COUNCIL OF EUROPE
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THE PROTECTION OF THE INDIVIDUAL IN RELATION TO ACTS OF ADMINISTRATIVE AUTHORITIES

An analytical survey of the rights of the individual in the administrative procedure and his remedies against administrative acts

Strasbourg
1975

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INTRODUCTION

Scope of the survey

The present note takes stock of the legal provisions and practice in the different European States aimed at ensuring the protection of the individual with regard to administrative acts.

For purposes of the present study, the term "administrative acts" denotes: any measures or decisions taken in the exercise of public authority and of such nature as to affect the rights, interests and liberties of the individual. Judicial decisions and legislative acts are not included, however.

The note deals with two groups of problems: those relating to the taking of decisions by the administration (the administrative procedure), especially where these decisions are addressed to particular individuals, and those relating to the controls which can be exercised over administrative acts, and, in particular, the remedies against those acts. Wherever possible the note adds to the description of the present situation some indications of the trends that can be observed.

Origin of the survey

In September 1970, the Committee of Ministers (1), following a proposal made by the European Committee on Legal Co-operation (CCJ), decided to inscribe the "study of the protection of the individual in relation to acts of administrative authorities" in the Work Programme of the Council of Europe.

To that end, a Sub-Committee of the CJJ (2) was set up in 1971 and entrusted with preparing a pilot study, the main purpose of which was to determine whether general principles for the protection of the individual could be discerned, to identify the types of administrative acts involved, and to state the conclusions with regard to possible action to be taken at European level.

The present document is the result of that pilot study. The information it contains reflects the situation at the beginning of 1974.

It was prepared on the basis of replies to a questionnaire which the sub-committee had drawn up and sent to governments. Replies to the questionnaire were received from all member States of the Council of Europe (3) with the exception of Iceland and Malta, as well as from Finland and Spain.

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(1) At the 192nd meeting of the Ministers' Deputies.

(2) Originally composed of experts from Austria, Belgium, France, the Federal Republic of Germany, Italy, Norway, Switzerland, and the United Kingdom, and later enlarged so as to include all member States, as well as observers from Finland and Spain. Austria and Spain were not represented, however.

(3) As regards the reply from Switzerland, it referred only to federal administrative law, not to the legal systems of the cantons and half-cantons.

Outline of the problems studied

The sub-committee decided not to survey the entire area of administrative law but rather to limit itself to examining certain questions which had arisen in the course of the study of principles concerning the rights of individuals vis-à-vis the administration. Consequently, the survey focusses on the following problems:

I. Right to be heard

A. To what extent is the administration bound to inform the individual, before any decision is taken, of the fact that proceedings concerning him have been commenced?

B. Has the individual the right to be heard, to put forward his arguments and to call evidence? If so, what is the effect of the non-observance of this right on the validity of acts of the administration?

II. Access to information

A. Has the individual the right to be informed of all the relevant facts which the administration possesses to take the decision concerning him?

B. Does he have the right to access to files concerning other similar cases?

III. Legal assistance

A. To what extent has the individual the right to be assisted or represented by a lawyer or other person designated by him?

B. Can legal aid be granted to the individual at this stage of the proceedings?

IV. Contents of administrative acts

A. Must the decisions of the administration be reasoned?

B. Must they include an indication of the remedies open to the persons concerned?

V. Remedies

A. Is there a remedy against all administrative decisions?

B. On what grounds can each type of decision be challenged?

VI. Conditions of nationality and residence

A. Are the rules governing administrative procedure applied irrespective of the nationality and residence of the person concerned?

B. Is the existence of remedies subject to conditions concerning the nationality and/or residence of the applicant?

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GENERAL OBSERVATIONS ON THE ANALYTICAL SURVEY

Method of presentation

First of all it should be pointed out that it is difficult to adopt a classification which can be applied in a uniform way to administrative law in all European States.

A distinction should be made, for example, between those states which have a comprehensive system (or a number of systems) for the protection of administrative rights of individuals, and other states, such as Ireland and the United Kingdom, where there is no single system. For the latter category of states, in order to arrive at a correct reply for each of the questions posed, it would in theory be necessary to look into a vast number of administrative acts and authorities. Since it was not possible to undertake research on such a scale, the survey is confined to general observations, with references, where appropriate, to the more typical solutions.

With regard to those states which have a general system of administrative procedure and administrative appeals, it was easier to make a systematic analysis. This was particularly the case for those states which have adopted general laws in this field.

It should be mentioned that several states which have general laws on administrative procedure based their replies to the questionnaire on those laws, and not on special laws (for example on fiscal matters). It goes without saying that the existence of a general law does not prevent a state from also having its special laws.

Where in the course of the survey reference is made to certain states, it should be noted that their enumeration is not meant to be exhaustive, but is given by way of example to illustrate a situation or trend. A reference to particular states should therefore not be taken to mean that the contrary is true for states not mentioned.

Legal Texts quoted

In the present note reference will be made to a number of general laws or bills relating to administrative procedure and administrative appeals. The documents most frequently referred to will be mentioned in abbreviated forms:

- Austria : General Act on the Administration of 1950 (GAA);
- Spain : Law on the Legal Regime of the State administration of 26 July 1957 (LLR); Administrative Procedure Act of 17 July 1958 (APA); Regulations concerning the Organisation, proceedings and legal regime of local corporations of 17 May 1952 (ROL);
- Norway : Administration Act of 10 February 1967 (AA);
- Federal Republic of Germany : Administrative Procedure Bill (APB);
- Sweden : Administrative Procedure Act of 4 June 1971 (APA);
- Switzerland : Federal Administrative Procedure Act of 20 December 1968 (APA).

Literature

The information contained in the present survey is based not only on the replies submitted by the governments, but also on the general report on "Protection of the citizen in administrative procedures" which Mr B Wennergren, Swedish expert on the sub-committee, had presented to the XIVth International Congress of Administrative Sciences, held at Dublin in September 1968.

ANALYTICAL SURVEY

I. THE RIGHT TO BE HEARD

General observations

The right of an individual to be heard by the administrative organ before it will take a decision affecting him can be considered to offer a double safeguard. On the one hand, it safeguards equity: the individual will thus be called upon to participate in the proceedings concerning the decision and has the possibility of defending his legitimate rights and interests. It is to be noted in this connection that a right to appeal after the decision has been taken is not sufficient: in view of the time that has passed it may be difficult for the individual to collect the necessary proof; witnesses may have disappeared to whom the individual might have to pose important additional questions; etc. On the other hand, the principle of hearing the person concerned provides a safeguard for good administration: it implies that the administration will be fully informed before taking the decision; furthermore, it will help to establish a climate of collaboration and trust between the administration and the citizens.

However, it is in the public interest that the administration will proceed with appropriate expediency. Hearing the party might in certain cases unduly slow down the administrative process or even defeat its own purposes, for example, when large numbers of citizens are concerned. For this reason, certain exceptions to the principle are found in several states. For the same consideration, the right to be heard is sometimes reserved for the second instance of administrative procedure (for example, the "Widerspruch" procedure in the Federal Republic of Germany).

In several states there are, apart from the hearing of the individuals concerned, also other methods by which the administration can acquaint itself with the relevant facts and opinions:

- the obligation of the administration to consult, before taking certain decisions, with organisations representative of the persons concerned (such a formula is used, for example, in France, especially in the economic and fiscal fields and with respect to certain professions);

- the obligation of the administration, before taking its decision, to ask the opinion of advisory bodies and in that way to hear, as a minimum condition, another point of view than its own;

- hearing of the persons concerned by these advisory bodies if not by the authority itself which is competent to take a decision (this is a formula which is applied for example, in Luxembourg with regard to the withdrawal of a residence permit for foreigners);

- the general duty of administrative authorities to see to it that every case is sufficiently elucidated before any decision is taken, which may oblige those authorities to hear, at least in certain cases, the persons concerned (a general provision of the kind is contained, for example, in the Norwegian AA).

In the course of this study, two distinct aspects will be examined, first: the obligation of the administration to inform the individual (see at A below) and the right of the individual to be heard (B). In practice, these two aspects are closely inter-related. The reply given by a state to the first question should therefore be considered in conjunction with its reply to the second question, and vice versa.

Furthermore, it should be observed that the right to be heard is also closely linked to the question of access to the information on which the administrative decision is based. This question will be dealt with in Chapter II.

I - A. To what extent is the administration bound to inform the individual, before any decision is taken, of the fact that proceedings concerning him have been commenced?

Notification of the public by administrative authorities serves a number of purposes. In general, the administration should avoid taking citizens by surprise. If citizens are given sufficient forewarning about intended administrative decisions, they are better able to adapt their behaviour accordingly. Moreover, notification of the public allows the administration to take any reactions on the part of the public into account before reaching a decision. Examples of such a general notification are public announcements of building permits or road works, or, as in France, "statement of public utility".

More specifically, however, public notification will draw the attention of individuals concerned to the fact that their interests are at stake.

It should be pointed out, in this connection, that the right to be heard does not imply automatically an obligation for the administration to inform the individual that it intends to take a decision. Such an obligation on the part of the administration is an important safeguard for the effective exercise by the individual of his right. Without this safeguard, administrative decisions would have a tendency to be taken 'in absentia' without the individual knowing it.

The obligation does not play a significant role with regard to administrative decisions granting or refusing something applied for by the individual himself; it concerns rather administrative proceedings set in motion by the administration.

Bearing these observations in mind the analysis of the replies shows that states can be divided into two groups.

1. In certain states there is a general principle which enjoins the administration to inform the individual of its intention to take a decision concerning him and to enable him to exercise his right to be heard. This is the case only in a number of those states where the right to be heard is itself a general rule.

The Norwegian APA contains explicit provisions on this point in Article 17: "Before the decision is made, the party or parties to the case shall be notified and given an opportunity to express their opinions within a stipulated period. The period runs from the date on which the notification is sent, unless otherwise explicitly provided", and further: "The advance notification shall describe the case, and contain such information as is considered necessary to enable the party adequately to safeguard his interests. Advance notification can be omitted if such notification is not practically possible or might prevent the execution of the decision. Advance notification can also be omitted when the party concerned has already been informed by other means of the impending decision, and has had reasonable cause and time to express an opinion, or if such notification is evidently unnecessary for any other reason". The act does not say anything about the form in which notice should be given. As a general rule notice is given by ordinary letter, but in some cases a more formal manner is prescribed. Notice by publication is possible when the number of persons concerned is large or when the name or address of the individual is unknown.

According to the Spanish APA, any person who has an interest at stake in a matter that is pending for decision and who for lack of publicity could not have known about it, must be informed on the investigation that is going on. The ROL provides, inter alia, in its Article 296, that when the administration knows about the existence of other persons interested in a case, it must convoke them in writing in order that they may make, within ten days, any observations.

In Sweden and Switzerland, the obligation to inform all interested persons results from the very way in which the right to be heard has been formulated.

2. In other states there is no general rule: however, the obligation to inform the citizen in order to enable him to exercise his right to be heard is imposed upon the administration in certain specified cases, either on the basis of a law or by virtue of judicial practice.

Such is the case, first of all, in certain states where the right to be heard is a general rule: in the Federal Republic of Germany where the administration is not generally bound by an explicit legal provision to inform the citizen, but where exists a general rule based on judicial practice that the party concerned must be informed if an administrative decision will interfere with his rights; in Denmark where no general principle exists either in statute law or in judicial practice, even though the question has been the subject of many theoretical discussions; in Austria where the administration is not bound to inform the interested party except in cases where a hearing is mandatory by virtue of a special law; and in Finland.

The same can be said, secondly, for a number of states where the right to be heard is not itself a general rule. In these states the obligation to inform the citizen does not exist automatically whenever the citizen has a right to be heard, but only in certain specific cases, such as in Italy (particularly in cases of expropriation, city development plans, and administrative sanctions), in the United Kingdom, (particularly with regard to compulsory purchase), in the Netherlands (for example in the case of a change in the conditions governing a licence granted on the basis of the law on public harm), or in Turkey (in adversary proceedings for example). In Belgium, Luxembourg and France, the cases provided for are particularly numerous: in Luxembourg, for example, the administration must notify the individual whenever it has to follow adversary proceedings, either on the basis of a law or by virtue of the general principles established by the jurisprudence of the Conseil d'Etat. In France, the obligation to inform the interested person (and sometimes third parties who are indirectly involved) is laid down in a number of special laws; moreover, the obligation exists, even without any statutory provision, whenever according to jurisprudence the administration is bound to follow adversary proceedings (ie on decisions having the character of a sanction).

In Ireland, the inhibition in the Constitution on interference with property rights, save in limited cases and then only in accordance with the requirements of constitutional justice, is interpreted in such cases as implying the obligation to inform the citizen so that he can exercise his right to be heard. In addition, certain statutes specifically impose that obligation.

SUMMARY I - A

- It follows from the analysis of the replies to this question, as well as to the question to be considered under I - B below (the right to be heard) that at present in the majority of cases in which the right to be heard is recognised, the administration has the obligation to inform the individual, unless it concerns decisions for granting or refusing something applied for by the individual, cases where the individual has been informed about the proceedings through other channels, and cases where it is practically impossible to inform the individual.

I - B Has the individual the right to be heard, to put forward his arguments and to call evidence?

This sub-chapter will deal both with hearings held at the administration's initiative and at the request of the individual concerned.

The analysis of the practice of the states on this point can be summarised under four different aspects:

1. Recognition of the principle of hearing the parties

a) The right of the individual to be heard, to put forward his arguments and to call evidence is explicitly recognised in all states which have a general administrative procedure act.

In Austria, the administration should in principle follow a procedure of establishing the facts, and in the course of this procedure the parties may be heard; the GAA emphasises that every party should be given the possibility of presenting all relevant facts and arguments, to offer evidence, to discuss all basic elements and the evidence put forward by other parties in the case, or by experts and witnesses, and to comment on the proposals and evidence put forward by the administrative authorities.

In the Federal Republic of Germany, the APB formulates the right to be heard in Article 24: "Before an administrative decision is taken affecting the rights of an interested party, the latter shall have the opportunity to give explanations on the relevant facts which have a bearing on the decision". This right is developed in detail in the formal administrative procedure which should be followed in a number of cases provided for by law (for example concerning expropriation). According to Article 59, the interested parties should have the possibility of explaining their point of view orally or in writing before the decision, they must have the possibility to attend the hearing of experts and witnesses and to participate in any visit of the scene; they may on such occasions ask any pertinent question; the written opinions of experts shall be communicated to them. The decision shall be taken only after the hearing, which is not public, has taken place, with all the interested parties summoned (Article 63).

In Norway, the right to be heard is laid down in Article 17 of the AA (see p. 15).

The Spanish APA lays down the principle of a hearing with the participation of the citizens concerned, previous to any administrative decision concerning them; this hearing must take place after the establishment of the file and immediately before the proposed decision is drawn up. Moreover, while the file is being established, the persons concerned can actively intervene: they have the right to know the present state of their file (Article 62 and 63), to bring, at any moment before the hearing an allegation which must be taken into consideration (Article 83), and to take steps to complete the information on which the decision is to be founded (Article 81).

In Sweden, no case may be decided without the applicant, the complainant or any other party having been given an opportunity to respond to the material introduced into the case by someone else besides himself, (Article 15, APA).

In the same way, in Switzerland, the APA establishes the principle that "the parties have the right to be heard" (Article 29). The hearing must be held before the decision is taken (Article 30). The authority must admit evidence proposed by the party if it is likely to elucidate the facts (Article 33) and it must take into account all important statements which the party has made in proper time, whereas consideration of statements made too late is facultative (Article 32). Finally, the parties may as a rule be present at the hearing of witnesses and ask additional questions (Article 18).

b) Apart from the states which have a general administrative procedure act, the right to be heard is set out as a general rule in two other states.

In Denmark, the principle is stated in Article 12 of the Law of 10 June 1970 on the access of the public to administrative files: "Anyone who is a party to a case pending before the administration may ask that the decision be deferred until he has been able to present his observations." This rule, however, entitles a party to be heard only at his request. It is under discussion whether and to what extent a hearing must be held at the initiative of the administration.

In Finland, according to a general principle which has been established as a custom and which applies even in the absence of any express provision, the interested party must be heard before the decision concerning him is taken, unless a particular text provides otherwise.

c) In all other countries there is no general principle on hearing the parties, but there are specified provisions granting the right to be heard in certain cases enumerated limitatively. Sometimes, as in the case of Turkey, the right to be heard is granted only exceptionally. In other instances the cases may be very numerous. This is the case in Belgium (particularly in questions of discipline of civil servants, expropriation and aliens police), in Luxembourg, (where apart from a certain number of cases provided for by law, an adversary procedure ("procédure contradictoire") is compulsory according to the jurisprudence of the Conseil d'Etat whenever the decision to be taken is likely to seriously affect the property rights of a citizen or if it amounts to a serious administrative sanction), in Cyprus (where on the basis of the idea of natural law the interested party is in many cases given the right to be heard) and in France: in this state apart from the numerous written provisions regulating the administrative procedure in certain fields and recognising explicitly the right to be heard (examples: public enquiries prescribed in cases of expropriation and, more generally, of city development operations or prior to a license to open a dangerous, inconvenient or polluting enterprise; adversary proceedings which are provided for certain police measures such as the expulsion of foreigners or the administrative withdrawal of the driving licence), the general principle has evolved in jurisprudence that the parties shall have the possibility of putting forward their arguments in any proceedings leading to disciplinary measures (economic, administrative or professional sanctions). In all such cases the administration shall furnish to the interested parties sufficient information to permit them to appreciate the full consequences of the proposed decision. It shall obtain their observations and suggestions which are often examined by a special authority (commissaire-enquêteur). In adversary proceedings the administration shall notify the interested party of the grounds on which it intends to base its decision, communicate to him the documents on which it will pronounce itself and give him sufficient time to prepare his observations and arguments.

In the United Kingdom, there is no general principle that an individual has the right to be heard before an administrative decision is taken, although legislation may provide this in particular cases. The field of town and country planning is an example. The decisions of an administrative authority (eg a local authority) on planning applications are subject to appeal to a Minister, while proposed action, eg orders for compulsory purchase, are subject to confirmation by the Minister. In such cases, the hearing of the parties takes the form of a public inquiry during which other persons may also present their observations. The situation in Ireland is broadly similar, save that there is a written constitution which guarantees rights of the citizen in regard to, for example, property and person, subject only to limited derogations. The courts in proceedings before them require the administrative body which is seeking to interfere with those rights to show that it acted in accordance with the provisions of constitutional justice, one of which is the right to be heard.

It should be noted that the principle of hearing the parties does not play any role of importance in administrative proceedings concerning concessions, ie proceedings in which the administration decides on an application made by a citizen. Thus for example, in Finland, an application may as a rule be denied without hearing the applicant any further if there is no other material in the case than the applicant's own statements (however, if the authority has procured information which is detrimental to the applicant, the application may not on these grounds be denied without the applicant having been granted an opportunity to present additional explanations).

In France, likewise, the principle of hearing the parties and the obligation for the administration to respect the rights of the applicant are not extended by jurisprudence, in the absence of an explicit rule, to decisions whereby the administration refuses an advantage or a quality which it is asked to grant; in fact, the courts hold the opinion that it is up to the applicant to present proprio motu his observations with his initial request.

2. Modalities of the exercise of the right to be heard

Does the right to be heard, to explain one's arguments and to call evidence, imply that the individual should be allowed to express himself in person, orally, before the administrative authority? The question is important because in certain cases the oral hearing may offer the citizen a particularly valuable safeguard since it gives him the opportunity to explain more fully this situation and his point of view to the authority. For this reason, for example, the Swiss APA gives the individual the right to express himself in writing or orally. In the states which have replied to the questionnaire the right to be heard orally is not the general rule. Only the Spanish APA enjoins the administrative authority to hold a hearing before taking any decision concerning a citizen. In the Federal Republic of Germany, the APB provides for such a hearing only in cases of formal administrative procedures; in other cases it is left to the discretion of the administration. Similarly, in Austria, the administrative organs may investigate the case wholly or partially, orally or in writing. In the majority of states, such as for example Denmark and the Netherlands, there is no right to an oral hearing except in cases explicitly provided for by law; apart from those cases, the administration may use its discretion, and practice in this connection varies from one country to another: thus in the Netherlands, for instance, the authorities tend to use more and more the oral hearing; in France, Norway and Sweden, oral hearings are seldom prescribed: most cases are dealt with by the administration on the basis of written documents. According to the Norwegian AA, Article 21, however, a party can on justifiable grounds be allowed to appear in person and speak before an official of the administrative authority which handles the case.

3. Exceptions to the right to be heard

a) Even in those countries where it is a general principle the right to be heard is most frequently subject to exceptions.

Thus in Switzerland, according to Article 30 APA, the authority does not have to hear the parties before taking:

- interlocutory decisions for which no separate remedies are provided;
- decisions liable to be set aside;
- decisions fully accepting the parties' requests;
- measures of execution;
- any other decisions in first instance proceedings where there is danger in delay, where the decisions are open to appeal by the parties and where no provision of federal law entitles them to be heard beforehand.

Article 18 of the same law rules out, moreover, the right of the parties to attend the hearing and to question witnesses if important public or private interests so require; in those cases, however, the information thus obtained by the administration in the absence of the parties may not be used against them unless the administration has informed them of the basic tenor and has given them an opportunity to express themselves and, if necessary, to offer counter evidence (Article 28 APA).

In Sweden, the authority may, under the terms of Article 15 of the APA, take a decision without hearing the parties:

- if this is manifestly useless;
- if the case concerns appointment to a post, admission to a traineeship, performance marks and examinations, research grants, or similar matters and if it is not examined in second instance;

- if the measures for a hearing would render difficult the application of the decision;

- if the final decision cannot be delayed.

In the Federal Republic of Germany, Article 24 of the APB provides similarly that the hearing of the parties may be foregone if such hearing is not necessary in view of the particular circumstances (especially: in the case where an immediate decision is necessary on account of danger in delay or on grounds of public interests that are at stake; if the hearing would result in exceeding an important time-limit connected with the decision; or when the authority intends to take a general decision or a whole series of analogous, individual decisions), or else if an overriding public interest is opposed to such a hearing. Moreover, under the terms of Article 63, the hearing in a formal administrative procedure may be waived:

- when the administration gives entire satisfaction to the application in agreement with all parties;

- when the party does not object within the prescribed time-limit to the proposed measure;

- when the authority has informed the parties of its intention to decide without a hearing, unless one of them objects within a set time-limit;

- when all parties have waived the hearing;

- when delay entails danger.

In Spain the obligation to hold the hearing prior to the decision is ruled out in cases in which the administration takes into account only the facts and evidence submitted by the citizen (Article 91 APA).

In Denmark, the right to be heard is not applicable when the hearing of the citizen would mean non-observance of the time limit set for the decision or when important reasons of public or private interest are opposed to it.

In Austria, the exceptions provided for are basically the following: decisions to be taken by virtue of provisions which apply automatically (for example, financial decisions to which a legal tariff is applied); decisions, the delay of which might cause damage; decisions in petty cases; decisions in summary proceedings (particularly in police matters).

b) In states where the right to be heard results from special rules exceptions are also provided. In particular the following exceptions can be noted: decisions which the citizen may reasonably expect (Netherlands); exceptional circumstances (Finland and France).

4. Sanction for the principle of hearing the parties

With regard to the sanction for the principle of hearing the parties, the following cases should be distinguished;

- absolute nullity (nullity of the decision, entering into force automatically);

- obligatory nullity (the decision must be quashed on the application of the party concerned);

- cases in which the appellate body decides whether or not the decision will be avoided.

Non-observance of the right to a hearing leads to nullity or is a ground for a plea of nullity both before the administration and before the courts, in Austria, Belgium, France, Ireland, Italy, Luxembourg, Norway, Spain, Switzerland, Turkey and the United Kingdom.

In Spain, the decision is void not only in cases of non-observance of the general principle of hearing the parties (Article 48 APA and Article 293 ROL), but also in accordance with the jurisprudence of the Supreme Court of Justice in cases of violation of the rules of procedure prescribed for the hearing.

In most countries, the appeal instance cannot substitute itself for the administration with respect to the merits of the decision against which a plea of nullity has been filed. However, in Norway and Sweden the appeal instance, when it accedes to an application for the annulment of a decision, reviews the case and confirms or quashes the decision or decides itself.

SUMMARY I - B

- It follows from the analysis that the right to be heard is recognised as a general principle only in a certain number of states.

In the other states the right is recognised only in particular fields (especially with regard to administrative sanctions and disciplinary matters).

- In general the right to be heard is accompanied by exceptions which refer essentially to the following cases: the necessity to take an immediate decision because there is danger in delay or in consideration of major public or private interests; the risk of exceeding the normal time-limits for the decision; decisions in petty cases; decisions by virtue of provisions for automatic application; the enactment of a large number of identical decisions; summary procedures, particularly in police matters; agreement by the parties not to have a hearing; decisions whereby an application of the interested parties is entirely granted.

- The sanction for violation of the principle of the hearing is generally the nullity of the decision, which enters into force either automatically or on the application of the party concerned. In some states the case may be referred to the administrative authority in order that it may hear the party and reconsider, if necessary, its decision.

II. ACCESS TO INFORMATION

General observations (1)

The importance of this question is evident: if the citizen has no access to the various relevant facts which the administration has in its possession, he cannot successfully intervene in the proceedings and defend his rights. At the same time, the subsequent judicial control may become meaningless when the citizen cannot duly and in proper time set out before the judge the grounds of his complaint because he had no knowledge of the file.

It should be observed that the right to access in some states concerns single documents (eg in the United Kingdom) and in other states complete files or records (eg Federal Republic of Germany).

(1) With regard to the special problem of access to information stored in electronic data banks, see also Resolution (73) 22 (on the protection of the privacy of individuals vis-à-vis electronic data banks in the private sector) and Resolution (74) 29 (on the protection in the public sector).

II - A Has the individual the right to be informed of all the relevant facts which the administration possesses to take the decision concerning him?

1. Recognition of the principle of access of the party to the relevant facts in the possession of the administration

From an analysis of the replies received, it appears that in about one half of the states the right of access of the party to the relevant facts in the possession of the administration is recognised as a general principle; in the other half this right exists only in certain specific cases by virtue of a specific rule.

a) Among the states which have accepted a general principle, distinction should be made according to whether the citizen has the right to consult the documents concerning his case, or whether he only has the right to obtain from the administration information on the various facts in its possession.

- Several states belong to the first category, such as for example, Denmark: The Act of 10 June 1970 on access of the public to administrative files provides for a general right of citizens to acquaint themselves with files established by the administration; it contains special provisions (chapter 2) pertaining to parties to an administrative appeal or to a matter pending before the administration. According to Article 10 "applicants, complainants and other parties to a case which has been referred to the public administration may request to peruse the file ... If it is important for a party in the defence of his interests to obtain a copy or photocopy of the documents in the file, his request to that effect should be granted". It should be noted that, by virtue of Article 4 of the act, if an official organ receives oral information of capital importance for the settlement of a case, written mention must be made in such a way that the information can be passed on; moreover, Article 11 stipulates that if in the course of a procedure, a party wants to peruse the official file and the administration is bound to grant this request, the decision is in principle delayed until the party has been able to consult the file.

Likewise, in Austria, the administration must in principle allow the parties to examine and copy the file or parts of files about which they should have knowledge in order to be able to explain or defend their interests.

In Spain, also, according to Articles 62 and 63 APA, the parties have the right to learn at any given moment the state of the proceedings and the various relevant facts which the administration possesses and to ask for authentic copies of the documents.

The cases of Norway, (Article 18 AA), Sweden (Article 14 APA) and Switzerland (Article 26 APA) should also be mentioned; here any party has the right to study his file.

- In states belonging to the second group the party only has the right to obtain from the administration information on the facts in its possession, and not the right of access to the file itself. Thus, in Finland, every citizen may obtain information on administrative documents connected with a pending case concerning him; he must, however, in some cases ask special permission from the authority concerned. In several offices there are special officials whose task it is to acquaint the citizens with the elements of information concerning them.

In the Federal Republic of Germany a statutory right to consult the file exists only to the extent provided for by explicit provisions. Article 25 APB states that the administration is obliged to inform the party on the various elements which it has in its possession for taking the decision.

In Turkey, the principle has been adopted in administrative practice that the administration may deliver authentic copies of documents to the individual concerned or to his representative, unless it concerns documents the disclosure of which might be prejudicial to national defence, relations with foreign states, public or private interests or where perusal of the document by the party would interfere with the proceedings or with the functions of the administration.

b) In the other states the citizens cannot study the file or have the elements of information communicated to them except in particular cases provided for by special regulations or judicial rulings; outside these cases, they have no such right. To this category belong Belgium, Cyprus, France, Ireland, Italy, Luxembourg, Netherlands and United Kingdom.

2. Exceptions to the principle

Even when it is drawn up in the form of a general principle, the right of the party to have access to the information in the possession of the administration is usually subjected to exceptions.

In Denmark, the Act of 1970 specifies in detail a series of exceptions to the right of the parties to consult their file. This right is ruled out, according to Article 10, if the interest of a party to know the documents in order to develop his arguments is outweighed by important considerations of public or private interest (yet if these considerations are only valid for certain parts of the document the party is allowed to study the remainder); furthermore, according to Article 5, the right of access to documents in the file does not apply to certain documents such as the minutes of cabinet meetings, reports on ministerial meetings, correspondence between ministers with regard to legislation or certain other correspondence, and internal documentation of the administration (reports, charts, drafts, notes etc). Article 10, however, holds that rules on the professional secrecy of civil servants shall not restrict in any way their obligation to communicate information to parties in the proceedings.

In Austria, the right to perusal does not apply to purely internal administrative documents and to documents which, if made public, would be prejudicial to the outcome of the proceedings or would be harmful to the interests of a third party or to the functions of the authority.

In Norway, according to Articles 18 and 19 AA, parties have no access:

- to proposals, drafts, opinions and other documents or reports drawn up by the administrative organ or obtained, without legal obligation, from sources other than the parties, as an aid to the investigation of the case;

- to documents containing information on certain questions (particularly questions of importance to national security and defence, or to relations with foreign states, or to inventions, technical processes and commercial methods if their secret is of capital importance for the persons concerned in view of competition);

- to documents containing information which must be kept secret, as provided by law, or documents which for special reasons must not be communicated, except if a document in one or the other of these two categories contains information which is indispensable to the party for the defence of his rights (in this latter case the party may be bound to observe secrecy).

In a preliminary draft law, which is now being considered, it has been proposed to supplement the AA with rules concerning the duty of secrecy for civil servants in order to protect the interests of private parties.

In Switzerland also, the APA contains detailed provisions on this point: According to Article 27, the right to consult the documents of a file does not apply if important public interests of the confederation or of the cantons (especially internal or external security of the confederation) or important private interests (especially those of other parties) or else if the interest of a public enquiry which has not yet been terminated requires that the secrets shall be kept. In those cases, the refusal of the administration to communicate the file applies only to those documents which should be kept secret. For the rest, Article 28 provides that a document which the party has not been permitted to consult may not be used to his disadvantage unless the authority has informed him orally or in writing of the essential contents pertaining to the case and has given him the opportunity to express himself and furnish counter evidence.

SUMMARY II - A

- The practice of states is divided between recognition and non-recognition of a general principle of access (direct and free or indirect and limited) of the citizens to the official files in their case.

This divergence is due to the co-existence within the states concerned of two opposed principles. On the one hand it is a requirement of good and efficient administration that civil servants can give their opinion without fear or favour about matters entrusted to them and on the other hand there is the need to enable the individual to understand the reasons which have led to the decision.

- In many countries which do not have the general principle of access of citizens to their file, specific measures nevertheless impose this rule in specific cases.

- On the other hand, in states where a general principle is recognised, it is always subject to exceptions which pertain essentially to internal working documents of the administration, and to documents which should not be disclosed in view of important public or private interests. In those cases, if the administration intends to use these documents, it is sometimes obliged to inform the party of the essential tenor with regard to his case, such as is provided for example by the Swiss APA.

II - B. Does the individual have the right of access to files concerning other similar cases?

While access, free or limited, direct or indirect, of citizens to the offical file in their case is recognised by a fairly large number of states, access to other administrative files concerning analogous cases is recognised only in some states; it is, moreover, restricted by important exceptions. The reason for this is that interests of other citizens are at stake; these are a ground for excluding or restricting publicity which could lead to intrusion into their privacy or their professional life.

1. Access of parties to other administrative files is provided for only in four countries, which have admitted the general principle of access of all citizens to all administrative files: Sweden, Finland, Denmark and Norway.

It should be observed that the principle of publicity of administrative files in these states is not meant in the first place to be an aid in view of administrative procedures. It is an additional safeguard for democratic control over the functioning of the administration. However, as a by-effect it may also benefit citizens in administrative proceedings.

In Sweden and Finland, there have existed for many years laws concerning the publicity of official documents. In Sweden, in particular, the right of citizens to peruse official documents has been in force since 1766; it is now a fundamental constitutional rule (chapters one and two of the Constitutional Law concerning the freedom of the press of 5 April 1949). The right applies in principle with regard to documents kept by authorities of the central and local government. Likewise in Finland, all official documents, that is to say, documents established by authorities or documents addressed to them are considered to be public. Every Finnish national is authorised as a general rule, to obtain information on these documents. In certain exceptional cases, a special authorisation must be obtained for that purpose from the authority concerned.

In Denmark, the Act of 1970 concerning access to administrative files by the public, stipulates in its Article 1 that everyone shall have the right to examine documents in files which are or have been under consideration by the public administration. It is a condition that the person concerned is able to specify the file of which he wishes to examine the documents.

In Norway, the Act of 19 June 1970 on access of the public to administrative files contains similar provisions.

In all other states, the right of access of citizens to files other than those concerning them directly, is, in principle, ruled out. The replies received set out, however, three variants:

- In certain states, the administration may furnish if it so wishes, certain information or certain documents pertaining to other cases: for example in Spain, Turkey, Ireland and the United Kingdom (in the two latter states the administration may communicate to a citizen letters containing the grounds of a decision in an analogous case). Sometimes, a special provision obliges the administration to do so; thus in France, by virtue of the general tax regulations (Article 1651 bis and 1941-6), when the administration bases a decision relating to assessment of tax reductions or the revenue of a tax payer on certain comparisons with other tax payers; the person concerned may then obtain, under certain conditions, the information on which the administration intends to base itself.

- In certain countries, such as France in particular, the enactment of administrative decisions often involves the seeking of advice of organs in which the citizens concerned are represented, which enables the party, through the intermediary of his representatives, to be informed informally of analogous cases which have already been dealt with.

- Finally, in many states, such as Belgium, Cyprus, Spain, France, Italy, Netherlands and the Federal Republic of Germany, if a party does not have the right to consult other files during the preliminary investigation leading to an administrative decision, the court to which his appeal is referred in the subsequent judicial stage may order, if it deems necessary, that other analogous case files are submitted to it by the administration. Thus for example, in France, the administrative judge who when reviewing the career of a civil servant wishes to ascertain whether the administration has promoted the applicant in a fashion comparable to his colleagues with comparable seniority in rank and performance marks, he may order the administration to produce the files in question.

2. Even where it is recognised, the principle of publicity of the administrative files is subject to important exceptions, in fact, more important than in the matter of consultation by the parties of their own file.

Thus, particularly in Denmark, the following exceptions apply in addition to the exceptions already mentioned with regard to the right of parties to consult their own file (Article 2 of the law of 1970):

- documents containing information on the personal or financial status of individuals;

- documents holding information on installations, technical processes, working and exploitation methods in cases where it is of vital economic interest for the person or activity concerned that these documents are not disclosed;

- major considerations such as state security, relations with foreign states and international organisations, the exercise of official functions of control, regulation or planning, or the application of measures provided for by fiscal law, economic interests of the state and the protection of other interests when the particular nature of a case requires their secrecy.

However, when the exceptions concern only a part of a document, the citizen has the right to know the remainder of its contents.

SUMMARY II - B

- It follows from the analysis that three different solutions exist with regard to the problem of access to files on analogous cases:

i. the administration must grant access to such files (exceptions are, however, provided in order to protect the interests of third parties or public interests);

ii. the administration may at its discretion grant access;

iii. the administration is barred from granting access.

It should be noted that two of these solutions or all three may co-exist within a same legal system.

III. LEGAL ASSISTANCE

General observations

Legal assistance, a familiar concept in court proceedings, has also gained a certain measure of recognition in administrative procedure. The present study is concerned only with legal assistance before the administration. It goes without saying that anyone may seek in private the advice of a legal expert on administrative questions.

Attention will be given both to the right of individuals to be assisted or represented by a counsel and to certain facilities offered by the administration enabling the individual actually to obtain such assistance and reimbursement of costs.

III. A. To what extent has the individual the right to be assisted or represented before the administration by a lawyer or other person designated by him?

1. Most of the answers confirm the principle of such a right. Only in Italy the right for the individual to be assisted by a lawyer or another person of his choice is in general excluded, except in proceedings concerning tax assessment. In some states, moreover, the right has not been formulated as a general rule but is only regulated by special provisions: such is the case for Belgium, Cyprus and Luxembourg. However, in the case of Luxembourg, even in the absence of a special law, the right is recognised each time when the administration intends to take a decision which is likely to seriously affect the individual situation of the person concerned; in Belgium, even in the absence of an explicit provision, the administration in practice seldom refuses the interested person the possibility of being assisted by a lawyer or other person of his choice.

In all other states the right for the interested person to be assisted or represented is recognised in the form of a general principle. In Turkey the individual has the right to be assisted or represented, during all stages of the administrative procedure, by a lawyer or another duly mandated person. Article 11, paragraph 1 of the APA of Switzerland provides that all stages of the proceedings the party may be represented or assisted, save provisions to the contrary.

In the United Kingdom anyone may seek assistance about an administrative decision, except in very few cases in which this freedom is limited. More generally, there may be a right to assisted legal advice if the individual complies with the provision of the Legal Advice and Assistance Act 1972. On the other hand, there is no general right to representation at the administrative stage (see III - B). Often the administration will not object to this, but in certain cases legal representation may be specifically excluded by law. An example of this is in hearings before the Services Committees of complaints against general practitioners under the National Health Service. The idea behind this is that legal representation, which would have to be allowed on both sides, would be to the disadvantage of the complainant.

The Norwegian AA contains very detailed provisions: Article 12 stipulates that "in all stages of the proceedings a party has the right to be represented by a lawyer or another counsel"; the law specifies that the party may present his application through the intermediary of a counsel or have himself accompanied by a counsel when he appears in person before the administrative organ; all notifications

and questions emanating from the administrative body are addressed to the counsel, while the person concerned may ask him to receive notification in addition to or instead of his counsel.

Article 6 of the Swedish APA states that "all parties of the case are entitled to use the services of a representative or a counsel. They shall, however, appear in person if the administration so demands".

In the Federal Republic of Germany, Article 14 of the APB contains detailed provisions to the same effect. Moreover Article 15 provides that the judge (the custody court) may ex officio designate, at the request of the administrative authority itself, a suitable representative of the interested persons in certain cases (particularly when the identity of the person concerned is not known or when the person is absent or prevented from taking care of his own affairs).

In Ireland, legal representation is generally permitted, and is excluded only in some cases by specific legislation. There is at present no provision of legal aid by the state in civil cases, although this question is currently under review. Representation by persons other than lawyers is rarely permitted.

2. The right to be represented or assisted when it is recognised is, however, subject to certain conditions or limitations.

A minimum condition consists in obliging the representative or assistant to prove his mandate, either automatically or at the request of the administration. Explicit provisions are laid down in Austria, the Federal Republic of Germany, Norway and Switzerland (where Article 11, paragraph 2 of the APA specifies that the authority may require the agent of a party to produce a written proxy). The APA of Spain contains very precise rules on this point.

Additional conditions are sometimes imposed: for example, that the person selected by the individual enjoys full civil rights (Switzerland); that the agent is not a civil servant subordinated to the administrative agency under whose competence the matter falls (Article 12 of the Norwegian AA).

Above all in several countries, the administrative authority has the possibility of objecting to a counsel or agent chosen by the individual: such is the case in the Federal Republic of Germany where the agents and counsels who are not generally authorised to take care of the legal affairs of others may be objected to if their written statements are unfit. They may also be refused if they are unfit for making adequate oral explanations. In Sweden Article 6 of the APA provides that if a representative or counsel shows incompetence or lack of judgement or appears in other respects to be unsuitable for performing his task the authority may object to him (such decision can form a ground for appeal). Article 12 of the Norwegian AA provides similarly that the administrative organ may refuse to hear any person who, without being a lawyer, seeks to intervene professionally on behalf of another person in administrative affairs (this provision does not apply, however, to certain cases).

3. The right to be represented or assisted is often subject to exceptions. Thus, Article 11 of the Swiss APA indicates that the urgency of an official enquiry may justify the exclusion of the exercise of the right to be assisted. Above all, the right to be represented is frequently subject to the following exception: the administration has the possibility of requiring, if it deems necessary, the personal attendance of the individual concerned in order to obtain directly from him the information which it is seeking. This exception is explicitly provided for by legal texts or judicial decisions in Austria, Finland, France, Norway, Sweden and Switzerland. A typical case where the personal appearance of the individual may be required is, for example, a naturalisation procedure.

SUMMARY III - A

- Most states grant the individual a right, or at least a facility, to be assisted or represented before the administration by a person of his choice.

- This principle does not exclude the personal appearance of the individual concerned if the administration considers this necessary.

- Where the duly recognised right of the individual is subject to the possibility for the administrative authority to challenge a representative or assistant, the law sometimes provides, as in Sweden, a possibility of appeal against such a challenge.

- Finally, the APB of the Federal Republic of Germany gives to the administration itself the possibility of having a qualified person designated for representing the citizen in certain cases so as to avoid that administrative decisions taken are " in absentia ".

III - B. Can legal aid be granted to the individual at this stage of the proceedings?

When examining the replies to this question one should distinguish two aspects:

1. Has the individual the possibility to obtain legal aid in connection with his intervention in administrative proceedings already before a decision is taken in his case?

a) An affirmative answer to this question has been given by Finland, Norway and Sweden.

- Comprehensive legal aid is provided for by the new Finnish Public Legal Aid Act of 1973, which deals with any legal aid required by an individual. Therefore it can be applied in administrative matters both at the stage where a decision has not yet been taken and afterwards at the stage of subsequent proceedings.

Legal aid is granted mainly to indigent persons; it is given either entirely free of charge or against a reduced fee.

Legal aid is dispensed through legal aid centres.

In some Länder of the Federal Republic of Germany there are legal aid centres, which grant legal aid already during the phase before a decision is taken.

- It may further be mentioned that in Article 33 of the Swiss APA the following provision has been laid down:

"The authority admits the proof submitted by the party if it appears to be likely to elucidate the facts. If the calling of evidence involves relatively high costs and if the party must carry these in case it loses, the authority may make the calling of evidence contingent upon the condition that the party prepays within a given time-limit the costs that may be claimed from him; if he is indigent he is exonerated from advancing the costs".

In the case of the United Kingdom, the individual may have the right to assisted legal advice in accordance with the provisions of the Legal Advice and Assistance Act, 1972.

b) In other states, the free legal aid system does not apply to the phase prior to the taking of the decision, but only to the subsequent appeal proceedings before administrative organs (or parliamentary organs) against the decision that was taken: such is the case in Denmark where persons of modest means have the right to be assisted by a lawyer upon payment of a token fee, particularly for drawing up the documents needed for an administrative appeal; in the United Kingdom where legal aid

is possible in cases of appeal to the Parliamentary Commissioner for Administration (1) or before the Commissioner of Complaints; in Switzerland, where in a case of an administrative appeal partial legal aid (exemption from prepayment of the costs for the proceedings) or full legal aid (including the assigning of a lawyer) is possible for indigent persons (Article 65 APA).

c) Outside these cases legal aid is available only in judicial proceedings.

2. In what form is free legal aid given?

a) According to the replies referred to above under 1, legal aid is usually given in the same form as legal aid in judicial proceedings, ie assistance by legal counsellors outside the administration proper. It is provided only to indigent people.

In several states there exist private organisations, some of which are subsidised by the government, which give legal advice to individuals.

b) In Finland, the administration itself provides assistance, and not only in cases of indigence. Such assistance is organised in the form of an administrative agency which is specially charged with providing assistance, advice and information to the citizens, the underlying idea being that it is the task of the public administration to assist the citizens and secondly, that where efficient aid is given to the citizen during the initial phase of administrative proceedings this may help to avoid conflicts arising at a later stage.

c) In Turkey, the Ministry of the Interior is preparing information leaflets containing details about the various administrative remedies, which will be distributed to citizens in order to better enable them to invoke the appropriate remedies.

SUMMARY III - B

- According to existing provisions legal aid in most states is not available to individuals before decisions are taken affecting them.

- However a new tendency can be noted in a number of states in favour of granting legal aid even at the preliminary stage.

IV. CONTENTS OF ADMINISTRATIVE ACTS

IV - A. Must the decisions of the administration be reasoned?

This question is of considerable practical importance. If the citizen does not know the grounds on which the organ has based its decision, he is not in an adequate position to challenge it. Similarly, it is important for the hierarchical superior who examines an appeal by the person concerned or who intervenes ex officio, to know the reasons for the decision. Stating the reasons for administrative decisions is particularly important in countries where the files of the administration are not accessible by the parties with the result that they have no means of learning the reasons of the authority.

The statement of reasons in administrative decisions has moreover an "educational" virtue: in obliging the administrative body to set out the reasons for its decision, one obliges it to account for the way in which the case has to be dealt with, to formulate its opinions and to express them.

For two categories of administrative decisions, the stating of reasons is of particular importance: decisions which are unfavourable to the party and discretionary decisions. Citizens should know the reasons for administrative decisions which

(1) The Parliamentary Commissioner for Administration will be referred to in this document in abbreviated form as PCA.

adversely affect their interests so that they can defend themselves if necessary. With regard to discretionary decisions their motivation permits the exercise of a minimum of control.

The problem of the motivation of administrative decisions is closely connected with their form: in practice the question whether they should or should not state reasons arises in connection with explicit administrative decisions, particularly written decisions. Motivation does not enter into consideration for implicit administrative decisions (resulting from silence kept by the administration over a certain length of time). For explicit decisions the principle is recognised in all countries that these decisions should be given in written form but there are a certain number of cases in which the administration may take oral decisions. In this respect important provisions are in force in certain countries (such as Austria, Denmark, Spain, Finland, the Federal Republic of Germany, in its APB, Norway) according to which all decisions of the administration must be confirmed in writing at the request of the citizen.

From the analysis of the replies received it appears that in certain states the administration must state its reasons while in the other states, which are more numerous, the administration is only bound to state its reasons in certain particular cases by virtue of statutory or case-law.

1. General obligation for the administration to state reasons

a) In principle, administrative decisions must state their reasons in Cyprus, the Netherlands, the Federal Republic of Germany (APB), Sweden, Switzerland and Turkey.

In Switzerland, in particular, Article 35 of the APA states: "Even if the authority notifies them by letter, the written decisions shall state their reasons ..."

In the Federal Republic of Germany, according to Article 35 of the APB, "an administrative decision enacted or confirmed in writing shall state its reasons in writing. The motivation of discretionary decisions shall state clearly that the authority has exercised its discretionary power".

b) In several states, the cases in which reasons must be given are enumerated by law. Thus, in Austria, decisions of the administration shall state their reasons when they disagree with the point of view of the party, or when they give a ruling with regard to objections or proposals formulated by him; urgency does not discharge from this obligation; Article 60 of the APA stipulates that the motivation must sum up clearly the results of the enquiry, the considerations which have determined the evaluation of evidence, as well as considerations of a legal nature.

In Spain, according to Article 43 of the APA, the following decisions shall state their reasons with a summary reference to facts and to the legal basis: decisions limiting subjective rights; decisions deciding an appeal; decisions which deviate from practice hitherto followed or from the advice rendered by consultative bodies; decisions whereby decisions are set aside against which appeal has been lodged; and decisions which must state their reasons on account of an express legal provision.

The Norwegian AA contains particularly detailed provisions: according to Article 24 every individual decision shall state its reasons when it concerns an appeal, when it concerns the settlement of a dispute between several parties or when it modifies a previous decision to the disadvantage of a party, moreover, in other cases, a party may always ask, after the decision, for the reasons to be stated to him when the decision is not entirely in his favour; this request must however be made within the time-limit set for appeals against the decision. The authority may refuse to state its reasons to the extent to which it would, in stating the reasons, have to reveal information to which the party has no right of access; moreover, when particular circumstances so require, the King, may for certain categories of cases, rule that the reasons shall not be communicated or be

communicated later than the enactment of the decision. Finally, Article 25 of the act lays down the conditions of the motivation: "The statement of reasons shall briefly mention the circumstances that have motivated the decision. The chief considerations that have motivated the exercise of the administrative agency's discretionary powers should also, if possible, be mentioned. If instructions have been given for the exercise of such powers, reference to these instructions will normally be sufficient".

In Sweden, all administrative decisions shall in principle state their reasons; Article 17 of the APA lays down, however, that reasons need not be stated in the following cases:

- when the decision is not unfavourable to the party or when, for any other reason, it is manifestly superfluous to state the reasons for the decision;

- when the decision pertains to the nomination to a post, admission to a traineeship, performance marks and examinations, the granting of subsidies for research or similar questions;

- when the indication of reasons would jeopardise national security, threaten to encroach upon the respect of the right to privacy or upon legitimate economic interests of individuals, or tend to have similar effects;

- when the urgency of the matter is such that no time is available for formulating the reasons.

When the reasons for the decision are not indicated at the same time as the decision, the authority is bound to communicate them to the party at his request if this communication is possible.

c) In some states practice fills the lacunae of law. In Finland, the practice of stating reasons for administrative decisions is extended to many other cases than those stated by law or in jurisprudence; frequently the principle is invoked that apart from decisions based on discretionary power, the public authority should furnish to the party at his request the reasons which led to the decision.

Often adverse decisions must be motivated. However, this rule is not always very firmly established and in general it is linked to the very principle of control over the administration and of the right of citizens to appeal against administrative decisions. Such is the case for the Federal Republic of Germany under its present legal system: according to a decision of the Federal Constitutional Court of 16 January 1957, it follows from the rule of law that "every citizen whose rights have been affected is entitled to know the reasons. It is only then that he can adequately defend his rights". Likewise in Italy, jurisprudence shows that all administrative decisions which are unfavourable to the parties, in particular discretionary decisions, shall state their reasons except in cases of simple matters; this principle derives from Article 113 of the Constitution according to which "against the decisions of the public administration, judicial protection of legitimate rights and interests shall always be permitted before ordinary or administrative judicial organs"; it is held that judicial control cannot be properly exercised if decisions do not state their reasons.

d) In some states, the general principle, thus recognised, is subject to exceptions.

Thus in Switzerland, by virtue of Article 35, paragraph 3 APA, the authority may renounce from stating its reasons if it accepts entirely the conclusions of the parties and if no party asks for a motivation.

In the Federal Republic of Germany, Article 35, paragraph 2 of the APB states that motivation is not compulsory in the following cases:

- when the authority entirely grants an application and a decision does not prejudice the rights of other parties;

- when the party knows already the opinion of the authority on the facts or merits of the case or if he is in a position to understand the reasons even if no motivation is given in writing;

- when the authority enacts a large number of similar administrative decisions and it is not necessary to state reasons based on the circumstances of every individual case;

- when a law so provides explicitly;

- when a general decision is published.

2. Absence of an obligation

In a certain number of states there is no general obligation for the administration to state the reasons for its decisions. This is the case, for example, in Denmark (1). The same is true for the United Kingdom, where a number of legal provisions require a statement of reasons in particular cases. Moreover, over a wide range of administrative decisions reasons may in practice be given either automatically or on request, even though there may be no obligation to do so. In some cases statutes explicitly absolve ministers from giving reasons for example on naturalisation cases.

SUMMARY IV - A

- From the analysis it can be concluded that a general obligation for the administration to state its reasons prevails only in a certain number of states.

- In the other states, the obligation for the administration to make its reasons known to the interested parties exists only by virtue of specific legal provisions dealing with certain categories of decisions, as for example, those which are unfavourable to the interested parties.

- To the extent that administrative authorities are required to state their reasons, this obligation may be reduced by certain exceptions, such as: cases in which stating the reasons would create a danger for public security or legitimate private interests; emergency cases; cases in which the parties already know the reasons; cases in which the administration enacts a large number of similar decisions.

- Where the law provides that reasons must be stated, this means in general reasons on the facts and merits of the decision. Where the authority has used discretionary power, it should also state the considerations that are found decisive.

- Even where no general obligation for the administration exists, it is often in practice obliged to state its reasons to the appellate body. However, this does not apply to appeals which are in the nature of a re-hearing, because in that case the administration and the individual are given the possibility to put forward new arguments.

(1) The question of motivation of administrative decisions has been studied by a committee set up by the government which reported in 1972.

IV - B. Must decisions include an indication of the remedies open to the persons concerned?

The analysis of the practice in the different states can be summarised under the two following questions: Is there a general principle which obliges the administration to attach to its decisions an indication of the possible remedies? When such an obligation exists what are the consequences if the administration fails to comply with it?

1. Obligation to indicate the remedies open to the individual

a) In several states, the administration is bound by a general rule to indicate in its decision or in the notification of its decision the possible remedies; this general principle is, however, subject to exceptions in specific cases.

- A general principle is found in all general administrative procedure acts. Thus in Austria every administrative decision should indicate the possibilities of appeal. In Spain, by virtue of Article 79 APA, the notification of a decision should mention the possibilities of appeal and indicate the appeal body, as well as the time-limit within which the appeal is to be lodged. In Norway, Article 27 AA states: "The notification shall further supply information on the right of appeal, the appeal period and the appeal procedure. It shall in addition state, if such is the case, that an appeal to the superior administrative agency is a condition for bringing legal action for a review of the decision, or the period of the time allowed for bringing such legal action". It should be noted that the obligation to inform the party of the remedies open to him concerns only administrative remedies. In other words, the administration is not obliged to mention possibilities for an action in ordinary courts or for an application for the ombudsman.

Federal authorities in the Federal Republic of Germany are bound, by virtue of Article 59 of the Administrative Courts Procedure Code, to indicate the remedies. All authorities, whether federal, Land or other, when deciding on an administrative appeal, have to do the same (Article 73 of the code).

In Switzerland, according to Article 35 of the APA "even when the authority notifies them by letter, the written decisions ... shall state the remedies. The indication of the remedy shall mention the ordinary remedy which is open, the authority with which it should be lodged and the time-limit within which it should be exercised".

According to Article 18 of the Swedish APA, applicable to administrative decisions, the administration is bound to indicate the remedies to the party concerned only if the decision is evidently unfavourable to the party.

A general principle is also in force in Finland where decisions from which appeal lies according to law should always be accompanied by a statement on the conditions for appeal.

- Exceptions of a limited nature sometimes apply to the general principle. Such is the case for example in Finland with regard to decisions emanating from the State Council or from ministries, decisions against which appeal may be lodged before the Supreme Administrative Court; in this case it need not be mentioned expressly. In Switzerland, Article 35 of the APA provides the following exception: "the authority may renounce ... from indicating the remedies if it concurs entirely with the conclusions of the parties".

b) In the other states, the indication of the remedies is not mandatory in principle save for explicit provisions in specific cases: in France particularly in fiscal and social security matters or more generally when the remedies are to be exercised within a time-limit shorter than the customary two-month time-limit.

In the United Kingdom, there are no general provisions requiring administrative authorities to indicate remedies. Statutes may require this in specific cases, for example in the social security field. Where statutory appeals machinery exists, the

administration is normally required to indicate the remedies. Outside the area of formal appeals machinery, it would be unusual to indicate the remedies which might possibly be open to citizens. If there is no clear legal remedy, the aggreived individual is always free to complain to the authority itself, to a minister, to a member of parliament and, through a member of parliament to the PCA. Generally speaking, these courses of action are not surrounded by formalities and it would be quite impracticable to define, in a formal decision the circumstances in which they could be embarked upon.

In Denmark, the committee set up by the government, mentioned above (p. 22) proposed that every administrative authority should be under the obligation, when taking a decision, to inform the party at the same time of the possibilities of appeal. In Italy, a similar obligation might be laid down for all administrative decisions as a result of drafts which are in an advanced state of elaboration. In the Netherlands also, it is increasingly recognised that the administration, when taking a decision, should inform the party concerned of the possibilities of appeal against it.

2. Sanction on failure to indicate the remedies

a) In some states the obligation to indicate the remedies which are open to the individual is not accompanies by a sanction. Thus, in Norway, the time-limit for appeal continues to run even if no indication whatsoever is given in the decision; but a period of grace may be granted to the party if he finds himself foreclosed. In Sweden also, failure to indicate the remedies does not lead to any particular effect: the time-limit for the appeal starts running from the date on which the party has been informed of the decision. The same solution applies in the Netherlands and in Turkey.

b) In other states a sanction is provided for:

- The most usual sanction is the suspension of the time-limit for the appeal. Such is the solution in Spain; however, according to the Spanish APA, the defect of not having indicated the remedies is remedied if after the personal notification of the decision to the party, the latter has not protested formally to the administration asking it to correct the omission. In France, Italy and Switzerland failure to mention the remedies, if such mention was obligatory, also results in that the foreclosure of the time-limit cannot be invoked against the party.

In the Federal Republic of Germany in the event of an omission or incorrect indication, the time-limit, which is normally one month, is extended to one year.

In Austria, the time-limit is suspended only in the event of erroneous indications; as a matter of fact, according to Article 71 of the APA, when a decision wrongly indicates that no appeal can be lodged, while, in fact, there was the possibility of legal appeal, the person who, on the basis of this information has failed to lodge an appeal within the normal time-limit, may recover his rights as from the time when he learns that the decision is open to appeal.

- Sometimes other forms of sanctions are provided. In the United Kingdom, in certain cases, failure to indicate the possibility of appeal renders the decision liable to be quashed by the court.

In Finland, if the rules on the conditions for appeal which should in principle be joined to the decision, are incomplete or have not been communicated to the party, he has the right to ask for the full, or duly corrected text. If no indication of remedies has been given, the party has the right to ask for the amended text even after expiry of the time-limit for lodging an appeal. The official who refuses to grant this request will be deemed to have failed in his professional duties and disciplinary action may be taken against him. An appeal made by a person who has received incorrect indication of remedies shall be considered as having been made properly.

SUMMARY IV - B

- A general rule to the effect that the administration is obliged to join to its decisions an indication of the relevant remedies is in force in most states which have a general law on administrative procedures, as well as in Finland.

- In the other states there is no such obligation save when it is explicitly provided for with respect to specific categories of decisions.

- However, the present practice in these states and the proposals for new legislation now being considered by some of them show that the principle of indication of remedies is not unknown there either.

- Remedies need not be indicated where the decision gives entire satisfaction to the interested parties.

- In general, the indication of remedies gives the party complete information on the types of appeal, the competent appeal body, the time-limits for lodging the appeal etc.

- In general, the sanction against failure to indicate the remedies is not the nullity of the decision, but suspension of the time-limit for lodging the appeal. Normally the sanction is applied both in cases of failure to indicate anything at all and in cases of insufficient or incorrect indications which prevent the party from successfully availing itself of all the remedies open to him.

V. REMEDIES

V. - A. Is there a remedy against all administrative decisions?

Posing this question leads to a problem: Should there be taken into consideration the possibilities of appeal before the administrative authorities themselves (and in particular appeal to the hierarchical superior of the official who took the decision) or only appeal to independent authorities which are especially assigned the task of overseeing the administration?. More often than not, the replies to the questionnaire on this point have followed the latter reasoning, and have not mentioned the possibility of an administrative appeal to the very authority that took the decision or to the superior authority. However, in many states where practically possible, the administration may benefit a complainant by revising its original decision. A tax authority, for example, may revise a tax assessment. However, it will not be possible for an administration to cancel an appointment once it has been made. Sometimes this remedy is even guaranteed by the Constitution (for example, Article 17 of the fundamental law of the Federal Republic of Germany). Hardly any restrictions can be found except in the Netherlands, where, save for an explicit provision, the administrative authorities do not have to take into consideration or to examine an appeal made to them by the citizens, but where many legal provisions provide for this remedy nevertheless in specific cases.

It should be added that by "remedy" should be understood only effective remedies according to the domestic law of the states (petitions for pardon, steps with the press, etc, are not included).

The following six types of decisions deserve special attention in view of the problems which arise with regard to the remedies open against them:

1. Administrative decisions of a general character

a) In the great majority of states there is a possibility of appeal against general administrative measures. Such is the case, for example, in Belgium, Cyprus, Denmark, Spain, Finland, France, the Federal Republic of Germany, Italy, United Kingdom, Sweden, Norway and Turkey.

The question of when and by whom an action may be brought was not raised in the questionnaire.

It should be pointed out that a citizen may take objection to an administrative decision having a general character not only where it is affecting him directly, but also where the decision is not addressed to a particular individual but potentially affects him. Some states, such as Sweden and Switzerland permit a person two courses of action: to attack the administrative measure as such, or to attack individual decisions affecting him.

In other states remedies against general administrative measures are less readily available than remedies against specific measures.

Thus, in the Federal Republic of Germany, appeals against decisions of administrative authorities may in principle only be lodged against decisions having an individual or particular content (even if these decisions apply to a series of specific facts which concern a large number of persons, for example, breaking up of a meeting, prohibition of a manifestation, etc). However, the legislature of a Land may allow a higher administrative court to take a ruling on the validity of a decree promulgated by the land or on any other general administrative measure of a lower rank; such a provision exists in five Länder. Moreover, the right to submit petitions or requests to the competent authorities and to parliament such as laid down in Article 17 of the Fundamental Law, may concern general administrative matters. The interested party can also lodge a constitutional appeal with the Federal Constitutional Court against a measure of a general character if, on account of that measure, he is directly and personally affected in one of his fundamental rights. No remedy is available against internal directives which a higher authority addresses to a lower authority and which do not, by themselves, affect the citizen's rights.

As regards Austria, it is necessary to distinguish between administrative acts of a general character and administrative acts of an individual character. Only acts of an individual character can be challenged by the person concerned by way of appeal within the hierarchical structure of the administration. After exhaustion of the remedies before the administrative authorities an appeal may be lodged with the administrative courts or with the Constitutional Court. In such cases an administrative act of a general character may be annulled by the Constitutional Court on the ground of unconstitutionality as far as this act forms the legal basis of an administrative act of an individual character.

In Norway, the administrative or judicial appeal organ may assess the lawfulness of the regulations in question and if necessary consider it not applicable. In its conclusion the court will limit itself to order that the regulation should not be applied to those who made the appeal. However, the regulation will then have to be repealed or amended. When complaint is made against individual decisions the ombudsman may state an opinion on the validity of the regulations on which the decisions are based and inform the ministries concerned.

b) In certain states, appeal against general administrative measures is not possible save when otherwise provided. Such is the case in Luxembourg and the Netherlands.

In Luxembourg, there is no direct remedy with administrative or judicial organs against general administrative measures. But the conformity of these measures with the constitution and the law may be tested before all these organs in an incidental fashion; namely when a decision is challenged which has been taken in execution of a general administrative measure.

c) In Finland, it is not possible in principle to appeal against decrees; however, according to the constitution, if a decree contains a provision contrary to constitutional law or any other law, the authorities have the facility not to apply this provision (decisions based on the unconstitutional provision may be quashed). Moreover, if a decree manifestly violates the legal status of an individual the citizen whose rights have thus been violated is by way of exception entitled to lodge an appeal, save when it concerns a decree promulgated by the President of the Republic.

2. Deeds or actions

It may happen that an administration creates a factual situation contrary to law and without any formal decision having been taken. The majority of the replies indicate in so many words that also in cases of this kind the individuals whose interests are affected may use the remedies which may be had against decisions of the administration. (Austria, Belgium, Denmark, France, Ireland, Italy, Luxembourg, Norway, Spain, Sweden, United Kingdom). They may, in particular, demand the stopping of the deeds or actions contrary to law and a restituto in integrum. Where the latter is no longer possible, they may claim damages either by bringing an action before an ordinary court or by an administrative remedy.

3. Abstentions and omissions

Practically all the replies mention the possibility of a remedy against abstention and omission on the part of the administration. However, the contents of these replies being rather brief it is not possible to deduce more than the following:

- Often silence observed by the administration during a certain period after an application has been made to it by a citizen is regarded to be tantamount to a tacit refusal, and appeal may be had against this under the general system of appeal in administrative cases. Such is the case for example in France, where silence of the administration during four months since the application was made is regarded as an implicit decision to refuse the application. Likewise in Turkey, silence on the part of the administration during more than three months is equivalant to a refusal of the application. In Spain, also, when the administration has not taken a decision within three months the person may complain against this delay and after the expiry of another period of three months the administration is deemed to have rendered a negative decision against which appeal may be lodged. Similar provisions are to be found in other countries such as Belgium and Luxembourg. However, in some cases, the opposite rule applies: where the administration fails to take a contrary decision within a certain time-limit, the application is deemed to be granted (in France, for example, in the case of construction permits).

- Certain replies make mention more generally of the fact that any abstention or omission on the part of the administration, with regard to the taking of a decision which it would be required to take under the legislation in force, may give rise to a remedy either in order to oblige the authority to take the decision in question or in order to obtain the award of damages.

Thus in Switzerland, Article 71 of the APA states that anyone may at any time denounce to the supervising authorities facts which in the public interest require an ex-officio intervention against an authority; Article 70 states more precisely, with regard to the failure of an authority to decide on an appeal, that the interested party may at any time appeal to the supervising authority on the ground of denial of justice or unjustified delay. In Italy, an appeal is possible in cases where the administration abstains from taking a measure which should be taken; the abstention must however be formally established by the party by means of a summons in which the administration is given a time-limit within which to take the necessary measures. In France, when the administration abstains from taking a decision which should be taken but for which no specific time-limit is provided, appeal is possible to the administrative court which will consider whether the administration has had reasonable time and which indemnifies if necessary, the interested party; it is also possible for the party to serve a notice on the authority to take the decision and in case of refusal, appeal against this refusal to the administrative court.

In the United Kingdom, the court, the PCA and ministers, where there is a right of appeal to them, can consider acts of abstention or omission, but administrative tribunals would normally hear appeals only against positive acts; the United Kingdom does not generally follow the practice of silence implying refusal (although there are some such provisions in planning legislation).

The ombudsman in Sweden can consider complaints against abstentions and omissions on the part of the administration.

In the Federal Republic of Germany, a remedy for default is open to the interested parties, particularly in cases where the authority has failed to decide within a reasonable time without sufficient reasons, in spite of the opposition voiced by a party concerned or contrary to an application for the performance of an administrative act. Solutions of the same kind exist in Austria, Finland and Cyprus.

4. Acts of State

a) In the majority of states, "acts of state" are not subject to remedies or most of the remedies (in any case judicial remedies) because they are usually not considered to be administrative acts. The list of these acts of state varies from one country to another.

In Spain, these acts are outlined by Article 2 of the Act on the Organisation of the Judiciary following two criteria, one being a subjective criterion (decisions taken by the Government or by the Cabinet as collective bodies), the other being an objective criterion (decisions concerning defence of the national territory, international relations, internal security and military organisation and command). The decisions in question are considered to have a political not an administrative function; for that reason they are excluded from the jurisdiction of law courts, but the courts may award damages to citizens whose rights have been infringed by such decisions.

In France, acts of state cover grosso modo two categories of decisions: decisions concerning international relations (conclusion, interpretation or execution of international agreements; protection of French citizens abroad; military operations and, more generally, war events, etc; decisions concerning the relations between the government and parliament (submitting or refusal to submit a bill, decrees promulgating laws, decrees for convocation of Parliament or adjournment of the sessions, etc).

In Luxembourg, acts of state are in particular the decisions concerning relations with a foreign power, decisions on the acquisition of nationality and decrees of pardon.

Norway has no "act of state" doctrine. However, the difference in practice between Norway and other states is small, since many of the decisions which would in other states be considered acts of state are taken by virtue of a discretionary power and the exercise of discretionary power is not appraised by the courts.

In the Federal Republic of Germany, acts of state are recognised only to a small degree in view of the provisions of Article 19, paragraph 4 of the Fundamental Law, according to which "a judicial remedy is open to anyone whose rights are violated by the public power"; these acts are deemed to correspond with the exercise of a function of political leadership and not with a function of administrative implementation. In this category are included the adoption of the main guide lines for policy, any decision of military command, acts of the President (for example the award of a distinction), declarations addressed to Parliament and, to a certain extent, organic acts in as far as they do not violate rights of an individual. There is controversy about the nature of the decrees of pardon.

In the United Kingdom an act of state is an act of the prerogative in foreign affairs in relation to a foreign state or in relation to an individual outside the allegiance of the crown. Exceptions based on an act of state are not very numerous. In particular the defence of act of state is not available to the crown in any action taken against a citizen of the United Kingdom or against an alien within the jurisdiction of the crown.

In Sweden anyone can ask the permanent Constitutional Committee of parliament to verify the legality of an act of state, but the committee is not obliged to consider the matter. This is therefore not a real remedy in the strict sense of the word.

In Switzerland, acts of state concern in particular the decisions of the Federal Council concerning internal and external security of the country, neutrality, diplomatic protection and other matters concerning foreign relations; as well as certain decisions concerning aliens police. Remedies are not completely absent in those cases except against acts of the Federal Council, appeal lies against decisions of services subordinate to it in the form of an administrative appeal or of a procedure by which the act is denounced to the supervising authority (Article 71 PPA).

In Denmark, the problem of acts of state and their immunity with regard to a review by the courts and the ombudsman has not yet been fully clarified.

In Turkey, likewise, there are theoretically no more acts of state since 1961, the date of entry into force of the new Constitution, of which article 114 subjects in principle all acts of the administration to judicial control: "a judicial remedy remains open against any decision and deed of the administration". Nevertheless, certain decisions continue to be regarded as acts of state and escape the control by the courts: international relations, acts or events of war, proclamation of the state of siege, etc.

b) Only in some states all acts of state are subject to appeal: such is the case for Finland where there is no rule according to which certain acts of the President of the Republic or of the Cabinet would escape from an appeal on account of their political character; Austria; and the Netherlands. In Italy, Article 113 of the Constitution of 1974 lays down the principle that a judicial appeal is always open against acts of the administration and provides explicitly "This judicial protection cannot be excluded or limited to particular means of appeal or for specific categories of decisions". As a result of this provision, all laws which excluded judicial appeal against administrative decisions have been repealed; however, it is still debated whether this provision applies to decisions of a political character, and if these are to be regarded as administrative decisions.

In Belgium, the tendency of appeal organs is not to allow any act of the administration to be immune from remedies for the sole reason that it is to be considered an act of state. This does not mean, however, that appeal organs would not grant the administration a large measure of discretionary powers in certain very sensitive matters.

5. Actions of private persons (natural or legal) who perform a public function

a) In many states the acts of natural or legal persons who perform public functions are regarded as acts of the public administration and subject to the same system of appeal. For instance, in Austria, Spain, France, Luxembourg, Norway, Netherlands, Federal Republic of Germany, Sweden and Switzerland.

In Cyprus, remedies are open according to Article 146 of the constitution against any decision of "any organ, authority or person exercising any executive or administrative authority."

b) In the other states which are less numerous, the acts of private persons are not in principle (and save express contrary provisions) subject to the system of appeal against administrative decisions. Such is the case in Finland and Italy. In all these cases, the private organs concerned are submitted to the supervision which the ordinary courts exercise with regard to individuals.

c) In Belgium, acts of corporate bodies which have the legal form of an institution under civil law, but have in fact been set up by public authorities for the furthering of a public cause, are subject to the same system of appeal as administrative acts. On the other hand, private persons who perform a public function but cannot be considered to be an administrative authority remain subject to the jurisdiction of the ordinary courts.

d) In the United Kingdom, special rights of appeal exist in some cases where private bodies exercise public functions. More generally private bodies are subject to the jurisdiction of the courts as are administrative authorities and the ordinary legal remedies are open against them.

6. Internal instructions

Some replies have made reference to the question whether internal rules having an administrative character are subject to remedies. In France, such measures (circular letters, instructions, measures concerning the internal organisation of government offices) are not subject to remedies provided that they do not create legal rules. In the United Kingdom, internal rules, particularly those about the use of discretionary power can be questioned by the PCA. In the case of the Federal Republic of Germany, when instructions not having force of law are less favourable than the law itself the court may set them aside. When they are more favourable the court may take them into consideration under the aspect of equal treatment.

SUMMARY V - A

- There exists in the majority of states a remedy against administrative acts of a general character although sometimes the possibilities of appeal are more limited here than with regard to acts of an individual or of a special character.

- In general, states provide remedies both against positive acts and against abstentions and omissions on the part of the administration. In particular, silence observed during a certain period by the administration after an application made by a citizen is often considered to be a refusal and as such is subject to a remedy. It is also possible to bring an action with the purpose of obliging the administration to take those measures which it is legally bound to take and to be awarded, should the occasion arise, damages.

- In many states a category of decisions called "acts of state" escape wholly or partially the system of remedies which is normally open against administrative decisions, and in particular from appeals to courts. The contents of this category vary; it includes essentially the sector of external relations, the relationship between the executive and the legislature and questions of state security.

- The majority of states treat acts of private persons performing a public function on the same basis as administrative acts and submit them to the same system of remedies. In some states these actions are submitted to the system of controls exercised by the ordinary courts over individuals.

- In several states factual situations contrary to law created by an administrative body are subject to various kinds of remedies before ordinary courts, constitutional courts and administrative courts.

V - B. On what grounds can each type of decision be challenged?

The replies received do not permit detailed analysis of this point because they do not list for each category of decision the reasons which can be invoked for appeal in the different countries. It is possible, however, to deduce from the replies that generally administrative acts can be challenged on the following grounds: unconstitutionality, illegality, inappropriateness and improper use of discretionary power.

1. Unconstitutionality of the decision

In practically all states, administrative decisions can be challenged as being unconstitutional before one or several appeal organs, with the proviso, however, that in the United Kingdom the control of constitutionality is more or less the same as the control of lawfulness, in the absence of a written constitution. In Ireland the superior courts have the power to declare void any Act of parliament, or any administrative decision taken under such Act, which is repugnant to the terms of the Constitution. In Finland, decisions of authorities deciding the appeal do not in general mention explicitly the unconstitutionality of the decision even if it was challenged on that ground. In Sweden, there are no special provisions on this point, but it is accepted that all appellate bodies can test the constitutionality of administrative decisions.

- In the majority of states the constitutionality of administrative decisions may be reviewed by all appeal bodies or by the most important ones. Such is the case in Belgium, Cyprus, Denmark, Finland, France, the Federal Republic of Germany, Italy, Luxembourg, Norway, the Netherlands, Sweden, Switzerland, and Turkey.

In the Federal Republic of Germany the Constitutional Courts (Federal Constitutional Court and the Constitutional Courts of the Länder) which are competent to assess the constitutionality of laws, cannot be seized by a citizen for an alleged violation of his fundamental rights by an act of the administration unless he has first exhausted the remedies lying to the administrative courts.

In Spain, the basic law of the state of 10 January 1967, introduced a special procedure for the control of the constitutionality of laws or of general acts of the government: the "contrafuero" procedure before the Head of State; but the courts (basically the chambers for administrative disputes of the Supreme Court and the administrative disputes chambers of the Assizes Courts) may check indirectly on the occasion of an appeal against an administrative decision, the constitutionality of the law or of any other instrument on the basis of which the administrative decision had been taken (Article 3 of the Law of Principles of the National Movement of 17 May 1958).

In certain states, such as Belgium, France, the Federal Republic of Germany, Luxembourg, Italy and the Netherlands, the appellate bodies may test the direct conformity of an administrative decision with the Constitution; but if an administrative decision is in conformity with a law which is itself unconstitutional then they cannot declare this law unconstitutional since they have not the power to pronounce on the validity of laws. In the Federal Republic of Germany, an administrative tribunal confronted with such a problem has to submit the case to the Constitutional Court in order to obtain a ruling on the constitutionality of the law in question. In Italy this possibility also exists, at the option of the administrative tribunal on the basis of the decision of the Constitutional Court, the administrative tribunal can then draw the consequences with regard to the validity of the administrative decision.

2. Illegality of the decision

Illegality of the decision (including irregularity of the proceedings) may be invoked in principle in all countries as a ground for appeal. The replies received do not contain sufficient material to elaborate on this point and in particular to analyse the different types of illegality and the sanctions, if any.

3. Inappropriateness of the decision

As has already been underlined above, many replies have only dealt with judicial appeals or appeals to independent public authorities or organs (of the ombudsman type or para-judicial organs competent for administrative disputes), and these replies have not covered the administrative appeals lodged with the author of the decision or his hierarchical superior. Yet it would seem that if a decision is challenged because it is inappropriate (ie the decision is alleged to be of a "bad quality") such appeals will mainly be lodged within the framework of administrative remedies, and the question then arises to what extent the administration has the power to come back for reasons of simple inappropriateness, on decisions which it has lawfully taken (a question which the replies that were received have left unanswered).

It is therefore with this proviso about appeals to the administration itself that the following analysis should be interpreted.

a) Only in certain states may administrative decisions be challenged for inappropriateness, and this with some reservations.

In Denmark, the appeal to the ombudsman may be based on inappropriateness of the decision; but this does not hold true for appeals to courts.

In Finland, inappropriateness of administrative decisions may be invoked before various appeal organs and in these matters as a last appeal organ before the state Council. There are nevertheless decisions of which the inappropriateness cannot be proved. Most decisions taken by municipal and ecclesiastical authorities and all decisions of the state Council itself fall into this category.

In the Federal Republic of Germany, the control of appropriateness is exercised on the one hand by the administrative authority to which appeal is made within the administration and, on the other hand, by the administrative courts; the latter will examine the appropriateness of the decision within the framework of its assessment of legality. If the court is of the opinion that the act is not the proper means for achieving the intended purpose, it may declare it illegal.

In Luxembourg, inappropriateness can only be invoked in a "recours en réformation" (however, the committee for settlement of disputes of the Conseil d'Etat, the chief appeal organ, has competence as "recasting" judge only in cases provided expressly by law).

In the Netherlands, inappropriateness of administrative decisions may be invoked before appeal organs within the administration, but not before the courts.

In Norway, inappropriateness may be invoked in an administrative appeal or an appeal to the ombudsman, but not to the court.

In Switzerland, Article 13 of the APA provides that "the applicant may allege ... inappropriateness; this ground for complaint cannot be invoked when a cantonal authority has taken a decision as appellate instance".

In the United Kingdom, the concept of inappropriateness as a technical ground for appeal does not seem to be generally applicable in judicial review; when an appeal is lodged on a point of law, the appellate body is not entitled, as a general rule, to substitute its decision for that of the administrative authority. The PCA is concerned with complaints of injustice caused by "maladministration", a loosely defined term which enables the PCA, in certain circumstances, to test the quality of the decision.

Only Sweden mentions, without any restriction, the possibility of challenging the decision before appeal organs on the grounds of inappropriateness.

b) In all the other states, inappropriateness as a ground for appeal is in principle excluded. Such is the case, particularly for Belgium, Spain, France, Italy (although for certain matters the state Council may judge on the appropriateness: Article 27 of the Royal Decree of 26 June, 1924) and Turkey.

In Belgium, the appellate organ does not substitute its own appreciation for that of the administrative authority wherever the law has conferred on the latter a discretionary power or - what amounts to the same - to the extent that the administrative authority is judge of the appropriateness. This does not prevent the appellate organ from ascertaining whether the administrative act is based on grounds which are acceptable whether it has been taken within the limits of the law and whether the prescribed formalities have been complied with.

4. Incorrect use of a discretionary power

In the majority of states, incorrect use of a discretionary power may be invoked as a ground before appeal organs. Only in Belgium it is not admitted as a ground for appeal. The answer from the Netherlands indicates that this ground can be invoked "up to a certain point".

For the rest, practically all appellate bodies may control the exercise of discretionary power by the administration. Thus in Denmark, not only may the ombudsman control the exercise of discretionary power in connection with misuse of powers, but also the courts. In Spain, the courts exercise a control on the basis of

the facts on which the decision is founded and the aims for which the decision has been taken. In France, administrative courts exercise in this field a "minimum control" which is as a matter of fact rather a large control because it deals with incompetence, with misuse of powers, with mistakes in the form or procedure, factual error, legal error and manifest mistakes of appreciation. In Norway, the courts exercise a control with a view to abuse of power: the decision is quashed if discretionary power has been used for serving other interests than those set out by the legislator, if the administration has not taken into account the principle of equality or if the decision is considered to be highly unreasonable. In the Federal Republic of Germany the courts examine whether the limits of discretionary power have been exceeded and if this power has been well used in conformity with the purposes for which it was instituted. In Turkey, the courts control the use of discretionary power in the light of its procedural conditions and its objectives. Solutions of the same type are found in Austria, Finland, Ireland, Italy, Luxembourg and Sweden. In the United Kingdom, in addition to the control exercised by administrative tribunals, the ordinary courts will sometimes quash a decision on the grounds that a discretionary power has been incorrectly used.

SUMMARY V - B

- Illegality of the decision may be invoked as a ground in all countries before all appeal organs.

- Unconstitutionality of administrative decisions may be invoked as a ground in the majority of states before all appeal organs or before the most important among them. It does not arise as a separate issue, apart from illegality, in the United Kingdom, which does not have a written constitution. In those states which do not allow controlling the constitutionality of laws, the constitutionality of decisions taken in conformity with law cannot be controlled either.

- Inappropriateness of the decision can only be invoked, apart from administrative appeals, in a small number of states and in general with restrictions.

- Improper exercise of a discretionary power can be invoked as a ground in the majority of states before all appeal organs or the major appeal organs.

VI. CONDITIONS OF NATIONALITY AND RESIDENCE

VI - A. Are the rules governing administrative procedure applied irrespective of the nationality and residence of the person concerned?

The states which have replied to the questionnaire normally apply their rules governing administrative procedure without any distinction based on the nationality or residence of the person concerned.

- Certain laws and regulations pertain specifically to aliens, such as immigration laws and naturalisation laws, but they do not really affect the procedure of decision-making or the remedies.

In Belgium, however, in matters of entry, sojourn and establishment on the national territory, aliens are subject to separate rules of procedure; a committee has been created in order to revise the status of aliens; the work of this committee has reached an advanced stage.

- In certain states, particular historical circumstances have led to the enactment of special rules for questions concerning certain regions or provinces. Such is the case, for example, in Finland, for the Province of Åland and its inhabitants. Yet it should be emphasised that these special rules do not provide a lesser protection than the rules in force in other parts of the country, but aim, on the contrary, to safeguard certain special privileges of the province and its inhabitants.

SUMMARY VI - A

- In general the rules governing administrative procedure are applied independently of nationality and residence of the persons concerned.

VL - B Is the existence of remedies subject to conditions concerning the nationality and/or residence of the applicant?

In all states, the exercise of remedies is not subject, in principle, to any condition of nationality and/or residence of the applicant.

Two provisos have been formulated; they concern the United Kingdom and Switzerland. In the United Kingdom, the PCA and the Commissioner for Complaints of Northern Ireland cannot consider an application unless the aggrieved person resides in Northern Ireland or unless the application refers to a decision taken with regard to him while he was in Northern Ireland, or unless the application has as its object rights or obligations which have their origin in Northern Ireland. Similar limitations concerning residence of the interested party in the United Kingdom apply to applications to the PCA of the United Kingdom. In Switzerland, if a party has no fixed domicile in the country, he may for that reason be asked to give security in view of the payment of the costs of proceedings (Article 150 of the federal act on organisation of the judiciary); moreover, on the basis of Article 63 of the APA, an advance of costs may be required from an applicant who has no fixed domicile, who is domiciled abroad, or who is in arrears with regard to the payment of costs of a previous process: this advance must be paid within a certain time-limit, otherwise the application is inadmissible. Provisions of a similar nature exist in the Federal Republic of Germany and in the United Kingdom.

However, the security of costs rule can be attenuated by treaties.

SUMMARY VI - B

- In all states, the general principle is that the exercise of remedies is not subject to any condition of nationality and/or residence of the applicant, provided that the decision or right was one which arose within the jurisdiction of the state concerned.