall the ideas and sources of the reform, which have several lessons to teach for both today and tomorrow.

1. Legal policy choices

After the entry into force of the Constitution, which provided a framework for the development of the legal system but a relatively high degree of freedom of choice, it was necessary to make principled legal policy choices as regards the direction in which to move. In making these choices, an important role was played by a decision on consistency in the drafting of legislation, made by the Riigikogu on 1 December 1992, according to which the acts in force before 1940 have to be taken into account in the preparation of new draft acts.¹ The legislature thus formally acknowledged the fact that Estonia has been and continues to be a part of Continental European legal culture. Nevertheless, this decision too allowed a relatively high degree of freedom and, in some cases, was even disregarded. In drafting legislation for the special part of administra-

¹ Riigikogu 1. detsembri 1992. aasta otsus seadusloome järjepidevusest (Decision of the Riigikogu of 1 December 1992 on the consistency of legislative drafting). – RT 1992, 52, 651 (in Estonian).

tive law, the relevant laws of countries with the same general legal system were taken as the starting point, and these were incompatible with the Estonian legal system. When attempting to form generalisations, we may say that the first half of the nineties was characterised by an orientational and conceptual confusion in administrative law. One group of legislative drafters drew ideas from Germany, another from England, and yet another from the Scandinavian countries. As a result, the systematic structure of administrative law suffered considerably. In 1992, the Ministry of Justice ordered a study, 'Analysis and Prospects', conducted by a group of legal experts comprising Raul Narits, Eerik-Juhan Truuväli, Jüri Pöld, and Kalle Merusk, which was submitted to the ministry at the end of 1993. The study, aimed at identifying the trends in the development of public law in the period following the entry into force of the Constitution, suggested that public law be modelled on the German and Austrian legal systems because of the similar legal culture. At the same time, the study emphasised that mechanical copying of the legal acts of other countries should be avoided. A legislative act that is efficient in one country need not be efficient in another — and in practice is indeed usually not, as the experience of other countries has demonstrated — because it fails to take due account of historical, economic, and cultural differences; traditions; etc. It is much more important to examine conceptual solutions and transpose them into a new milieu.

In the mid-nineties, it was concluded that without providing legal bases for the general part of administrative law, it would be impossible to ensure the systematic structure of administrative law and shape the development of public law as a whole. Besides conceptual confusion, the situation that evolved was also characterised by the general eclecticism of the legislation drafted. The Acts addressing the special part of administrative law were prepared in different ministries, proceeded from different foundations, were not uniform, etc. The situation was further complicated by the fact that European Union directives were often translated as acts. It must be noted that in very many cases, the protection of the rights of individuals in administrative proceedings was not included in the regulations. The established practices of the courts alleviated the problem to a certain extent. It may be said without any exaggeration that the administrative courts, particularly the Administrative Law Chamber of the Estonian Supreme Court, made a significant contribution to the further development and establishment of the democratic principles of administrative law in the administrative court context.

The confusion concerning regulations pertaining to administrative law also had an inhibiting effect on administrative capacities as a whole. In many cases, legislative acts were not compatible, they did not include enforcement mechanisms, etc. Administrative capacities that were lacking were also among the things pointed out in the progress reports of the European Commission.²

The situation that had evolved left a need for radical legal policy decisions. And they were made. The Ministry of Justice adopted the position that the fastest and most efficient method would be to transpose, with some amendments, the relevant acts of the Federal Republic of Germany, which would ensure a systematised body of administrative law based on accepted theory tested by practice. For that purpose, translations of the relevant acts were ordered as well as translation books, and twinning training was planned and carried out. Foreign experts prepared the relevant drafts. The implementation of this concept would have entailed the transposition of certain political decisions and significantly affected, among other things, the judicial system and administrative organisation as a whole. Several legal experts, administrative experts, and judicial officials did not agree to such an approach. Here we may list Prof. R. Narits, Prof. K. Merusk, Prof. I. Koolmeister, Prof. W. Drechsler, Associate Prof. R. Randmaa, T. Annus, and others. The wider community of jurists also joined the discussion. On 13 March 1998, a conference titled 'Theoretical Foundations of the Estonian Legal System' was held in Tallinn, where the mechanical transposition of German law into the Estonian legal order came under criticism. The conference proceeded from the thesis that Estonia indisputably belongs to the Continental European judicial area; however, this does not mean that Estonia should and could take on the legal frameworks of other countries. Legal reforms must, above all, take account of the Estonian context. Estonian jurists developed a prevailing position that Prof. R. Narits has characterised as follows: 'The primary foundation in developing a legal order is rational, since it proceeds from an assumption that each state identifies itself through very specific features. One of the most important of these is a national legal order.'³ Here we should also mention an idea expressed by Estonian legal expert Artur Taska: 'Law must be understandable to everyone who deals with it. The content of law must rely on the legal consciousness of the people; it must be in conformity with people's sense of justice and value sets. Only then can law act as an intermediary between real life and justice.'⁴

On 27 November 1998, at a conference dedicated to the 80th anniversary of the Ministry of Justice, entitled 'The History, Present Situation, and Prospects of the Estonian Legal System', then Minister of Justice Paul Varul noted in his presentation, 'In a model of a legal system, a distinction must be made between private

² European Commission progress report. Available at: http://europa.eu.int/comm/enlargement/report2002/ee_en.pdf.

³ R. Narits. Eesti õiguskord ja väärtusjurisprudents (Estonian legal order and jurisprudence of the value). – *Juridica* 1998/1, p. 3 (in Estonian).

⁴ A. Taska. *Õigusteaduse metodoloogia* (Methodology of Law). Lund 1978, pp. 72–73 (in Estonian).

and public law. Everything that I just said about a clear model and a fixed system mainly concerns private law, because in the case of private law we can speak about a higher degree of unification, a possibility for greater harmonisation. As regards public law, it is quite clear that we must be more careful when taking on board the examples of other states, since the so-called model for public law is still determined by our Constitution. If the Constitution does not provide the clearest foundations and limits for the development of private law, leaving a great deal of freedom of choice, then public law, and particularly administrative and constitutional law, are determined as far as possible by the Constitution. We can speak about familiarising ourselves with the experience of other countries and learning from the mistakes of other countries; however, it is clear that the need for taking account of the peculiarities of the country in question is considerably more significant in the area of public law than in private law.⁵

The end of the nineties witnessed a change in the goals of administrative law reform. It was found that the finished draft acts did not duly reflect the actual situation of Estonia and the specifications arising from the Constitution. It was decided to re-focus on administrative law reform proceeding from an Estonian perspective and the legal order developed in Estonia. It was also decided to found the organisational structure on the classical system, which was deemed a prerequisite for successful implementation of the reform. A steering commission for administrative law reform was formed, whose members included politicians, judicial officials, legal experts, and administrative experts. This was accompanied by the formation of relevant working groups comprising legal practitioners, researchers, and officials. An agreement was concluded with the German experts Prof. Dr. U. Ramsauer and Dr. H. Schwemer, from whom additional theoretical support was sought for the implementation of an administrative law reform based on the Estonian context.

2. Bases of administrative law reform

The steering commission for administrative law reform also formulated the main objectives of the reform. They saw it as their task to ensure through legal regulation simple and modern administration that takes account of and guarantees an individual's rights. The reform had to rely on the principles arising from the Constitution and show due regard for the actual relations developed in society.

2.1. Constitution

The administrative law reform has various points of contact with the Constitution. This applies to substantive and procedural fundamental rights, as well as to constitutional principles. With respect to the law of administrative procedure, section 14 of the Constitution plays an important role, according to which guaranteeing rights and freedoms is the duty of the legislative, executive, and judicial powers, and of local government. Section 14 of the Constitution firstly carries both an organisational and a procedural dimension and secondly also implies that public authority is related to fundamental rights. The requirement to guarantee rights and freedoms does not consist only of the obligation to respect fundamental rights but also relates to their active formalisation in societal structures. Consequently, section 14 of the Constitution guarantees subjective rights, and its provisions are implemented in conjunction with other material addressing fundamental and subjective rights, as it lacks clearly defined and independent substantial elements of content.⁶

The Constitutional Review Chamber of the Supreme Court's interpretation of section 14 of the Constitution has been rather thorough. In its decision of 22 February 2001, the Review Chamber emphasised that a person's right to fair and effective process stemmed from section 14 of the Constitution.⁷ In its decision of 14 April 2003, the Supreme Court took a step forward and explained what principles an administrative procedure should follow. The court found that according to section 14 of the Constitution, the state is obliged to guarantee the rights and freedoms of individuals. The guarantee of rights and freedoms does not mean that the state must avoid interference with fundamental rights. According to section 14 of the Constitution, the state is obliged to establish appropriate procedures for protecting fundamental rights. Both judicial and administrative proceedings must be fair. This means, among other things, that the state must enforce the use of proceedings that ensure efficient protection of the rights of an individual. The court further noted that the protection of the fundamental rights of one individual could result in restriction of the fundamental rights of another. In such cases, a reasonable balance must be sought between fundamental rights. The

⁵ P. Varul. Eesti õigussüsteemi taastamine (Restoration of the Estonian legal system). – *Juridica* 1999/1, p. 3 (in Estonian).

⁶ U. Lõhmus jt. Põhiseaduse III peatükk (Chapter III of the Constitution). – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented edition). Tallinn 2002, pp. 128–136 (in Estonian); R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental rights in the Estonian Constitution). – *Juridica eriväljaanne* (Special edition of *Juridica*) 2001, p. 73 (in Estonian).

⁷ CRCSCd, 22 February 2001, 3-4-1-4-01. – RT III 2001, 6, 63 (in Estonian).

procedures established for the protection of fundamental rights on the basis of section 14 of the Constitution must also aim at finding such balance.⁸ Besides section 14 of the Constitution, the organisational and procedural law dimension of fundamental rights issues is also evident from the other provisions of the Constitution. From the point of view of administrative procedure, the first sentence of section 15 of the Constitution — stating that everyone whose rights and freedoms are violated has the right of recourse to the courts — is the most significant. This provision ensures that individuals have the right of appeal. It is also important to point out section 20 of the Constitution. In respect of administration, clauses 4, 5, and 6 of subsection 2 of the section are relevant here. According to these clauses, a person may be deprived of liberty only in cases specified by law and pursuant to the appropriate legal procedure:

- 1) to place a minor under disciplinary supervision or to bring him or her before a competent state authority to determine whether to impose such supervision;
- 2) to detain a person suffering from an infectious disease, a person of unsound mind, an alcoholic, or a drug addict, if such person is dangerous to himself or herself or to others; and
- 3) to prevent illegal settlement in Estonia and to expel a person from Estonia or to extradite a person to a foreign state.

For administrative proceedings, the following sections also have importance: section 21 (everyone who is deprived of his or her liberty shall be informed promptly, in a language and manner that he or she understands, of the reason for the deprivation of liberty and of his or her rights, and shall be given the opportunity to notify those closest to him or her); section 44 (1), which sets forth the general right to receive public information (everyone has the right to freely obtain information disseminated for public use); and subsection 2 of this section, which deals with the duty of a public authority to provide information about its activities to an Estonian citizen at his or her request. The right to obtain such information is not unrestricted, according to the provision concerned. Information the disclosure of which is prohibited by law and information intended exclusively for internal use shall not be disclosed. According to the third subsection, an Estonian citizen has the right to access information about him- or herself held by state agencies and local governments and in state and local government archives, in accordance with the provisions of the law. The citizens' rights specified in section 44 (2) and (3) of the Constitution also extend to citizens of foreign states who are in Estonia, unless otherwise provided by law. At the moment, no such specific regulations have been provided.

Section 46 of the Constitution is also important. According to this section, everyone has the right to address state agencies, local governments, and their officials with memoranda and petitions. The second sentence of the section imposes an obligation to respond to the petitions — the procedure for responding shall be specified by law.

Section 3 establishes the principles related to administrative proceedings and administration generally; it states the principle of lawfulness, under which the state's authority shall be exercised solely pursuant to the Constitution and laws that are in conformity therewith. The provision declares both the supremacy of the law and the principle of reservation. As regards administrative proceedings, also set forth are the principles of a social and democratic state based on the rule of law (section 10), proportionality (section 11), and the principle of general equality (section 12).

2.2. Historical experience

It is worth mentioning that the preparations for the administrative law reform did not begin from scratch. For example, the legal regulation of administrative proceedings has its roots in the thirties — *i.e.*, in the first period of Estonia's independence. On 30 December 1936, the Administrative Proceedings Act was adopted by the Head of State decree, and it entered into force on 1 April 1936.⁹ The objective was to lay down general rules for settlement through adjudication of administrative matters, which was assigned among the powers of the state or local government agencies insofar as specific laws did not provide otherwise. The importance of this Act has been emphasised from two angles. Firstly, it played an important role in developing Estonian administrative law terminology. It introduced into use such terms as 'participants' (*asjaosalised*), 'occupational commitment' (*ametikoohustuslikkus*), 'practicality' (*otstarbekohasus*), and 'public documents' (*avalikud dokumendid*). Secondly, it was relatively modern for its time, and certain regulations have retained their topicality. Above all, this concerns procedural principles and the protection of the rights of participants in the proceedings. The Act set out the bases for removal of officials (§ 5), the right to examine documents (§ 31), the principle of investigation (§ 51), the requirement for substantiating administrative acts (§ 77), challenge proceedings (§ 81), the principles for amending and repealing administrative acts

⁸ CRSCd, 14 April 2003, 3-4-1-4-03. – RT III 2003, 13, 125 (in Estonian).

⁹ Administratiivmenetluse seadus (Administrative Procedure Act). – RT 1936, 4, 25 (in Estonian).

(§ 86), substitutive enforcement provisions (§ 113), etc. The adoption of the Administrative Procedure Act also testifies to the fact that Estonia had managed to develop uniform administrative law theory and practice by the 1930s, which was discontinued when Estonia was occupied by the Soviet Union starting in 1940 but whose influence definitely extends to the present day. At this point, it is important to note that Estonian legal experts published a number of serious works on the problems of administrative law theory during the period. For example, the monographs by Prof. A.-T. Kliimann, the Department of Law, University of Tartu – *Theory of Administrative Acts*¹⁰, *Administrative Procedure*¹¹, and *Legal Order*¹² – may be mentioned, as well as his article on the right of discretion, published in the legal journal *Õigus (Law)*¹³ and other works. It may be said without doubt that historical experience has contributed its share to the development of the general part of modern administrative law in Estonia.

2.3. Judicial practice

Administrative law reform was significantly affected also by the practice of the courts, and particularly that of the highest court in Estonia — *i.e.*, the Supreme Court. The principles established in the Constitution and fundamental procedural rights were developed further in several decisions issued by the Supreme Court. For example, the Supreme Court has elaborated on the following important principles of administration in its decisions:

- 1) lawfulness. Relying on the provisions of the Constitution, the Supreme Court has emphasised in its decisions that a public authority is entitled to act only when authorised by law to do so. The court has also found that a public authority may interfere with the sphere of the rights of private individuals only under conditions and to the extent provided by law, and, according to the principle of lawfulness, all legal acts adopted by administrative authorities must be in conformity with the Constitution and the legislation in force¹⁴;
- 2) the requirement for substantiating an administrative act. This has been considered extremely important in judicial practice since the establishment of administrative courts in Estonia after the restoration of independence. Court decisions have elaborated upon the principle that an administrative act must have both a factual and legal basis¹⁵;
- 3) proportionality. In several of its decisions, the Supreme Court has indicated that an administrative act must be in proper proportion to the matters it addresses and has elaborated on the mechanism for implementation of the principle of proportionality and supervision thereof¹⁶;
- 4) legal certainty. The Supreme Court has emphasised that the adoption of administrative acts and administration must take account of the principle of legal certainty, which protects a person's legitimate expectation and trust that one cannot be deprived of rights, granted by the state, that a person has started to exercise.¹⁷

2.4. European Union law and experiences of other countries

In relation to Estonia's accession to the European Union, much attention was paid to the analysis of the principles of European Community law and their introduction to the relevant draft legislation. The regulations belonging to the general part of the administrative law of other countries were also examined, and the examiners familiarised themselves with the experience of their implementation as much as possible. The greatest attention was paid to the legislation and experience of the Federal Republic of Germany, as German law has had the greatest effect on the Estonian legal system.

¹⁰ A.-T. Kliimann. *Administratiivakti teooria* (Administrative act theory). Tartu 1932 (in Estonian).

¹¹ A.-T. Kliimann. *Haldusprotsess* (Administrative procedure). Tartu 1937 (in Estonian).

¹² A.-T. Kliimann. *Õiguskord* (Legal order). Tartu 1939 (in Estonian).

¹³ A.-T. Kliimann. "Vaba kaalutus" ja selle kohtulik kontrollimine ('Free discretion' and its judicial verification). – *Õigus (Law)* 1928/3 (in Estonian).

¹⁴ CRCSCd, 12 January 1994, III-4/A-2/94. – *Riigikohtu lahendid* (Decisions of the Supreme Court) 1993/1994. Tallinn 1995 (in Estonian).

¹⁵ ALCSd, 6 October 1995, III-3/1-26/95. – RT III 1995, 14, 176 (in Estonian).

¹⁶ CRCSCd, 30 September 1998, 3-4-1-6-98. – RT I 1998, 86/87, 1434 (in Estonian).

¹⁷ CRCSCd, 30 September 1994, III-4/1-5/94. – RT I 1994, 66, 1159 (in Estonian); ALCSd, 4 May 2001, 3-3-1-21-01. – RT III 2001, 16, 170.

2.5. Administrative practice

In preparing the draft legislation, it was considered very important to collect the opinions of those involved in public administration as well. So, in the autumn of 2000, the members of the working group for the draft Administrative Procedure Act^{*18} arranged for introduction to the draft in state agencies and inspectorates, county governments, and local government units. The proposals and opinions obtained were of great help for the completion of the final version of the draft. The draft proceeded from the thesis that the objective of legal regulation can be achieved only when it is based on real life, real relationships. Otherwise, law fails to perform its function; it will simply not be observed. Law that is not acknowledged and approved by the addressees of legislative provisions does not function.

3. Results of administrative law reform and principles adopted

Proceeding from the above principles, the already mentioned Administrative Procedure Act, State Liability Act^{*19}, Substitutive Enforcement and Penalty Payment Act^{*20}, and Administrative Co-operation Act^{*21}, as well as the Code of Administrative Court Procedure, were prepared and adopted by the Riigikogu.^{*22}

In order to ensure coherence between the general part and special part of administrative acts, the Administrative Procedure Act Amendment and Implementation Act^{*23} was prepared and adopted by the Riigikogu, amending a total of over 130 specific laws, accompanied by five specific laws that amended acts proceeding from the Constitution.

How could we briefly characterise the results of the administrative law reform? We cannot but fully agree with the position of Ülle Madise, who worked as Head of the Public Law Division of the Ministry of Justice in 1998–2002: ‘Both in Estonia and in Germany, public administration is related to law, and the principle of a state based on the rule of law is understood in the same way. That is why the Administrative Procedure, Substitutive Enforcement and Penalty Payment Act, and State Liability Act are similar to the corresponding German acts. However, there are still differences between the Estonian system of administrative law and the German administrative law system. The field of administrative law did not experience the transposition of German law; the general part of Estonian administrative law contains solutions based on Estonian life and comprehensively experienced by Estonian legal experts.’^{*24}

3.1. Administrative Procedure Act

The Administrative Procedure Act contains two equal and important goals. These include the guarantee of appropriate and lawful activity in reaching and taking administrative decisions and the guarantee of and respect for individuals’ rights in administrative decisions.

One of the important principles underlying the Administrative Procedure Act is the **protection of a person’s rights**, which derives from section 14 of the Constitution. Already in section 1, the purpose of the Act expresses is stated clearly: ‘the purpose of this Act is to ensure the protection of the rights of persons by creation of a uniform procedure that allows judicial control and individuals’ participation’. This is also supported by § 3 (1) of the Act, according to which in administrative procedures, the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to the law. This provision also corresponds to the first sentence found in section 11 of the Constitution, which requires that any activities of public authority restricting fundamental rights be in accordance with the provisions of the Constitution. Such activities must thus be both formally and substantively in compliance with the Constitution.

Another important principle underlying the Administrative Procedure Act is **lawfulness**. This idea is upheld already by § 3 (1) of the Act, mentioned above, as well as § 4, which sets out both the internal and external

¹⁸ Administrative Procedure Act. – RT I 2001, 1, 58, 354; 2003, 20, 117 (in Estonian).

¹⁹ State Liability Act. – RT I 2001, 47, 260 (in Estonian).

²⁰ Substitutive Enforcement and Penalty Payment Act. – RT I 2001, 50, 28 (in Estonian).

²¹ Administrative Co-operation Act. – RT I 2003, 20, 117 (in Estonian).

²² Code of Administrative Court Procedure. – R I 1999, 31, 425; 2003, 13, 67 (in Estonian).

²³ Administrative Procedure Act Amendment and Implementation Act. – RT I 2002, 61, 375 (in Estonian).

²⁴ Ü. Madise. Eesti haldusõiguse reformi kandvatest ideedest (Underlying ideas of Estonian administrative law reform). – Juridica 2003/1, p. 44 (in Estonian).

limits for exercising the right of discretion. According to this provision, the right of discretion shall be exercised in accordance with the limits of authorisation, the purpose of discretion, and the general principles of justice, taking into account relevant facts and considering legitimate interests (§ 4 (2)). The right of discretion has been one of the most frequently discussed problems in administrative law, as its exercise entails a rather high degree of threat that an administrative authority may act arbitrarily. Hence, it is important to lay down these principles in law, so as to ensure that discretion is exercised lawfully. The principle of lawfulness also derives from § 54 of the Act, which sets out the prerequisites for an administrative act to be considered lawful — both formal and substantive ones. The same applies to measures taken and contracts under public law. For example, according to § 107 (1) of the Act, any measures taken shall be in accordance with legislation. They may restrict rights and freedoms only if there is a legal basis for such restriction. The principle of lawfulness also underlies many other provisions of the Administrative Procedure Act.

The third principle that may be pointed out is the **principle of proportionality**. The principle of proportionality is stated in the second sentence of section 11 of the Constitution, according to which some restriction of rights and freedoms is necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. Relying on judicial practice as well as on interpretation provided by the European Court of Human Rights, in § 3 (2) of the Administrative Procedure Act, the principle of proportionality has been elaborated upon with its three sub-principles — administrative acts and measures shall be appropriate, necessary, and proportionate to the stated objectives.

The fourth important principle is that of **good administration**. As the Supreme Court has put it, the principle of good administration also derives from § 14 of the Constitution. Moreover, the Supreme Court has found that the right to good administration is one of the fundamental rights.²⁵ The right to good administration underlies many provisions in the Administrative Procedure Act. In its most general representation, it manifests itself in § 5 (2) of the Administrative Procedure Act — administrative procedure shall be purposeful, efficient and straightforward, and conducted without undue delay, avoiding superfluous costs and inconvenience to persons. Thus, the provision demands that an administrative procedure be carried out in such a way that it burdens an individual as little as possible. The Administrative Law Chamber of the Supreme Court has emphasised that on grounds of human dignity, in a state based on the rule of law, efficient legal protection, and the principle of good administration, each individual must be involved in an administrative procedure even if in the case of a conscientious performance of administrative duties, the administrative act may be foreseen to limit his or her rights.²⁶ The right to participate in an administrative proceeding is ensured by § 11 (1) 3), according to which a person whose rights or obligations the administrative act, contract under public law, or measure may affect, or a third party, is a participant in the proceedings. The principle of good administration also presumes that administrative proceedings are conducted in a fair and impartial manner. One of the guarantees of the latter is § 10 of the Act, which sets out the bases for removing a person acting on behalf of an administrative authority and grants the participants in the proceedings the right to submit a petition for the removal of an official. According to the principle of good administration, proceedings must be completed in a reasonable amount of time. As a rule, the terms for issuing an administrative act or taking action have been set out in specific laws. According to § 5 (4) of the Administrative Procedure Act, procedural acts shall be performed promptly but not later than within the term provided by law or a regulation. If an administrative act cannot be issued or a measure cannot be taken or implemented within a prescribed term, § 41 of the Act requires that the administrative authority promptly give notice of the probable time of issue of the administrative act or taking of the measure and indicate the reasons for failure to adhere to the prescribed term. The right to good administration includes, among other things, the right to examine documents, the right to be heard, the right to receive explanations, and the obligation of the public authority to reason its decisions. These aspects of good administration are to a greater or lesser extent related to procedural fundamental rights, which have also been dealt with in the Administrative Procedure Act. The most important rights of participants in administrative proceedings are the following.

- 1) The right to be heard (§ 40). The first subsection specifies the right to be heard upon issue of an administrative act, the second upon the taking of measures. An administrative authority shall, upon issue of an administrative act, grant a participant in a proceeding the opportunity to provide his or her opinion and objections in written, oral, or any other suitable form. Said regulation guarantees the participant in the proceeding the right to be heard on the one hand and on the other hand imposes on an administrative authority the obligation to ensure the exercising of this right. Here it is also important to note that, for example, upon refusal to issue an alleviating administrative act on the basis of the right of discretion, the right to be heard shall be exercised. In the case of administrative measures, the right to be heard shall be applied only with regard to such measures as may be detrimental to the rights of the participant in a proceeding. The Act also provides for exceptional cases in which an administrative proceeding may be conducted without hearing

²⁵ CRCSCd, 17 February 2003, 3-4-1-1-03. – RT III 2003, 5, 48 (in Estonian).

²⁶ ALCSCr, 8 October 2002, 3-3-1-56-02. – RT III 2002, 25, 283 (in Estonian).

the opinions and objections of a participant in the proceeding (§ 40 (3)). Exceptions may be made if prompt action is required for prevention of damage arising from delay or for the protection of public interests, and also if there is no deviation from the information provided in the application or explanation of the participant in the proceeding and there is no need for additional information, or if a resolution is not made against the participant in the proceeding. Further to that, exceptions may be made if notification of the administrative act or measure, which is necessary to allow submission of opinions or objections, does not enable achievement of the purpose of the administrative act or measure; if the identity of the participant in the proceeding is not known; or if the measure taken affects an unlimited number of persons and identification of the persons within a reasonable period of time is impossible. The exception also concerns the so-called mass procedure (where the number of participants in the proceeding exceeds 50) and situations where an administrative act is issued as a general order.

- 2) The right to examine documents (§ 37). Here it is important to note that this right extends not only to participants in the proceeding but to everybody — this is everyone's right. An administrative authority may prohibit examination of a file, a document, or a part thereof if disclosure of information contained therein is prohibited by a legislative act or on the basis of one.
- 3) The right to receive explanations (§ 36). The right to receive explanations does not generally derive from the objective duty of an administrative authority to give explanations. An administrative authority shall explain to a participant in a proceeding **at his or her request** the rights and duties of a participant in the proceeding as concern administrative procedure, the amount of time terms under which the administrative proceeding will under unexceptional circumstances be conducted and which allows further possibilities for expediting the administrative proceeding, which materials (applications, evidence, and other documents) must be submitted in the administrative proceeding, and which procedural acts must be performed by participants. As required by the provision, the consultation must be substantial — *i.e.*, provide an overview of the information related to the proceedings. Although according to § 36 (1) of the Act, an administrative authority is obliged to provide such information to a participant only at his or her request, the Supreme Court has interpreted the duty of explanation to be more far-reaching. The Administrative Law Chamber of the Supreme Court has noted that it is contrary to good administrative practice if an administrative authority implies when dealing with an individual that it intends to make a decision at the end of an administrative proceeding that complies with the individual's wishes but instead makes a decision that is not in accordance with them. Such activities may also violate a person's legitimate expectations. If an administrative authority sees that the conduct of the individuals concerned does not lead to the desired results, it is obliged to notify the individuals thereof and enable them to adjust their conduct.²⁷ According to § 36 (2) of the Act, the administrative authority shall inform the participant in proceedings on its own initiative if it is necessary, in order to issue an administrative act or take a measure which is applied for, to issue another administrative act beforehand.
- 4) The right to maintain business and personal data (§ 7 (3)). The Act specifies data protection as an objective duty of the administrative authority — an administrative authority is required to maintain state and business secrets and the confidentiality of information intended for internal use by an agency, including private personal data.
- 5) The right to representation (§ 13). A participant in a proceeding has the right to representation in all procedural acts that, in accordance with the law, need not be performed personally by the participant in the proceeding.
- 6) Right to appeal (§ 71). A person who finds that his or her rights have been violated or his or her freedoms restricted by an administrative act or in the course of administrative proceedings may generally file an appeal, through the administrative authority that issued the administrative act or took the measure in question, with an administrative authority that exercises supervisory control over the authority that issued the administrative act or took the measure being challenged (§ 73 (1)). Unless otherwise provided by law, an appeal concerning an administrative act or measure shall be filed within 30 days from the day on which a person became or should become aware of the administrative act or measure in question (§ 75). A challenge serves as an alternative to filing an appeal with the administrative court. Thus, it is for the individual to decide whether to file an appeal with an administrative court or file a challenge petition in accordance with administrative procedure. An individual who is not satisfied with the decision on the challenge may appeal to an administrative court.

²⁷ ALCSCd, 27 February 2002, 3-3-1-17-02. – RT III 2002, 11, 110 (in Estonian).

3.2. Substitutive Enforcement and Penalty Payment Act

The Substitutive Enforcement and Penalty Payment Act has had a significant influence on the increase of administrative capacities and the efficiency of administration. Until the adoption of this Act, administration was regulated by dozens of specific laws. There was no general law governing the principles and means of applying administrative enforcement. Adherence to the provisions of administrative legislation was mainly ensured through penal means provided for in the Code of Administrative Offences.²⁸ This brought about at least two negative consequences. Firstly, penal sanctions grew out of proportion in administrative enforcement. Secondly, it had a negative impact on the efficiency of administration. After the imposition of administrative penalties by officials, the procedure for which is relatively complicated, the person affected has the right of recourse to the courts, where he or she may pass through all three levels, which could take a year or even more. In addition, when the appeal was processed in court, the court could suspend the implementation of the administrative act at the person's request.

The Substitutive Enforcement and Penalty Payment Act introduced into the Estonian legal system a non-penal system of penalty payments and substitutive enforcement, which ensure faster compliance with precepts and thus also the efficiency of administration. According to law, the coercive measure used in administrative enforcement is to be a penalty payment, a set amount, payable by the individual concerned if he or she fails to perform the obligation imposed by a precept during the time indicated (§ 10 (1)), and substitutive enforcement, applied also if during the term prescribed a person addressed by an administrative act fails to perform an obligation imposed therein. Substitutive enforcement may be carried out by the competent administrative authority or by a third party under an enforcement order, and this is performed at the expense of the person sanctioned (§ 11 (1)).

At this point, it is important to note that the Administrative Procedure Act applies to legislative acts issued and measures taken upon the application of a coercive measure, taking into account the specific provisions of the Substitutive Enforcement and Penalty Payment Act (§ 3 (1)). Hence, the procedure for applying administrative enforcement is also subject to the principles and the rights of a participant in a proceeding that have been set out in the Administrative Procedure Act. As an important principle, the Act also stipulates the requirement to apply the mildest coercive measures — in order to ensure performance of an obligation, the mildest coercive measures and the minimum degree of coercion expected to be sufficiently effective are applied. An administrative authority shall choose a coercive action that forces a person to meet the obligation imposed by administrative action while causing the person minimal harm (§ 3 (3)).

3.3. State Liability Act

The adoption of the State Liability Act was a breakthrough in the development of Estonian administrative law. The Act provides the bases of and procedure for the protection and restoration of rights violated upon the exercise of powers of a public authority and performance of other public duties and deals with compensation for damage caused. It is worth noting that until the adoption of the Act, public law did not govern compensation for damage caused by public authorities. Compensation for damage caused by the state was provided on the basis of the provisions of civil law, and the disputes arising were settled not by administrative courts but by the county and city judiciary. The measures prescribed by the Act for the protection of an individual's violated rights may be conditionally divided into two categories — administrative and substantive ones. Firstly, a person may request that a public authority annul an administrative act, terminate continuing measures, refrain from issuing an administrative act or taking a measure, or issue an administrative act or take an action. Secondly, if damage could not be prevented and cannot be eliminated by administrative measures, a person may request that a public authority compensate for the damage caused to him or her (§ 7 (1)). Direct proprietary damage and loss of income are compensated according to the provisions of the Act (§ 7 (3)). According to the Act, only a natural person may claim financial compensation for non-material (moral) damage upon wrongful loss of dignity; damage to health; deprivation of liberty; violation of the inviolability of the home, private life, or the confidentiality of messages; or defamation of the honour or good name of the person (§ 9 (1)). In order to ensure that a person receives compensation for the damage caused, the Act provides that if damage is caused by a public authority who is a natural person or private law legal person, the state, local government or other public law legal person who authorised the natural person or private law legal person to perform public duties is liable for the damage unless otherwise provided by law (§ 12 (3)). The Act also includes the principle that any damage caused directly by a natural person performing the functions of a public authority, regardless of whether the functions are performed on the basis of a service relationship, contract, or single order or on another basis, is deemed to be damage caused by the public authority (§ 12 (2)). Unless prescribed otherwise by specific laws, natural persons performing

²⁸ The Code of Administrative Offences became invalid on 1 September 2002, as the Penal Code and the Code of Misdemeanour Procedure entered into force.

the functions of a public authority are not liable to the injured party. By law, damage may be caused by both action and failure to act. In the latter case, damage shall be compensated if the public authority failed to issue an administrative act or take appropriate measures in due course (§ 12 (1)).

As a special case of liability, the Act provides for compensation for damage caused by legislation of general application (acts and regulations). According to § 14 (1) of the Act, a person may claim compensation for damage caused by legislation of general application only if the rights of the person were materially violated by the legislation of general application and the Supreme Court has repealed the corresponding provision of law or declared it unconstitutional. According to the second subsection of the provision concerned, loss of income as a result of legislation of general application or non-proprietary damage caused thereby and damage caused by a legislative act or failure to issue legislation of general application are only compensated for in cases provided for by a separate law. The regulation concerning compensation for damage caused by legislation of general application or failure to issue legislation of general application is not in accordance with European Community law. In several of its decisions, the European Court of Justice has emphasised that the liability of the state for damage caused by violation of European Community law is independent of the body that caused the damage by its activities or failure to act.²⁹ The Riigikogu is currently processing a draft State Liability Act Amendment Act to bring Estonian regulations concerning this matter into conformity with European Community law.

3.4. Administrative Co-operation Act

The story behind the preparation of the Administrative Co-operation Act is unique. The Act concerns two relatively independent objects of regulation, namely professional assistance and granting of authority to perform public administration duties. According to the initial plan, these regulations were to be included in the Administrative Organisation Act. The relevant draft was prepared, but to date it has not been adopted because no political decision is available about the further development of regional administration in counties. At the moment, regional administration for the counties is performed at the national level. Several attempts have been made to carry out a regional administration reform in order to organise national administration, which is currently scattered, and introduce a delegated local government dimension at the regional level. Unfortunately, the reforms have been suspended because of political disagreement, as the political parties lack a uniform vision of the further development of regional administration. Since both the granting of authority to perform public administration duties and professional assistance are closely related to administrative procedure, it was decided to separate them from the draft Administrative Organisation Act for the sake of the integrity of regulation and address them in a separate act.

The Act establishes the conditions and procedure for granting authority to natural and legal persons to perform public administration duties of the state and local government independently, and it specifies the procedure for different administrative authorities to provide each other with professional assistance as well as the bases for such assistance. Thus, for example, a person may be authorised to perform an administrative duty of the state by law, by an administrative act issued on the basis of legislation, or by a contract under public law entered into on the basis of law (§ 3 (1)). The same applies to local government units when they delegate the authority to perform administrative duties assigned to them by law or pursuant to relevant law (§ 3 (2)). The Act has significantly extended the opportunities to delegate the performance of administrative duties to persons under private law.

The professional assistance regulations allow for improvement of co-operation between various administrative authorities and thereby increase the efficiency of administration.

4. Conclusions

The discussions about the conceptual foundations of the administrative law reform led to optimal political decisions, which proceeded from the situation that has developed in Estonia and the provisions, idea, and spirit of the Constitution and which also relied on historical experience. They also took considerable account of the principles of European Community law and the experience of other democracies. The Federal Republic of Germany may be singled out here, as many points of contact between the German and Estonian legal systems already exist, for historical reasons. The fact that the Constitution of the Federal Republic of Germany served as a model for preparing the Constitution of the Republic of Estonia is not insignificant either.

²⁹ Andrea Francovich and others v. Italian Republic. Joined Cases C-6/90. – ECR 1991, 5357; The Queen v. Secretary of State for Transport, *ex parte*: Factortame LTD and Others. Case C-213/89. – ECR 1990, 2433.

The reform yielded the following acts now in force concerning the general part of administrative law: the Administrative Procedure Act, Substitutive Enforcement and Penalty Payment Act, State Liability Act, and Administrative Co-operation Act. The underlying principle of these is the value of efficiency, speed, and simplicity of administration, which is organically related to the principles of protection of persons' rights and good administration.

The Acts addressing the general part of administrative law and the principles provided therein have a significant impact on those dealing with the special part of administrative law. Firstly, this is manifested by the fact that the provisions of the acts comprising the special part can be interpreted on the basis of the provisions of the Acts comprising the general part — and, in particular, on the basis of the principles provided therein. This has been emphasised by the Supreme Court, which has noted that if a specific law does not provide for the application of the Administrative Procedure Act to a special procedure, the procedure must nevertheless comply with the principles of administrative law, which derive, *inter alia*, from the right to good administration as guaranteed by section 14 of the Constitution, the general principles of law, and the other principles of constitutional law.³⁰ Secondly, the Acts addressing the general part of administrative law have developed a framework and provided a general direction to the regulations contained in the Acts comprising the special part of administrative law, which are undergoing dynamic development and change.

³⁰ CRCSCd, 17 February 2003, 3-4-1-1-03. – RT III 2003, 5, 48 (in Estonian).