"Problèmes de procédure administrative non contentieuse".

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La Chaire "Mutations de l'Action Publique et du Droit Public", Sciences Po

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The Duty to Investigate and the Burden of Proof.

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Part of the Legality principle in Administrative Law?

Introduction

Between 2005 and 2007 62 percent of the asylum seeking from the Chechen Republic were granted asylum in Austria. In the neighbouring country Slovakia 0 percent of the asylum seekers from Chechenya were granted asylum during this period. During the same period 75 percent of the Iraqis that applied for asylum in Germany were granted it while Greece only granted asylum to 2 percent of those that applied for it in Greece. The different application creates a kind of lottery. What could be the reasons for the differences? The regulations concerning asylum might have been implemented different in different countries and it will in such cases be important for the politicians and the EU to try to give directives or regulations that promotes a more common interpretation f the rules. The European union member states are dependent on that other member states have the same interpretation in such matters. However the reason for the differences is not necessarily the interpretation. The reason might instead be difference with regard to the way the migration and border authorities handles the fact finding and the burden of proof. Such issues are in general not handled by the legislator, the EU or the national parliaments.

How can quality within the administrative investigations be secured? The investigations are often handled by officials at the administrative authority that are the first decision maker and these officials have the duty to represent the interest of the state, concerning for example migration, environment or health matters. These officials often are not lawyers but they shall be impartial and objective and the rule of law shall be the guide line when they decide on whether to give a permit, a subsidy, a certain tax or a prohibition or a sanction.

Many of the negative decisions taken by administrative agencies are never appealed by the individual party. He or she in general does not have any lawyer to help him. He is dependent on the administrative agency and its officials. The help that he needs does not so much involve how to interpret the law but how to prove his case. In the cases that are appealed to courts the review with regard to these issues are rather limited. It is supposed to be better handled by the administrative agency that is the first decision-making body.

Many cases are easy to handle with regard to the circumstances and the evidences. However problems with the quality of the investigation of the circumstances can exist and is such cases the situation in administrative law is different compared to similar issues in penal law and civil law. In penal law the accused cannot be condemned unless there is enough evidences to prove his guilt and the prosecutor is responsible for the investigation. In civil law the parties must present the evidences for their cause and the there are principles on the burden of proof if the evidences do not reach the needed standard of proof.

In administrative law the agencies handles both burdensome issues such as prohibitions or administrative sanctions but they also handle benign decisions such as subsidies to for example farmers. The rules for handling the burden of proof and the standard of proof in civil law cases and in penal law cases cannot be directly transferred to the administrative law. The standard of proof and the burden of proof is not very clear in the administrative law but the more crucial question in the administrative law instead concerns the duty to investigate.

According to some administrative laws the administrative body has the duty or the possibility to make inspections or similar compulsory investigation activities but especially in benign case the investigating activities can in general only consists of questions or guidance to the individual where he or she has to give the needed information to the agency. If the

administrative authority does not guide or ask the individual party or if the individual cannot or do not want or do not understand there might be a lack of information in the case and the burden of proof is in such a case not the solution. Instead the question is whether there is a duty to investigate.

Legality is often referred to with regard to the questions of law concerning the interpretation, the hierarchy and the human rights. However issues such as burden of proof and standard of proof and duty to investigate – if it exists – must be considered to be questions of law and as such they should also be reviewed as they are important for legality. The rule of law can hardly be obtained if the investigation - that the decision is based on - is insufficient. However the standards to be used are unclear and this papers aims at pointing at such problems.

Legality

Legality is the foundation of a legal system. Within the administrative legal field it means that the public power is bound by the law. The administrative agency must have support for their unilateral acts in the law. In this context it is often emphasised that there is a hierarchy of norms where lower norms must be in accordance with higher norms and with the constitution in order to be binding. Questions of law are therefore:
-What does the law says
-How shall the law be interpreted?
-Is the law and the interpretation in accordance with the higher norms (concerning matters of competence and the human rights)

The discretionary power is in general discussed in this context and the choice between several possibilities to interpret the law is in general not considered to be in contradiction to the principle of legality and the restraint to the law. The choice might imply some loss of legal certainty for the individual as it is difficult for him or her to know what the law says but it is still not considered to be outside of “legality” to choose one of the possibilities instead of another possibilities

A court or for that matter an administrative authority can not apply the law if it is not in accordance with higher norms and there is a right to appeal in order to control that the law has been applied in the right way.

Such issues of legality are in general described with regard to the questions of Law and the questions of Discretion. Text books in the legal studies are filled with case law concerning how to interpret the law and thus on questions of law and discretion.

However legality can hardly exist if relevant information on the case is missing or if the information has been evaluated in the wrong way. The question of who has the responsibility to collect information is therefore crucial and therefore the question must be asked: Who shall find the relevant information? What shall the authority do if there is not enough information or if the relevant circumstances have not been investigated?

How to handle these questions is rather clear in civil law cases where the parties give the information that they find important or in penal law cases where the prosecutor has the burden of proof and the court knows that standard of proof. But in administrative cases it is not very clear.

Questions of Law - Questions of Fact - Questions of Discretion

As the application of the law in an individual case involve questions of fact as well as questions of law and questions of discretion they need to be separated from each other which is sometimes difficult. They involve different methods.

Questions of Law
Questions of Law are the meaning to be accorded to a statutory term that defines the initial decision-maker's scope of authority. If the law is clear there is no need for an interpretation - the law points out the condition for the authority to give for ex a permit or to prohibit some acting. But if the condition (statutory condition[1]) is unclear an interpretation is needed. Through this interpretations it must be established what the statutory condition or condition mean.

For example if the law states that an alien who feels "a well-founded fear of persecution" is a refugee and has the right to a residence permit" there might be a need to interpret "well-founded fear of persecution". What does it mean and what facts are relevant?

The establishing of the meaning of the statutory condition, the interpretation, is a question of law. Through this it is made clear what facts are relevant. The law might state that a person who has reached the age of 65 shall receive pension. In such a case there is no need for interpretation. The law might state that a person who feels "a well-founded fear of persecution" is a refugee and then there is a need for interpretation.

Questions of Fact
Questions of Fact concern the circumstances in the case. The relevant fact (according to the interpretation of the statutory condition) must exist in the case. Whether it does or not depends on the circumstances in the case. The Q of Fact concern the evidences in the case.

To show "a well-founded fear of persecution" might for example mean that the alien has been involved in political activities that are illegal in his country. That could be a relevant fact according to the interpretation. A sentence from a criminal court of the country that the alien comes from where he is sentenced for having founded an illegal political party in the 3d country might be an evidence to show that the relevant fact is true but it can be shown also in other ways, through other information or other documents.

[1] There can be a statutory condition and a statutory consequence. For this text the statutory condition are in focus. Statutory condition is not a term used in literature but I will anyhow use it here.

Questions of Discretion
Questions of Discretion can concern broadly framed conditions that have to be further established before the power or duty can be exercised. If for example the law that a condition such as 'abnormally low' or such as 'serious underemployment' (as is the case in the ECT art 87 (3)(a) the agency (in this case the Commission of the EU) can – by use of discretion – establish what this mean. There are also other types of discretion[2] but the broadly framed conditions are of special interest here - in the context of how the investigation shall be fulfilled. This is due to two reasons. First the discretion is a choice of different possibilities of statutory conditions. Second the Questions of Fact will change depending on the choice. This can have influence on the Q of Fact.

Methods
Completely different methods are used to establish Q of law and Q of Facts. To establish Q of law you use the legal sources, such as the law and the precedents but to establish Q of Facts ie the circumstances in the case you cannot use the legal sources. Instead an investigation is needed where the circumstances in the case must be found out. This investigation can contain information from the individual party, information from other individuals or information from other administrative agencies or information that is already within the administrative agency that has to make the decision in the case or information that the administrative agency obtains through inspections.

The Q of discretion where a broadly framed condition such as for example ' abnormally low' is used as a statutory condition are a kind of Q of Law. What is special with the Q of Discretion is that the administrative agency can choose between different possibilities to interpret the law. This might have importance for the Q of Fact and thus the question what the relevant circumstances to be considered in the case are. If there is a choice between for example five different possibilities, p1, p2, p3 p4 and p5 and the administrative agency chooses to interpret the law according to p3 this might imply a need for a different set of circumstances in the individual case than if for example p1 had been used. Shall in such a case the administrative agency use information that the party has given or shall it ask for more/new information?

Q of discretion must be considered as Q of law where interpretation based on legal sources is needed and where there is a choice between different ways of interpretation and the agency therefore may choose one of them.

Discretion cannot be applied to questions of fact. However the discretionary power – the power to choose between different possibilities to interpret the law – involves fact finding. If the individual party have understood the law in one way - for example as p1 - and the administrative agency chooses p3 and this choose involve a different set of facts it would not be fair to take a decision without to give the individual party some guidance as to what fact that are relevant and give him a possibility to present such facts.

The Q of law and the Q of Discretion thus involve interpretation of the law.

The Q of Fact however involves different issues that can be called "fact-finding".

[2] Paul Craig mention discretion where the public body may take certain action – if x the agency may decide y – and discretion where instead y is cast in more general terms and thereby leaving som measures as to how it should be fulfilled.e

What is Fact finding?

Questions of fact concern the circumstances in the present case, for ex if an alien claims that he is a refugee it might be his nationality, fingerprints, language spoken, death sentence, membership in an illegal party. These circumstances refer to facts or to evidences that prove that the alien is a refugee. When a person claims that he is a refugee, the Q of Law might be rather complex. It involves “fear of being persecuted” and certain nationality might be one fact of relevance in this more complex context of question of fact. The language spoken could then be an evidence to prove the nationality.

The circumstances and the evidences for their truth in the case is something that the individual party often knows the best and it can therefore be presumed that he has to give the information to the administrative agency and looked at in such a simple way it would be easy to say that the individual party has to give the information about the circumstance in his case and that he is to blame has he not given the right information. It is hardly that easy.

Instead it is a legal matter for the decision maker to know or to establish:

-Who shall obtain information about the circumstances in the case?

Sometimes there are duties to make inspection etc. as a part of the investigation but the important question is whether the administrative agency shall be active asking for information and guiding the individual on what is needed from him.

-Who has the burden of proof?

The burden of proof is not the same as the duty to investigate. The administrative agency might have some duties to take initiatives (how shall the individual party otherwise know what circumstances to put forward?) but the burden of proof might still be on the individual party.

And if there are evidences but there is doubt with regard to their value it will be of importance to establish:

-How shall the evidences be evaluated?

Does for example information given by another administrative agency ha a higher value that information from the individual party? That would mean that the agency is bound with regard to the value of the evidences. Such evaluation might have developed in practice.

And if there are evidences but it is not for sure that there are enough evidences:

- What is the necessary standard of proof?

These questions on evaluation and standard of proof are questions of fact-finding but they are questions of law that shall be known or established by to the decision maker. The standard of

proof should be established by the law or by the court. The value as evidence must be established by the court. The Burden of proof must be established by the law or by court. The question of who is to find relevant evidences might also be a Q of law. There might be a regulation or a basic principle on for example "due care" according to which the administration has a certain responsibility to collect information needed.

These issues does not occur as problems in every case but when they occur they must be solved and if the administration in such a case does not have some uniform and well thought out methodology this opens up for mistakes involving maybe subjective discretionary solutions where the basic principle of legality will not be followed.

Burden of proof

The burden of proof is sometimes established in the law. However this is rare especially in administrative legal field. Instead it should be known by the decision maker, what the methods or principles are. It is often presumed that the administration has the burden of proof in burdensome cases while the individual party has the burden of proof in benign cases. But what is a burdensome case and what is a benign case. Does a legal rule concerning a permit imply a benign case and does a legal rule concerning a prohibition imply a burdensome case? Whether the legislator has chosen to stipulate that a permit is needed in order to be allowed to act in a certain way (use a chemical for example) or whether the legislator has stipulated that the acting is forbidden is merely a legal technical matter and it can be questioned whether it has influence on the burden of proof. Besides in many burdensome administrative cases there are regulations according to which a duty to give information is stipulated (for example in tax-law). Does this mean that the burden of proof is on the individual?

The law or the courts and the administrative agencies sometimes use standards for evidences or presumptions instead of a more complete investigation. In such case the burden of proof – regardless of whether the case concern a benign or a burdensome matter - is on the individual party if he finds that the presumption or standard is not to be applied in his case. However it might be difficult for him to understand that for example a presumption is being used and it could have been possible to have another decision.

Burden of proof has two sides. One is who has the burden of proof and the other is what is the standard of proof. The consequence of the burden of proof is that the one who has the burden of proof will win his case if there are enough evidences for his claim.

Duty to investigate

Does the burden of proof also mean that he who has the burden of proof also has the duty to bring forward the information? In a benign case concerning for ex. a permit the individual party is in general considered to have the burden of proof ie he will lose the case if there is not enough proof for his claim. In a burdensome case concerning for ex. a prohibition or the recall of a permit (to drive a car for ex.) he will win the case if the administrative agency can not present enough evidences for the claim that the agency has done. It is not unusual that the individual party gives all the information that is needed to the administrative body together with that application for a benign decision for example a permit to build a house. However there are many cases where the individual party does not know what is demanded from him in order to prove his case and it might also be that he thinks that he has given the information need but the administrative agency does not consider that to be evidences for his claim. In such cases the question is who has the duty to collect the needed information on the circumstances in the case? Is it the one that has the burden of proof? If the individual party

does not know what information is need he will loose the case if he does not get help from the administrative agency. It would be a rather unfair legal system if the administrative agencies would not have some duty to help the individual party to present the relevant fact. In most administrative cases he is not assisted by a proxy or a lawyer that can help him to bring forward the evidences. If there is no duty to guide him in such issues he will have difficulties in some case, especially in cases where the administrative agency has discretionary power to choose between different possibilities to interpret the law.

In some countries there are principles for the investigation such as "due care" that might involve some investigating activity from the side of the administrative agency. But regardless of whether this is stipulated in the law or not it would be very strange if the administrative agencies would not have a responsibility for the investigation. They shall guard the interest of the state. Naturally they must investigate all that concern the interest of the state and if that would be in contradiction to the interest of the individual it would not be fair not to help him with at least some guidance. That could hardly be good governance. If they have that in the benign cases the burden of proof would be on the individual and the responsibility for the investigation would be on the administrative agency. This indicates that burden of proof is not the same thing as the duty to investigate a case.

In burdensome cases it could be presumed that the duty to investigate as well as the burden of proof is on the administrative agency. There are however many regulations of burdensome nature within the administration according to which the person must give information on the circumstances in his case to the administrative agency. The agency then can threaten him with a fine in order to get information from him. He thus has some duty to give information. Does the agency have a duty to investigate? At least it would be proper to tell the individual party what information that he is expected to give.

Standard of Proof

There is a free evaluation of proofs in the sense that the decision-maker is not bound by any law that says that certain evidence is full proof. There are within the administrative legal field many regulations concerning information needed in a case and there might also be also some standards that the administrative authority follows for example through some form that has to be filled in. However if the individual party in the case can not give such information but gives other information the administrative authority must pay attention to the circumstances that he presents and assess their value as evidences. However there are also other ways used evaluate evidences or to avoid evaluate evidences. Sometimes standards for evidences or presumptions are used instead of a more complete investigation.

The evaluation of the evidences involves the standard of proof. What is the standard of proof? What degree of probability is needed? Maybe it differs from one kind of administrative issue to another and maybe it differs from one case to another. Maybe it is overweight that counts. If the there is an overweight for the probability of the facts that the administrative agency has presented and the probability of the facts that the individual party has presented is assessed to be lower, the individual will lose his case. However the administrative agency might have given to much attention or value to the information that it has got from for example other agencies just because it comes from an administrative agency. There is also the possibility that the value as evidence that the collected information has is low without that there is any counter argument. Can the assessment be based on an overweight in such a case? The starting point for any model of assessment of proof is the accepted standard of proof and it is naturally

difficult to develop a model if there is no standard of proof. Whatever the standard of proof is, it is important that the standard of proof is not just arbitrary and left at the discretion of the official. A structure and some methodological approach with useful common definitions are necessary.

Within the administrative legal field there are also presumptions and standards on which evidence to present. They can exist in the law or in practice. This is in fact a convenient way to solve the question of fact as well as burden of proof and the duty to investigate. It is presumed that the fact exists according to the presumption or that the fact is proved if an evidence according to a standard exists. There are such presumptions or evidence standards within for example tax-law. The tax-payer is supposed to have had a certain cost etc. No evidence is thus needed. However if the individual party makes objections to this it would not be correct to use the presumptions etc. without evaluation this contradictory information. It could be in contradiction to the rule of law.

The Fact finding is a Q of law.
The facts in the current case, their existence, their truth, their value must be established. The methods to establish (fact finding and standard of proof) this should be known to the agency and used by it and the handling of these methods should be controlled by courts. Though the circumstances as such are Q of facts the matters concerning how to establish the facts such as the burden of proof, the standard of proof and the eventual duty to investigate are Q of law. They can be defined by the court or the decision-making body. However it is rare that the court occupy itself with such issues. The court often regard the primary decision making body, ie the administrative agency, as the person best equipped to make factual determinations and in such case the interpretation of material law will be the priority for the court. The standard that the Administrative agency has applied, the assessment of truth and standard of proof will be accepted without any further comment.

As these issues are questions of law it could be expected that they would be more intensely checked by the courts of appeal. However it is a legal field where scholarship might be needed in order to improve the situation. Scholarship in European countries is often dedicated to questions of Law and its interpretation and principles in connection to that but less to such issues of administrative law that is dealt with here: Standard of proof, burden of proof and the burden to investigate.

Problems of legality in connection to the administrative investigation can be seen in penal law where administrative investigations sometimes must be dealt with by criminal courts. This can be the case when investigations on subsidies might involve a Fraud or when investigations on taxes might involve a break of article 6 ECHR

Break of Article 6 ECHR
It can be the case if a party has had to give information to the administrative authority (for example the tax agency) and thereby has to reveal a crime that he has committed (a tax crime) if this information is used in order to accuse him of a tax crime. This is not in accordance with article 6 ECHR which establish that ‘everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’. The duty for the individual party to give the needed information is thus not in accordance with the rule of law.

Fraud in connection to fact finding

It can have relevance in cases where fraud with subsidies or allowances is suspected to have been committed. If a party that has got a subsidy, for ex an EU subsidy for farmers, and the administrative agency has not asked or guided the individual party properly he has hardly committed a Fraud in connection to this subsidy. There is thus a fact finding – investigating – duty on the administrative agency.

The responsibility for the Fact-finding

Fact finding in administrative agencies
Who is responsible for the fact-finding? The individual or the agency? And who is responsible if enough facts can not be found? The individual or the agency? And when have enough facts been found to conclude the case and take the decision? What is the necessary standard of proof? These are questions of fact-finding. And these are issues that our administrative handle every day in a more or less conscious way – without much help from the scholarship and without much interference from the courts and with an individual party that in general does not have a lawyer to help him. He would in general have to pay the lawyer that he consults irrespective of whether he would win or loose the case. There might be cases where he can have legal aid, according to Swedish law for example in asylum cases and cases on compulsory care for drug abuse. However in most administrative cases he is dependent on that the administrative agency handles the fact finding issues properly.

There is little about such matters in the text books that are used in the law education. Fact finding is supposed to be mainly on the individual in benign cases – where the individual party has applied for a subsidy - and mainly on the administrative agency in burden some cases but there is nothing on burden of proof or evaluation of evidences. Besides it is easy to observe that in burdensome cases – concerning a prohibition - there are often legislation that says that the individual party has an obligation to give information. Such legislation has increased and exists in many administrative laws. Though there are problems in relation to the article 6 of the ECHR it is obviously considered to be important by the legislator that the administrative agency do not have the full duty to investigate. It is also easy to observe that there are lots of benign cases (concerning subsidies for example) where it is very difficult for the individual party to present evidences. For example if the law gives discretionary power to the administrative agency and it thus have the possibility to choose between different possibilities and the individual party has understood the law according to for example possibility p1 and given information according to this interpretation while the administrative chooses possibility p3 which imply that another set of facts and evidences are needed. Can the agency in such a case make a decision according to possibility p3 without further investigation of the case? Can it just presume that the individual party has presented all the facts he has? Or worse: Can they use p3 in order to avoid further investigation if they find that it would be too much trouble to control or to find counter-facts to the facts and interpretation in p1 that the individual party has presented?

Fact finding in Courts
A decision from an administrative authority can be appealed to courts. How do the administrative courts of appeal handle questions of Facts? Do they take responsibility for a

proper fact finding? What is their standard of review concerning such issues? There are different tests for review of facts
-the court regard the primary decision maker as the person best equipped to make factual determinations. The primary decision maker, ie the administrative agency, has better knowledge and has had the contacts with the individual party in the case
-the court might substitute judgement on the facts. This is however rare.
-the courts can use a substantial evidence test and the courts will then uphold the agency finding if there is substantial evidence in the record as a whole even if the court might not have made those finding if it had been the initial decision maker. There must then be such relevant evidence that a reasonable mind might accept as adequate to support a conclusion.
-another way of test that has been laid down in the UK by the Court of Appeal is the four points test where first there must have been a mistake as to an existing fact including a mistake as to the availability of evidence on a particular matter. Second the fact or evidence must have been established in the sense that it was uncontentious and objectively verifiable where the appellant must not have been responsible for the mistake and fourthly the mistake must have played a material – not necessarily decisive – part in the tribunals reasoning
-a manifest error has been committed and the applicant can show that the initial decision – maker made some manifest error in its handling of the facts. The meaning of manifest error can be discussed and it might change during time.

Professor Paul Craig presented a paper here at Sciences Po a year ago on Law Fact and Discretion in the UK, EU and the USA where he describes the handling of the questions of law in courts. In my own investigation I found that it is not uncommon that the courts use the burden of proof also when there is a lack in the investigation and some relevant information is missing. This might be a practical solution but it can be discussed whether this is of any help to the administrative agencies in future similar cases. They also sometimes use standards for evidences or presumptions instead of a more complete investigation. In such case the burden of proof is on the individual party if he finds that the presumption or standard should not be applied in his case.

The courts in such cases take a rather limited control over fact finding matters.

Fact-finding principles
A common interest to the EU member states?

Parts of the administrative law are EC regulation and EC directives that must be followed by all member states. The regulations and the directives concerning the common market are to be implemented in the same way in all member-states. The EC-legislation however in general concerns material law on what decisions to take in such matters and the prerequisites for the decision. The procedural law is in general national law. The EC rarely legislate on such issues. However also within the national law the mentioned issues concerning the fact finding, the burden of proof and the standard of proof are rarely regulated. There might exist some regulation on the burden of proof and such regulation is binding and there might exist some regulation concerning presumptions and standards to be used instead of proof but such regulations should not be binding in a legal system that is based on a freedom to bring

forward any evidences that one might have. However there is a common interest not only to interpret the law – the EC regulation and the implemented directives - in a similar way in all EU member states but also to handle the fact finding in a similar way. This should be the case with for example competition issues and border and immigration issues. For example the border control and the immigration are important common issues that should be handled in similar ways in all member states with EU-law as well as with other international treaties. The same goes for other international commitments such as the Geneva Convention.

The Geneva Convention on refugees shall for ex. be followed when monitoring border and immigration. The border controls however involve rather difficult legal issues with regard to questions of facts and the burden of proof. How do you handle the fact that a person has no paper? Is this a ground for denying the permit or is it a ground for further fact-finding initiatives? Such issues may be handled different in different countries. The questions of fact in immigration matters involve not just standard of proof but also the burden of proof. Shall the alien have the burden of proof? Yes he has but shall he in spite of this have the benefit of the doubt? Such legal issues are vital in immigration matters and the way they are handled might differ from one EU-border country to another.

The legal issues with regard to the differences between questions of law and questions of facts thus have relevance for the administrative procedures on migration monitoring, the asylum issues and the border control. The regulations concerning asylum might be implemented different in different countries and this of course may have consequences also for other EU-member states. The alien can continue to another EU member state fo example Sweden without passing EU border control.

Such differences might exist due to different interpretation of law and thus Q of law but another reason can be different application of the burden of proof, different evaluation of proofs and different way of looking at the duty to investigate.

The Q of fact and the involved questions of duty to investigate and burden of proof can therefore be of interest not only on a national level but also on an EU level . We are dependant on how this is handled in other member states.

A challenge for the Scholarship?

The review of Q of Fact in court often leaves such issues as fact finding out. It is the administrative agencies, the first decision making body that is supposed to handle this on their own. They are in general considered to be better suited to evaluate the facts and evidences. But what methods are used to define issues such as burden of proof and standard of proof? Is it just a feeling or is it built on some theory that can be tested or are there regulations or principles that are to be followed on such matters? When do the administrative agencies find that it is their responsibility to be active in the fact finding and what do they consider to be their duty? What is the ordinary standard of proof? Is it probability (something in between 51-98%) or is it just an overweight that is the standard to follow? What consequences do such standards have and what consequences are they meant to have? Shall they give as many correct decisions as possible? Shall they give the material law the best possible effectiveness

or shall it be shaped in such a way that the party – the individual party or the administrative agency - that has less damage of an incorrect decision will bear the burden of the doubt?

Many cases are simple with regard to fact finding and there is no problem to establish the facts of the case. But sometimes it can be complicated and such a case can concern a competition case where lots of money is to be won or to be lost. It might concern an alien standing at the border without paper, without money and in despair for a better life. It might concern an ordinary tax matter or some other ordinary administrative law where there is little or no money involved such as building permits, driving licences, and different grants or prohibitions.

Burden of proof, and standard of proof are not matters where legislation from the parliament etc. is the main tool but there is a need for a methodology and for clear legal concepts to help the administration and maybe also to give the courts some new tasks to occupy themselves with. This principle can not be fully legislated but it could maybe be developed by the scholarship. The standard of proof and the burden of proof is rather evident in penal law where the prosecutor has to prove "beyond reasonable doubt" that the suspect is guilty and as soon as there are some attempt to lower this standard of proof every lawyer will be discussing the correctness of this within short. It is also rather evident in civil law cases where the person who claims something in general has to prove the relevant facts. But in administrative law it is not clear. Maybe they cannot be fully clear but discretion is the other solution and that is not a good solution.

The administrative agencies handle these issues everyday but with little control from the courts and the scholars do not say much on the topic either. There is a need for methods and definitions in order to create some ground for legality with regard to fact finding. The parliament can hardly be expected to do this. Some cases, such as competition cases, a lot of money might be at stake for the individual party that is often a big company. In such cases lawyers are involved and burden of proof and standard of proof are focused by them if needed, but most cases involve smaller interest of individual parties. However small it may be the fact-finding matters might still be difficult and the individual party is dependent on how the administration handles it. If individuals experience that the fact-finding is not handled properly and there is a lack of legality with regard to the way these questions are handled this under mines the legal system. In Sweden there is an expression "rättshaverist" (eng. Dogmatic or opinionated person) and it relates to a person who appeals and makes anything else in order to emphasise his right without having any chance of wining the case. Such persons in general are involved in administrative cases. The reason why such persons exist as phenomenon within the administrative disputes can well be that the investigation of the case has been handled badly without any clear methods used by the administrative authority and thus appears impenetrable to the individual.

In the administrative law the fact-finding and the duty to investigate the circumstances in the case is primary to the burden of proof. Methods and principles for fact-finding would help and can be necessary in order to upheld the rule of law. However if it is not possible to create better methods it should be important to make this clear to individual parties that the decision cannot always be based on sufficient investigation or full proof and the individual might have to accept this. People expect a fair treatment from the state and if it is not possible to have this should be made clear.

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