

ELTE LAW JOURNAL

2018/1

ELTE LJ



ELTE  **LAW**
EÖTVÖS LORÁND UNIVERSITY

ELTE Law Journal, published twice a year under the auspices of ELTE Faculty of Law since 2013

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Contact • eltelawjournal@ajk.elte.hu

Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1-3, Hungary

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Recommended abbreviation for citations: ELTE LJ

ISSN 2064 4965

Editorial work • Eötvös University Press

18 Királyi Pál Street, Budapest, H-1053, Hungary



www.eotvoskiado.hu



Executive Publisher: András Hunyady, Eötvös University Press

Layout: Tibor Anders

Cover: Ildikó Csele Kmotrik

Printed by: Multiszolg Bt.

Contents

SYMPOSIUM

Alexander Balthasar

Foreword to the ELI-SIG Papers.....7

Alexander Balthasar

Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law?9

Marc Clement

Breach of the Right to Good Administration: So What?19

Anna Simonati

Administrative Transparency Through Access to Documents and Data in Italy: Lights and Shadows of a Principle in Transformation29

Bruno Reynaud de Sousa

Migration, the Sahel and the Mediterranean Basin: Which Scenario for the EU27 by 2025?47

ARTICLES

Sára Fekete

Preserving Intra-Corporate Mobility Between the UK and the EU After Brexit73

Biljana Grbić

The Liberalisation of the Serbian Electricity and Gas Markets87

Tomáš Mach

Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims105

Emőd Veress

Some Remarks on Shareholders' Agreements in the Context of Hungarian Law123

LECTURES

Klaus Rennert

Administration, Administrative Jurisdiction and Separation of Powers147

Alexander Balthasar*

Foreword to the ELI-SIG Papers

In June 2017 and in June 2018, the then newly formed ‘Administrative Law Study and Interest Group’ of the European Law Institute (ELI) met in Budapest, at Andrásy University, for two conferences. The main idea was – as it is in general the remit of ELI – to meet colleagues from all parts of Europe (several local universities, AUB, ELTE and CEU, included) and to discuss in such an inspiring climate matters of common interest. Whereas the first conference had a somewhat general focus (starting with ‘generalialia and fundamentalia’ and then tackling such a classical topic as ‘the right to good administration’ as well as various fields of ‘administration in action’, ranging from mutual recognition to the impact of independent agencies, from access to documents to environmental law and to such a burning issue as migration, the second one centred on the Commission’s White Paper on the Future of Europe [COM(2017) 2025 of 1 March 2017] and its possible impact on administrative law.

Moreover, the conferences gave the opportunity to visit the Kúria (2017) and the Hungarian Constitutional Court (2018) and thus to make direct contact with the presidents of these courts, Péter Darák and Tamás Sulyok, respectively. On the other hand, we also had, as a participant in the second conference, a member of the European Political Strategy Center of the European Commission and thus actually first-hand information on the most recent ideas and developments in our field.

Whereas it is, therefore, quite true that the principal purpose of these two conferences was to build bridges and to exchange thoughts, I am very grateful that vice dean Pál Sonnevend of the ELTE Law Faculty – in his capacity as co-organiser of these conferences – offered the additional opportunity to publish a fully-fledged written version of the presentation in this journal. You will therefore find four contributions assembled in this issue – some more are still in the pipeline.

I do hope that you will enjoy reading and I would be glad if you could be motivated by this to join ELI in general and our group in particular – our Europe needs scientific cooperation and enhanced mutual understanding, perhaps today even more than in former decades.

Alexander Balthasar

* Alexander Balthasar is Visiting Professor of Public Law, Andrásy University Budapest, Coordinator of the Study and Interest Group of the European Law Institute 2016–2018.

Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law?*

I 'Alternative to What' and Why Do We Need It at All?

The term 'ADR' seems to have been coined, some decades ago, in the context of *US private law court proceedings*;¹ hence, it originally reflects the *dissatisfaction* of US society of that time (judges included) with *this type* of proceedings;² however, the concept also spread over to other parts of the world and also to other fields of law,³ such as *administrative law*, the

* Alexander Balthasar is Visiting Professor of Public Law, Andrásy University Budapest.

** This paper was originally presented in English at a conference held at the Masaryk University Brno in April 2016 and subsequently published in Czech (Alternativní řešení sporů ve správním právu – významný krok vpřed pro větší spokojenost občanů, nebo trojský kůň pro právní stát?) in Soňa Skulová, Lukáš Potěšil et al. (eds), *Prostředky ochrany subjektivních práv ve veřejné správě – jejich systém a efektivnost* (Beck 2017), 419 ff.

¹ Cf Carrie Menkel-Meadow, Regulation of Dispute Resolution in the United States of America: From the Formal to the Informal to the 'Semi-formal' in Regulating Dispute Resolution, in Felix Steffek, Hannes Unberath, Hazel Genn, Reinhard Greger, Carrie Menkel-Meadow (eds), *ADR and Access to Justice at the Crossroads* (Hart 2013, Oxford), 419ff, 422; Elena Nosyreva, 'Alternative Dispute Resolution in the United States and Russia: A Comparative Evaluation' Annual survey of International & Comparative Law 2001, 7ff, 8f. See now the definition given in Sec 651 (a) of the US Code as amended by the Alternative Dispute Resolution Act of 1998: '... an alternative dispute resolution process includes any process or procedure, other than an adjudication by a presiding judge, in which a neutral third party participates to assist in the resolution of issues in controversy, through processes such as early neutral evaluation, mediation, minitrial, and arbitration...'

² See Menkel-Meadow (n 1) 422. Nevertheless, the essence of ADR seems to be deeply rooted not only in US history, but already in mediaeval English common law tradition, see Michael McManus, Brianna Silverstein, 'Brief History of Alternative Dispute Resolution in the United States' (2011) 1 (3) *Cadmus* 100-105; cf also Nosyreva (n 1) 11, cf, however, also infra n 10 for the impact of *Canon Law* on the development of arbitration in England.

³ With regard to *penal law* it seems that one has to distinguish between (i) the classical 'plea bargaining' which developed already in the early 19th century in the US and has gained nowadays overwhelming importance there (cf. George Fisher, *Plea Bargaining's Triumph. A History of Plea Bargaining in America* (SUP 2003, Stanford), but also Paul Craig Roberts, 'Die nackte Haut zum Kadi tragen' <<https://www.freitag.de/autoren/der-freitag/die-nackte-haut-zum-kadi-tragen>> accessed 2 April 2019. (ii) forms of genuine 'ADR' like the 'Tausgleich' (paragraph 204 of the Austrian Penal Law Procedures Act [StPO]) which developed much later than (i).

topic on which we now focus.⁴ *This finding, however, far from being obvious, causes bewilderment in two respects:*

(i) Isn't 'access to court' one of the essential features of the 'rule of law,' and, therefore, enshrined in all our high-ranking human/fundamental rights documents – at the global and continental level (Article 8 UDHR; Article 14 ICCPR; Article 6 ECHR; Article 47 EUCFR)?

*So: if there are any shortcomings in existing procedural law or practice – why not thinking of amending the shortcomings within the court's procedure rather than seeking an external alternative?*⁵

(ii) Even seeking for 'alternatives' to court proceedings could be justified with regard to US private law court proceedings, is there sufficient commonality to seek 'alternatives' with regard to *European administrative law* proceedings as well?

What is more, the term of 'ADR in *Administrative Law*' seems to be *ambiguous*:

When looking into the US Administrative Dispute Resolutions Act of 1996,⁶ we see that the means mentioned there ('any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombudsman, or any combination thereof')⁷ are meant already as an *alternative to 'administrative proceedings'* which 'have become increasingly formal, costly, and lengthy resulting in unnecessary expenditures of time and in a decreased likelihood of achieving consensual resolution of disputes.'⁸

Apparently, however, 'ADR' may also be understood in a narrower sense, focusing not primarily on 'alternatives' to the proceedings led by an administrative authority, but rather to

⁴ Cf the Recommendation of the Committee of Ministers of the *Council of Europe* Rec (2001)9 on alternatives to litigation between administrative authorities and private parties and, apart from Nosyreva (n 1), Aldo Sandulli, 'L'arbitrato nel codice del processo amministrativo' (2013) 2 *Giornale di diritto amministrativo* and the contributions assembled in Dacian Dragos, Bogdana Neamtu (eds), *Alternative Dispute Resolution in European Administrative Law* (Springer 2014), parte pro toto, the following literature: Polonca Kovač, 'Mediation and Settlement in Administrative Matters in Slovenia' (2010) 10 (3) *Hrvatska Javna Uprava* 743ff; Salvija Kavalnè, 'Mediation in Disputes between Public Authorities and Private Parties: Comparative Aspects' (2011) 18 (1) *Jurisprudencija* 251ff; Gatis Litvins, 'Alternative Methods of Judicial Protection and Dispute Resolution in Administrative Law' (2013) spec edn, 1 *European Scientific Journal* 371ff; Gregory Garde, 'Alternative Dispute Resolutions – Can it work for Administrative Law' (of 26. 2. 2014, <<http://www.austlii.edu.au/au/journals/Vic/Schol/2014/2.pdf>> accessed 2 April 2019). Just for clarification: for the purpose of this presentation, neither Investor-State Disputes nor relationships between public bodies are considered to be covered by the term 'administrative law' and are therefore left aside.

⁵ One answer could, of course, be that communication between human rights lawyers and practitioners of procedural law is suboptimal, to the extent that, in the view of the judicial review remains a *dream* whereas the latter have come to consider it rather as a nightmare, a *trauma*...

⁶ Pub. Law 104–320; below: ADRA.

⁷ § 571 (3) of the US Code, as amended by the ADRA of 1996. Note the slight differences between this definition and that applied for private law procedures (cf supra n 1).

⁸ Section 2 (2) of the ADRA of 1996.

the proceedings of an administrative law court and, thus, also considering ‘administrative appeals’, besides ‘mediation’ and ‘ombudsman’, as part of ‘ADR’.⁹

In order to assess the need for ‘ADR’ in ‘Administrative Law’ properly, covering *both* meanings we have, therefore,

- (i) to look first at the role *courts* play in *private* law, taking also into account divergences between Anglo-Saxon and European (continental) tradition;
- (ii) it is only afterwards that we are able to assess whether the reasons that are valid to justify ‘alternatives’ in private law may also be invoked in the field of administrative law, the structure of which, as is well-known, cannot be fully equated to that of private law. In addition, we will also have to deal with alternatives to the proceedings of an administrative *authority of first instance*.

II ADR and the General Role of Courts in Private Law

1 The Fundamental Principles: Subsidiarity and Judicial Self-restraint

Acting in the sphere of private law is, with only a few limitations, acting by virtue of one’s *private autonomy*; hence,

- (i) the *settling of disputes* between the parties concerned also remains, at least in principle, within their ambit of private autonomy, still following the overarching paradigm of private law, i.e. the *model of contract*. The State and its courts have come into play mainly only in a *subsidiary* manner, i.e. if the parties did not find a peaceful way to solve their dispute among themselves, due to the progressive prohibition of taking the (enforcement of the) law into one’s own hands.
- (ii) at least in the original concept, the main focus of state courts in private law cases was just to provide an *formal alternative to a private feud*, not so much to establish *material ‘justice’* by ‘investigating the real facts’ (i.e. ‘the truth’), nor a specific care whether each party was likewise capable of making use of its procedural rights in a sufficiently effective manner.

2 The Mitigations of the Original Judicial Self-restraint in Continental Law

It has to be said, however that, at least *on the European continent*, this original concept has already undergone successive and considerable changes (at least mitigations) for *centuries* with regard to the procedural role of the *court*:

⁹ See for such an understanding (i) Dacian Dragos, Bogdana Neamtu, ‘From the Editors: The Story of a Comparative Interdisciplinary Research Project’ in (n 4) V; (ii) Brian J Preston, ‘The Use of Alternative Dispute Resolution in Administrative Disputes. A Paper presented to the Symposium on Guarantee of the Right to Access to the Administrative Jurisdiction’ on the Occasion of the 10th Anniversary of the Supreme Administrative Court of Thailand’ (9. 3. 2011; available under: <http://www.lec.justice.nsw.gov.au/Documents/preston_use%20of%20alternative%20dispute%20resolution%20in%20administrative%20disputes.pdf> accessed 2 April 2019), referring to the Australian use of the term.

Already since medieval times, we notice the influence of the ecclesiastical ('canonical') procedure (building on the *'cognitio extra ordinem'* and the *'cognitio summaria'* of the ancient Roman Empire), where the duty of the judge to investigate *ex officio* was strengthened and the time-consuming formalism was significantly reduced.¹⁰

With regard to the public interest (both in speedier proceedings and in substance), some issues of private law were subsequently conferred to *administrative* authorities, at least for a *provisional judgement*; as a consequence, the principles of administrative proceedings (in particular: a reasonable investigation of 'the truth' *ex officio*) started to apply to these private law cases as well.¹¹

Closely related to these issues are those matters (mainly in the field of family law)¹² where a non-contested procedure has to be applied by private law courts.

Finally, with regard to Austria, I would like to mention that we had an in-depth reform of private law proceedings at the end of 19th century,¹³ which aimed to reduce most of the inherited formalism¹⁴ and which, therefore, could in turn serve as a model for the (still much simpler) codification of our general administrative proceedings some 25 years later¹⁵ (and nowadays it is exactly this codification which governs, only slightly adapted, the proceedings of our recently established administrative courts, too¹⁶).

¹⁰ Cf e.g. Olivier Descamps, aux origines de la procédure sommaire: *Remarques sur la constitution Saepe contingit*, and David von Mayenburg, Die Rolle des kanonischen Rechts bei der Entwicklung des officium iudicis als rechtliche Handhabe in Untertanenkonflikten, both in Yves Mausen, Orazio Condorelli, Franck Roumy, Mathias Schmoeckel (eds), *Der Einfluss der Kanonistik auf die europäische Rechtskultur* Bd. 4. Prozessrecht (Böhlau 2014, Köln – Weimar – Wien) 45ff, and 113ff, in particular until p. 126. In contrast, Canon Law in *England* did not so much influence procedures *in court* but *arbitration* as the major *alternative*, see Anthony Musson, 'The Influence of the Canon Law on the Administration of Justice in Late Medieval England', in the same volume, 325ff, in particular 326–334.

¹¹ Cf, with regard to Austria, already *Maria Theresia's* decision of 30. 1. 1751 [see Alexander Balthasar, Die unabhängigen Verwaltungssenate. Verwaltungsbehörden und/oder Verwaltungsgerichte? (Manz 2000, Wien) 71, fn 301]. Cf further Article 118 (3) of the Austrian Federal Constitution (B-VG) where the *municipalities* are conferred with the task of establishing 'öffentliche Einrichtungen zur außergerichtlichen Vermittlung von Streitigkeiten' (public bodies for the settlement of disputes outside the courts). In contrast, the most recent Austrian Federal Act on ADR (Federal Law Gazette – BGBl I 2015/105, implementing Directive 2013/11/EU) is considered to be part of private law.

¹² These issues seem to have formed part (at least in Austria before 1848), of the competences of feudal landlords [see Balthasar (n 11) 71, fn 300].

¹³ Imperial Law Gazette – RGBl 1895/113.

¹⁴ See e.g. Walter Rechberger, 'Die Ideen Franz Kleins und ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa' (2008) 25 *Ritsumeikan Law Review* 101ff.

¹⁵ BGBl 1925/273ff.

¹⁶ Cf in particular paragraph 17 of the *Verwaltungsgerichtsverfahrensgesetz*, – VwGVG, BGBl I 2013/33 and paragraph 62 of the *Verwaltungsgerichtshofgesetz* – VwGG, BGBl 1985 (current version).

3 Remaining Reasons for Seeking Other ‘Alternatives’

While the subsequent reforms just mentioned may have decreased the need on the continent to look for ADR in the field of private law, it is nevertheless – to the extent that ‘private autonomy’ is allowed to rule private law cases – still perfectly legitimate for the parties to *agree conjointly on tailor-made dispute resolution tools* (mainly to arbitration, but also to mediation), allowing the autonomous selection

- of appropriate judges¹⁷
- of the applicable law (substantive as well as procedural)
- of the legal effects of the ruling.

The main drawback (at least of genuine arbitration) is, however, that significant *imbalances between the parties* concerned are very likely to affect the quality of the result directly, so that external supervision by state courts will be needed at least to ensure that the fundamental conjoint agreement was actually concluded by both sides in a sufficiently voluntary manner.¹⁸

III ADR and Administrative Law

1 The Vertical Relationship

a) *The fundamental principle: judicial review of the legality of administrative acts*

It is quite obvious that the role of a *court* acting in the field of *administrative* law is quite *different* to that in *private* law, due to the fact that the role of an administrative *authority* differs substantially from that of a *private party*:

¹⁷ There might be many reasons to prefer an autonomous selection of judges:

(i) As to *quality*, most state jurisdiction systems provide three or even more stages of courts, the most qualified judges being found only at the top of the hierarchy; in addition, specific knowledge is not always available within the deciding court of a sufficient quality. Parties could therefore agree to nominate a panel of top judges already at first instance but this would reduce the options for appeal.

(ii) As to *quantity*: more often than not a considerable backlog of cases impedes speedy decisions to incoming cases. A court of arbitration appointed by the parties concerned may start to deal with the case without any delay.

(iii) As to *balance of composition*, while the composition of a state court chamber is up to court organisation and, in all events, limited to judges appointed in that specific state, an arbitration panel may be composed of judges of different nationalities, thus reflecting better, in particular with regard to international cases, the complexity of the case; in addition, also other balances (gender, religion, ...) might be considered as felt appropriate.

¹⁸ Cf in this regard in particular the quite recent judgements of German civil law courts (of first instance and at the appeals stage) in the *Pechstein* case, where a previous judgement rendered by the Court of Arbitration for Sport (CAS) was considered void for want of free consent of the athlete (see interim judgement of the Appeals Court Munich of 15. 1. 2015 – U 1110 / 14 Kart).

At least to the extent that an administrative authority is bound by the *principle of legality*,¹⁹ it may still be allowed *some discretion*, but it *lacks* the full amount of *private autonomy*.²⁰

Hence, given the overarching paradigm of administrative law being the *decision imposed unilaterally* by the administrative authority on the parties concerned,²¹ according to ‘the law’²², neither the principle of ‘subsidiarity’ nor the principle of ‘judicial self-restraint’ can – with regard to the role of the administrative court – have the same meaning as in the field of private law;²³ rather, the scope of application of both principles is, by the very nature of fact, substantially reduced, because the yardstick of the *judicial review* (‘the law’) is *not at the parties’ disposal*.

b) The remaining field of application of ADR with regard to administrative courts/authorities I: mediation or arbitration

It is, therefore, hard to see how – with regard to a dispute between the administrative authority and the parties concerned²⁴ – tools such as mediation or arbitration could play a major role as an alternative to the formal proceedings of the authority/the court – as long as ‘the law’ as the ultimate yardstick is to be preserved.²⁵

However:

– ‘Mediation’ can be most welcome with regard to *improving communication*, in particular by providing ‘translation’ in both directions, thus helping to convince the authority, as well as

¹⁹ Note that this principle has been inserted in the horizontal provision of the EUCFR containing the limitations for fundamental rights (Article 52 [1]: ‘any limitation ... must be provided for by law’), following the model of the ECHR (cf Articles 5 [1], 8 [2], 9 [2], 10 [2], 11 [2]; cf also Articles 2 [1], 6 [1], 7 [1] conv cit).

²⁰ This limitation is nowadays considered also to apply when a public body acts within the framework of private law, cf Alexander Balthasar, ‘Wer ist künftig zur Sicherung der Gesetzmäßigkeit der gesamten öffentlichen Verwaltung berufen?’ (2014) 22 (1) JRP 38 ff, 61, and the (Austrian) case-law and references cited there in fn 202.

²¹ Due to the principle of legality applying to all kinds of State action, the vertical paradigm *prevails even in prima facie horizontal relationships* such as public law contracts between the State (represented by an authority) and an subordinate individual; the more so, the stricter the legality principle is construed. That is the main reason that the form of administrative contracts flourishes more in Germany than in Austria, cf Harald Eberhard, *Der verwaltungsrechtliche Vertrag. Ein Beitrag zur Handlungsformenlehre* (Springer 2005, Wien – New York) 130.

²² Following on from the previous footnote, this proposition applies too when the form of the ‘decision’ is a ‘contract’ (of public or of private law); that is why Article IV-7 (1) of the ‘ReNEUAL Model Rules on EU Administrative Procedure’ <<http://www.reneual.eu/>> states that most provisions on single-case-decision making should apply ‘*mutatis mutandis*’ also for concluding contracts.

²³ Up to now, not even elements of veritable ‘*plea bargaining*’, well-known in US penal law (see supra n 3) seem to have been introduced in administrative law (maybe with the exception of tax law, where agreements between the tax authority and the tax payer are very conceivable).

²⁴ See, however, for the horizontal relationship infra lit C.

²⁵ This assessment seems to be backed by the Rec(2001)9 (which remains rather vague and general with regard to the possible ‘scope of alternative means’, cf point I/2 of the Appendix), as well as by most of the doctrine cited supra in n 4.

the parties concerned, already at an early stage of the proceedings that a *specific interpretation* of the law will, most probably, be the most reasonable from all perspectives.²⁶

– While it seems rather strange that an administrative authority should be allowed to escape from the ordinary judicial review by an agreement concluded by itself with the parties concerned²⁷, the *legislator* could very well *offer alternatives* – as does indeed the Austrian Federal Constitution, in principle, when enabling the legislator to provide judicial review against administrative decisions by private law courts rather than by the newly established administrative courts.²⁸ With the code of private law procedure in turn allowing state courts' jurisdiction to be replaced by arbitration (even by courts of arbitration based outside the State's territory), one could indeed wonder whether the legislation now enables a complaint against an Austrian administrative authority to be lodged even at a foreign court of arbitration.²⁹

c) *The remaining field of application of ADR with regard to administrative courts/authorities II: qualified mediation, including ombudsmen*

As the French term for 'ombudsman' – '*médiateur*' – shows 'mediation' in the meaning just outlined above (in subsection 2) can, in principle, also be performed by an ombudsman (general or specialised). Ombudsmen are particularly qualified to enhance public confidence in the proper performance of the duties of administrative authorities (and, in principle, also of courts).³⁰

Some Ombudsmen – among them the EU Ombudsman and the Dutch Ombudsman – show a remarkable interest in developing an *additional set of norms* besides the positive

²⁶ In a way this has always been the task of *advocates*; unfortunately, however, experience shows that many advocates have a tendency to aggravate and prolong the conflict instead of contributing to find a reasonable solution already at an early stage. That seems to be why the British system still upholds the separation of tasks between 'solicitors' (chosen by the parties) and 'barristers' (who have the exclusive privilege of communicating directly with the court).

²⁷ Apparently, however, exactly this option seems to have been inserted quite recently into the Italian Code of administrative procedures (cf its Article 12 as amended by Decreto legislativo, 15/11/2011 n° 195, G.U. 23/11/2011); the efficacy of this new provision is, however, still very limited, cf Sandulli (n 4) 205ff. Cf also, with regard to Germany, Kaspar Möller, *Echte Schiedsgerichtsbarkeit im Verwaltungsrecht. Eine Studie zu Rechtsrahmen und Kontrolle nichtstaatlicher Streitentscheidung im Verwaltungsrecht* (Duncker & Humblot 2014, Berlin), in particular 134ff.

²⁸ Article 94 (2) B-VG.

²⁹ Cf paragraph 17 (4) of the Federal Anti-Doping Act, explicitly allowing the athlete to contest decisions of the national Anti-Doping Tribunal (which might be considered as an administrative tribunal!) before the CAS.

³⁰ Note that the Swedish Parliamentary Ombudsman (the model from which all other European ombudsmen stem) is in a way a general supervisory authority, ensuring that the law (made by Parliament) is observed as diligently by administrative authorities (needed because central government as well as regional executives lack the competence to interfere in individual cases led by – in this regard – independent administrative authorities) as by the courts.

legislation related to the concept of ‘Good Governance/Good Administration.’³¹ From a ‘rule of law’ perspective, such an approach is most justified when it would turn out that this ‘additional set of norms’ is, in essence, derived from *general principles of law* (such as the principle of proportionality, principle of equal treatment, respect for human dignity, fair trial, etc.), which indeed rank at the top of the hierarchy of law but had been neglected by the specific positive legislation. In this case, ombudsmen might *supplement constitutional courts* in particular where they still are missing.

d) The remaining field of application of ADR with regard to administrative courts/authorities III: contesting general administrative norms?

Individual administrative decisions are, more often than not, based not only on ordinary legislation made and passed by Parliament but also on administrative acts of general application, in which the parties of the individual proceedings had not been involved. When it turns out during the individual proceedings that the parties object more to the norm of general application than the individual decision based on it, there should be appropriate legal remedies available to deal with such complaints; if not, it is not only highly probable but also justified from the ‘rule of law’ aspect that parties seek to disregard that norm of general application they considered to be ‘unjust’ – even by invoking ADR tools of whatever kind.

2 Administrative Appeals

Appeals to an administrative authority may be considered as an alternative to judicial review if ‘ADR’ is understood in a narrow sense (see supra section I).

Coming from a country that just abolished its longstanding tradition of administrative appeals (completed by access to one single Administrative Court of highest quality), due to constant and reiterated pressure from Western Europe³² where the mantra for decades had been to facilitate access to court, I am least prepared to deny the advantages of administrative remedies which have to be exhausted before a complaint to a court may be lodged, in particular:

- Availability of specialised knowledge of a high level
- Uniformity of application of the law³³
- Affordability for the private parties concerned

³¹ For the EU Ombudsman, see his European Code of Good Administrative Behaviour ex 2001, even now exceeding what some years later had been enshrined at primary law level in Article 41 EUCFR; for the Dutch concept cf Philip Langbroek, Milan Remac, Paulien Willemsen, ‘The Dutch System of Dispute Resolution in Administrative Law’ in Dragos, Neamtu (n 4) 113ff, 132f (‘mainly an ethical category’).

³² See in more detail Friederike Bundschuh-Rieseneder, Alexander Balthasar, ‘Administrative Justice in Austria in the Stage of Transition: From Administrative Appeals to Administrative Courts or the Final Stage of ‘Tribunalization’ of Administrative Disputes’ in Dragos, Neamtu (n 4) 209ff.

³³ This is a fundamental requirement of the principle of equal treatment, which can, by the very nature of fact, not be fulfilled to the same extent when jurisdiction is conferred upon a multitude of independent judges (see, e.g., Magdalena Pöschl, *Gleichheit vor dem Gesetz* (Springer 2008, Wien – New York).

These advantages have, however, to be outweighed against the advantages of prompt access to a court, in particular:

- Independence of the judge from political influence
- Qualification to refer to the CJEU.

3 The Horizontal Relationship

When we remember that administrative law has assumed considerable tasks belonging originally and in substance to private law (see *supra* section II 2), it is, at least in principle, perfectly conceivable to reverse that development. Consequently, administrative law would then require, as a precondition for administrative authority starting the core assessment from a purely public interest perspective, that all the private parties concerned had mutually agreed on the private law points related to the public law issue.

With regard to only these private law parts ‘embedded’ in the administrative law case, it would then be also perfectly conceivable to apply again the full range of private law instruments – and, among them, mediation or arbitration as well, in the full meaning of these terms – to these parts of ‘Administrative Law’³⁴.

IV Evaluation

When we try now, after that *tour d’horizon*, to sum up, we might find that things didn’t change much compared with the first, provisional assessment we started from in section 1:

ADR is indeed deeply rooted in the context of private law, and the use we can make of it in the context of administrative law as well is most appropriate when the specific structure resembles private law most closely (III 1 b and III 3).

We did, however, also find that the term ‘ADR’ may serve merely as an indicator of deficiencies of quite a different kind, be they of the quality of legal protection provided by administrative courts compared with the traditional efficacy of administrative supervisory authorities (III 2), or related to countries that still lack a detailed system for constitutional complaints (III 1 c and d).

My personal conclusion is, therefore, a rather sceptical one: let us resist the attempt to cure the alleged shortcomings of the implementation of administrative law by a simple transposition of well-sounding concepts of quite a different origin instead of finding tailor-made solutions for what we should really consider, after a sober and thorough analysis, to be serious deficiencies.

³⁴ Cf, however, that the Austrian General Administrative Procedures Code (AVG) has always contained a provision that, in a public hearing, the authority should find a fair settlement of any dispute between private parties [paragraph 43 (5), formerly (6): ‘Stehen einander zwei oder mehrere Parteien mit einander widersprechenden Ansprüchen gegenüber, so hat der Verhandlungsleiter auf das Zustandekommen eines Ausgleichs dieser Ansprüche mit den öffentlichen und den von anderen Beteiligten geltend gemachten Interessen hinzuwirken’].

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CONTENTS

SYMPOSIUM

ALEXANDER BALTHASAR: Foreword to the ELI-SIG Papers

ALEXANDER BALTHASAR: Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law?

MARC CLEMENT: Breach of the Right to Good Administration: So What?

ANNA SIMONATI: Administrative Transparency Through Access to Documents and Data in Italy: Lights and Shadows of a Principle in Transformation

BRUNO REYNAUD DE SOUSA: Migration, the Sahel and the Mediterranean Basin: Which Scenario for the EU27 by 2025?

ARTICLES

SÁRA FEKETE: Preserving Intra-Corporate Mobility Between the UK and the EU After Brexit

BILJANA GRBIĆ: The Liberalisation of the Serbian Electricity and Gas Markets

TOMÁŠ MACH: Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims

EMÓD VERESS: Some Remarks on Shareholders' Agreements in the Context of Hungarian Law

LECTURES

KLAUS RENNERT: Administration, Administrative Jurisdiction and Separation of Powers