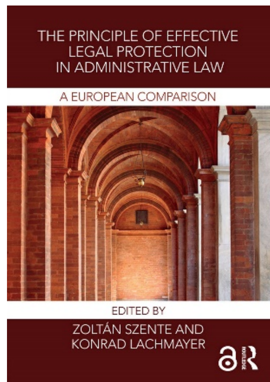

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The Principle of Effective Legal Protection in Administrative Law

A European comparison

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Introduction

After the wave of comparative studies inspired by the Europeanisation of national administrative systems,[1] and by the emergence of 'global' rules and proceedings of administration, comparative administrative law got a new impetus in recent years[2] when the comparison has been focused on particular administrative principles like legitimacy,[3] or protection of legitimate expectations.[4] In this book, we want to continue this work studying the principle of effective legal protection, another fundamental principle of administrative law. Procedural fairness is a substantial requirement of the rule of law principle whenever public power is exercised. According to this principle, the government – and its agencies – are bound by law, and it can prevail only if procedural rules are respected by all public authorities. It has significance not only for the better acceptance of the individual decisions of state institutions, but also for building a democratic consensus and legitimacy in society.

We explore this principle at European and national levels as well, but our main objective in this book is to study the various national understandings and practices of effective legal protection in administrative law. For this purpose, we examine how this principle has been developed and used by the European Court of Justice and the European Court of Human Rights, and what it means in the general international law. Then, the institutions, procedures and rights of effective legal protection are analysed in 14 national jurisdictions. These countries represent all legal cultures, administrative systems and regions of contemporary Europe.

Studying our topic, we use a comparative and legal method. By a general comparison of the national situations we examine if there are general trends in the development and the application of this principle. In order to compare the relevant legislation and practice of the various countries, all authors of these chapters used a common analytical framework. It meant the use of certain standard elements and, as far as it was possible, similar methodology in describing and analysing the national situations. Thus, each country report follows more or less the same structure describing the historical development of this principle, the current constitutional landscape

1 E.g. Karl-Heinz Ladeur (ed.), *The Europeanisation of Administrative Law: Transforming National Decision-Making Procedures* (Ashgate, Aldershot 2002).

2 Susan Rose-Ackerman and Peter L. Lindseth (eds.), *Comparative Administrative Law* (Edward Elgar, Cheltenham, Northampton 2010).

3 Matthias Ruffert (ed.), *Legitimacy in European Administrative Law: Reform and Reconstruction* (Europa Law Publishing, Groningen 2011).

4 Kari Anneken Sperr and Diana zu Hohenlohe-Oehringen (eds.), *The Protection of Legitimate Expectations in Administrative Law: A Comparative Study* (Hart Publishing, Oxford 2016 [forthcoming]).

analysing the most important domestic instruments and procedures, and the relevant effects of European law. Secondly, we apply a legal approach to public administration, rather than a managerial-organisational or political outlook.[5] This follows from the inherently legal nature of the procedural fairness that is the subject of this enterprise.

In the course of our research project, we combined two approaches of the system of effective legal protection of individual rights and legitimate interests. The so-called 'rights-based perspective' has provided a conceptual framework for expounding the available rights of individuals to legal remedy in national jurisdictions. For this objective, we have defined and elaborated those rights which have relevance here. Since there are significant differences between the examined countries in defining these rights, and in their importance, we did not give a closed list of the 'relevant' rights, rather, we used a 'functional' approach to assist the identification of them.

Apparently, the effective legal protection of rights in administrative law presupposes an institutional system guaranteeing or enforcing individual rights. The 'institutional approach' relates to mechanisms of institutional settings existing in the various countries. In this part of the research, the organisation, the scope of responsibility, or the working method of the various courts, tribunals or other institutions were relevant, but only as far as they have importance for the protection of individual rights of the citizens.

This book follows in three major parts the research project as introduced above. Part I begins a conceptualisation of the principle of effective legal protection in administrative law, defining core issues and elaborating the conceptual framework of our research. The other studies of this part analyse this principle on a European level, mainly in the jurisprudence of international/European courts. Part II includes collections of the country studies analysing the present situation of this imperative in the national administrative jurisdictions of the Western and the CEE countries. As a matter of fact, characteristic differences have not been revealed between these groups of countries. In the last section, Part III, we finally provide comparative studies and share some conclusions.

After all, this book does not only present a detailed study of a core principle of the administrative law in Europe, but can also contribute to a general scholarly debate on the minimum requirements of basic rights in those situations, when individuals come into contact with governmental authorities, and when the exercise of public power directly affects their rights and interests.

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5 For these possible approaches of administrative studies see David H. Rosenblom, 'Public Administration Theory and Separation of Powers' in Julia Beckett and Heidi O. Koenig (eds.), *Public Administration and Law* (M. E. Sharpe, Armonk 2005) 7–21.