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GENDER AND WOMEN'S STUDIES '17

CONFERENCE PROCEEDINGS

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II. INTERNATIONAL INTERDISCIPLINARY CONFERENCE ON GENDER AND WOMEN'S STUDIES

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Contents

THE STATUS OF MINORITY GROUPS AND ORGANIZATIONS IN THE ADMINISTRATIVE PROCEEDINGS

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Abstract

The lecture deals with client rights, which is one of the cornerstones of public administration and from a special perspective, it examines the participation rights of minority groups and their civil organizations. Within this, it examines the theoretical and practical aspects of the participation of these groups and non-governmental organizations in public administrative proceedings, the exercise of client rights, and the social judgment of the administrative procedures with public participation. The issue has recently become more and more actuality in the European countries after national legislators have gradually degraded their previously established warranty systems because of efficiency or cost saving reasons, thus making it unsafe for minority groups to participate in administrative procedures.

The relevance and actuality of the subject to the extent of the administrative procedures and the fact that the recognition or denial of the client status that guarantees the participation of minority NGOs, can ultimately have a decisive influence on the outcome of administrative issues. With the authorization of sectoral legislation of some nations, representatives of the civil sector, ultimately the people affected by the administrative issue, can now enforce their views throughout the world in a number of authority cases. The experiences of the processes implemented with the involvement of society and minority groups have not been adequately explored in the Hungarian and international literature and jurisprudence, and it is justified to process the relevant knowledge with a scientific need to improve the practice of law enforcement.

The purpose of the lecture and research is to explore the detailed legal framework for the participation of minorities, to evaluate the law and practice of the judiciary on the basis of international experiences, analysing the participation of the examined organizations and identifying legislative and application issues related to the subject.

Introduction

The transparent functioning of public administration (Kovács, 2011, p. 178), the legal (lawfulness) and social control of its activities (Ivancsics-Fábián, 2013) have become a basic requirement today. The civic presence in public administrative procedures is an embodiment of the expected openness of public administration in recent years (Doornbos, 2001, p. 101) with increasing professional interest. The role of representatives of civil society can take place in different ways (Jenei and Kuti, 2011, pp. 15-23): from informal action (lobbying, demonstration) to formal or partner cooperation, and as a branch of it, as a client intervention in the administrative procedures. With regard to participation in this process, the key question is what rights and obligations the individual actors are entitled to because it fundamentally determines the nature of the participation and the effectiveness of the action.

With this in mind, it is not surprising that NGOs and similar formations have participatory rights in many countries around the world and do not have a statutory customer status under the rule of a state during the administrative proceedings.

With the extension of the traditional customer concept (followed by our country's guiding procedural laws), these actors are increasingly presented among clients as well, and as a result of these changes, they typically characterize the wide field of view and authentic experience of civilians in certain fields and local conditions. (Stewart, 2003, pp. 441-442)

Nowadays it can be stated that there are basically satisfactory legal frameworks for the participation of NGOs in the administrative procedure in the European countries, yet very few organizations use this possibility and fewer find their true place and role in the process. It is particularly true for national and minority NGO actors, at least in terms of the characteristics of non-governmental organizations in administrative procedures.

Progress would be an exact definition and an obvious clarification of civil participation rules at the international level, and it is especially true for the participation of minority organizations. The present study undertakes to clarify the most important features and contexts.

Literature analysis

In Hungary, about the literature of the subject can be stated that it was active in this area in the late 2000s (Breiner, 2008, p 9.), but the authors nowadays are constantly documenting their research and professional achievements.

The works are typically created under the umbrella of civil advocacy, civil workshops and associations (Bendik et al., 2009, pp. 9-67) and work out the subject with theses based on domestic experiences, but typically with a casuistic character. In many cases, these works are not only scientific or process-like, but as an expression of the self-help nature of the civil sector. Less often, works are being produced as a result of higher education, research and development projects (Boda and Gulyás, 2011).

The Hungarian literature establishes the following characteristics of the regulatory and enforcement practices in the field.

Hungarian NGOs, especially those with a nationwide scope of minority organizations, in a case related to other geographic areas in their headquarters, usually have difficulties accessing the first instance authority procedure and acquiring entitlement to client privilege. The status of organizations has improved since the 2010 Arbitration Decision (4/2010 KJE Decision, Supreme Court of Hungary), but the first level authorities regularly deny client status from the organizations, due to which the organizations usually recourse to appeal and judicial review.

In many cases, the authorities at first instance are still not prepared for the procedures involving NGOs and they are averse, in many cases, looking for opportunities to exclude them from the client status, and in this way "protecting" the process of procedure from the participation of NGOs (Bendik, et. al, 2009, pp. 9-21).

Problems that have not been resolved at first instance will usually not be solved in the second instance administrative proceeding and further circled they will continue to judicial review.

The most common cause of the above-mentioned problem is in many cases the so-called "in-house remedy" in which the authority of the first instance and the review body are part of a common organizational system (e.g. in our case, the ministry), and thus more difficult to be decided based on objective considerations, disregarding the views of the supervisory body at the end of the procedure, as in other cases (Kilényi, 2009, pp. 372-373).

In many cases, this leads to a vacancy in the appeal procedure and to the lack of substantive remedies within the administrative procedure (Fábián and Bencsik, 2011, p. 62).

Cases on courts usually go through all the levels of the judicial remedy system because of the fact that civil organizations and claimants who are generally in the process tend to appeal court judgments to the benefit of the other party.

With regard to the international literature, the following can be stated: most authors do not separately deal with civil organizations, non-governmental organizations [NGOs in the Anglo-Saxon law, NFRs in German law (Nichtregierungsorganisationen)], with participation in the administrative procedures, but as a form of state and within that governmental and civic (and the social groups it represents) cooperation (Bingham, Nabatchi and O'Leary, 2005, pp. 547-558) (Alnoor, 2003, pp. 813-829).

Many authors find the participation of these organizations as an instrument and an expression of the "open", transparent, accountable, legally controlled administration, and democratic state of rule of law, in the administrative decision making process (Kettl, 2000, pp. 488-497).

Some authors consider process-like participation of civilians in public decision making, and in particular, the process of becoming a part of public administrative procedure and evolving the status of a client (Stewart,

2003, pp. 437-460): initially, only a cooperative practice from a state or civilian endeavour which extends to a wider range of state activities, and thus, of course, reaches the administrative procedure as well.

The reasons for the participation of non-governmental organizations (Weisbrod, Handler and Komesar, 1978, pp. 313-348) are often the representation of the public interest, the enforcement of different areas of law and rights (fundamental rights, consumer, labour, environmental and personal rights) and preventing regulatory violations. In several cases, the interpolability of administrative practices in countries related to the nationality or the subject of the authors appear (Stewart, 2005, pp. 63-108), which extends to the rights of the client and thus to civil participation as well.

The procedural rules of some countries

The VwVfG (Administrative Procedure Act 1976 (c.11), Berlin), which governs the administrative procedures of Germany, is in force since 1 January 1977, and it grants status of clients and participation right for civil organizations if they are eligible for that. The regulation is more restrictive than the average and it is clearer which, beside the natural and legal persons and beyond the authorities, also specifies expressis verbis non-governmental organizations among its clients in the administrative procedure with the application of the above disclosure. Organizations that can be involved in an administrative procedure involve civil society organizations, organizations without legal personality, and student organizations (Anwalt24, 2014).

The Austrian AVG (General Administrative Procedures Act (1991) (c.8)) is very strictly regulated compared to the German sample and recognizes only the people concerned with rights or legitimate interests directly related to the case as a client, excluding the opportunity to act independently of them. Environmental and nature protection procedures, however, are governed separately but they are directly governed by a European Union directive transposing the Aarhus Convention (Directive 2003/35 / EC).

As a result of the European Union connections in the Central European region in 2004 (Szegedi, 2011, pp. 57-76), similar regulations with many national features were created in connection with the involvement of NGOs in the administrative authority process:

In the Czech Republic, according to the procedural law in 2004 (Codex of Administrative Procedural Law (2004), the general term "client" also includes the client designation by the law, which is typically a foundation about the right of participation of environmental and nature protection and minority interest organizations. The right to take action in the matter of an administrative case is subject to participation in the prior administrative procedure.

In Slovakia, the Administrative Procedure Act (71/1967 Act, c.14 (2)) mentions in a separate paragraph the statutory right of NGOs, which is also governed by legislation.

It should be pointed out that in the above-mentioned countries, the introduction of regulations can be seen as expectations of European Union's rather than actual package of measures to strengthen civic participation, which, in many cases, is limited after accession, and will be dismantled by these countries. The main reason for this is that legal institutions and solutions coming from the Union to the legal system were not based on the democratic processes of the respective Member State and therefore, in many cases, their inclusion and application are difficult. There are similar problems with the application of this directive (Szegedi, 2011, pp. 72-75).

The dimension of participation

In the national administrative proceeding systems, it is essential for the proper functioning of the administrative proceedings to involve not only parties directly involved in the case, but also a wider public environment that help to achieve the real aims of the authority process: protecting the public interest and enforcing the law. (Gellhorn, 1972, pp. 359-361)

Consequently, the involvement of social groups and, thus, the involvement of minority groups and organizations in the administrative proceedings is due to the following reasons: the wide experience of community groups that promote the prudent and effective implementation of administrative decision-making, better knowledge of the situation and routine of minority organizations that can contribute to a faster and more robust process, and mainly they can contribute to the social control of the administrative proceedings, which has become increasingly demanding worldwide in the last decades. (Wright, 1999, pp. 608-620)

If we look at it more closely, we can characterize the participation of minority civil organizations and groups as to what rights and obligations belong to the groups involved in the public administration.

One of the most looser ways of participating is informal participation, which is in many cases some kind of co-operation, which is typically case-like between authorities and groups supervising authority proceedings, and it usually do not provide intervention and related rights into individual cases, but into generic ones (e.g. commentary, strategy creation) which in many cases become ineffective if they are forced to use by the group or civil organization despite the authority. (Cramton, 1972, pp. 525-533)

More stable participation can be provided by the status of a client, which a social group usually can have with two types: in individual cases, only directly through the citizen injured with indirect support and assistance rights, or with an independent legal status that can grant equal rights to other actors in the administrative proceedings and may constitute one of the highest levels of participation, as it may include access to documents, declarations and legal remedies under national law.

In this case, the originally two-pole authority relationship with an authority and a client is extended with one or more social actors, which can contribute to the extension of criteria of the authority process. (Hahn,2010, pp. 230-241)

Figure 1. The third-pole of administrative legal relationship

Direction of amendments of legal framework

Regarding the above regulation, there are fundamental changes in the wider sense of Europe's legal systems. In parallel to European integration, we have been able to see evolving rule and guarantee system undergoing continuous development within the regulation of national states about the participation of national minorities (with minor and major fractures in political context), especially after the 1990s, from the regime change in Central and Eastern European countries.

However, over the past decade, development has been halted, and the previously established rule system has been restrained by a number of countries, particularly with regard to the status of civil organization: once again in Central and Eastern Europe, with respect to the legal systems of Hungary, Romania and Slovakia, which countries' legal systems withdrew from their previous legislation providing broad participation rights without almost an exception, referring to the increasing efficiency, speed of the administrative proceedings and reducing the costs (Hohmann, 2017, pp.283-284). Other countries have not even reached that phase, because the political situation dominated by an intensified terrorist subject in the 2000s led the states to develop completely conflicting regulations, and instead of recognizing the rights of certain minority and national minority groups in the administrative proceedings, their suppression and the trend of "securatisation" have become a feature of dominance with violence (Buzan and Wæver, 2009).

Summary and proposal

The role and significance of minority groups and civil organizations representing them are unquestionable in administrative proceedings: their experience and their role of advocacy clearly justifies their right to participate, taking into account the international expectations that have come to the fore.

Legislative dumping in the European countries that is unfolding in the past few years, partially or fully subtracting participation rights, does not adequately address the problems that arise: problematic litigation proceedings do not work laboriously because of civil participation but because of the sensitivity and political concern of the case, and excluding minority groups only leads to the escalation of further problems and does not address the real causes, which would ultimately lead to a reassuring closure of the administrative matter.

As a suggestion, it consider a moderate extension of the participation rights of minority groups, which can help specifically promote the implementation of the administrative proceedings in certain administrative case types (e.g. in matters of equal treatment and social affairs).

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