

Nguyen Van Quang

THE APPLICATION OF PROCEDURAL REQUIREMENTS
FOR ADMINISTRATIVE DECISION-MAKING
IN VIETNAM'S JUDICIAL PRACTICE

Nguyen Van Quang
c.j.s. (PhD in law), Hanoi Law
University, Vietnam.

Unlike some other countries in the world, Vietnam has not passed a general law of administrative procedures setting out common guiding principles of administrative procedures, common duties of administrators in conducting administrative procedures or fundamental rights of participants in administrative procedures. Detailed administrative procedural rules can be found in many special laws such as Land Law, Building Law, Law on Enterprises or Law on Handling of Administrative Law Offences, and etc. While failure to comply with administrative procedures is one amongst many grounds for review under the law of Vietnam, the absence of a general law of administrative procedures causes certain difficulties for Vietnamese courts to judicially challenge administrative decisions of procedural errors. By analysing the law and practical cases, this paper reveals inadequacies of administrative procedural provisions under the Vietnamese administrative law. It then also addresses several issues of how to improve Vietnamese administrative law in this regard.

Keywords: administrative law of Vietnam, administrative decisions, administrative decisions making, administrative procedures, challenging of administrative decisions.

In the process of making administrative decisions, Vietnamese administrative law generally requires administrators to comply with legally prescribed administrative procedures. The principle of legality which requires the administrative decision-makers to comply with legal rules both substantively and procedurally can be inferred from specific provisions set out by the law of Vietnam. Failure to comply with administrative procedures, consequently, is one amongst many grounds for review under the law of Vietnam.

Unlike some other countries such as Japan or Germany, Vietnam has not passed a general law of administrative procedures setting out common guiding principles of administrative procedures, common duties of administrators in conducting administrative procedures or fundamental rights of participants in administrative procedures. In fact, there was a call for enacting an administrative procedural law in Vietnam but the delay in making this law still remains. The question is whether it is necessary to pass a general administrative procedural law while detailed administrative procedural rules can be found in many special laws such as Land Law, Building Law, Law on Enterprises or Law on Handling of Administrative Law Offences has caused this delay. The absence of a general law of administrative procedures as mentioned above causes certain difficulties for Vietnamese courts to judicially challenge administrative decisions which affect legitimate rights and interests of citizens and due to the failure to procedural requirements. Given this practice, procedural requirements for administrative decision making under Vietnamese administrative law mainly are understood as follows:

- (i) Administrative decisions are required to be made within the time limits prescribed by the law;
- (ii) Administrative decisions are required to be made under the legally prescribed forms;
- (iii) Administrative decisions are required to be made in compliance with any administrative formalities prescribed by the law.

To judicially challenge the legality of administrative decisions in terms of procedural requirements, Vietnamese courts have referred to the three categories as mentioned above. The practical application of those procedural requirements by

Vietnamese courts has revealed several inadequacies of Vietnamese administrative law. By analysing the application of procedural requirements for administrative decision-making in Vietnam's judicial practice, the paper addresses several issues of how to improve Vietnamese administrative law in this regard.

1. Challenging the legality of administrative decisions by Vietnamese courts on the ground of failure to comply with administrative procedures

Essentially, Vietnamese courts strictly follow the rule that an administrative decision will be held invalid if it does not comply with any procedural requirement regardless whether it is a minor or substantial or insubstantial error.¹ The case *Lan Huong and Thanh Nam Enterprises v. the People's Committee of Hochiminh City* below is an example illustrating the above strict rule.²

Lan Huong and Thanh Nam enterprises were granted licenses to produce cosmetics. However, these enterprises used the legally registered trade mark "Miss" of the Saigon Cosmetics Company for labelling their cosmetics products. On August 11, 2003, the People's Committee of Hochiminh City passed Decision No. 3272 imposing a fine of 150,000,000 VND on the two enterprises on the ground that they committed an administrative wrong in relation to intellectual property. Lan Huong and Thanh Nam enterprises initiated the case at the Administrative Division of the People's Court of Hochiminh City challenging Decision No. 3272 of the People's Committee of Hochiminh City on the ground that the Committee failed to comply with the requirement of time limit.³ The court of first instance held that as all substantive issues of the administrative decision were totally legal despite its having been made late, the administrative decision was upheld. Thanh Huong and Thanh Nam then appealed the Appeal Division of the Supreme People's Court based on the view that compliance with time limit is required by the law and administrators must strictly follow them held that the impugned decision was invalid.⁴

1 THE ADMINISTRATIVE DIVISION OF THE SUPREME PEOPLE'S COURT [TOA HANH CHINH - TOA AN NHAN DAN TOI CAO], THE MANUAL FOR RESOLVING ADMINISTRATIVE CASES [SO TAY TRAO DOI NGHIEP VU GIAI QUYET AN HANH CHINH] (2001), p. 12 (unpublished material, on file with the author).

2 See: H. Thanh, Hearing the case in which the People's Council of Hochiminh City is challenged by the two enterprises [Xet xu vu UBND TP HCM bi hai doanh nghiep kien], VNNEXPRESS (July 21, 2005) available at <<http://vietbao.vn/An-ninh-Phap-luat/Xet-xu-vu-UBND-TP-HCM-bi-hai-doanh-nghiep-kien/10918862/218/>>.

3 Article 56 of the 2002 Ordinance for Handling Administrative Law Offences of Vietnam sets out the time limit for the making of an administrative decision imposing administrative penalties as "within 10 days or 30 days in cases of complication since the day a report of administrative offence is made, the competent officer has a duty to make an administrative decision imposing administrative penalties on the offender". This Ordinance also states that in cases of need the competent officer may ask for a permission to extend the time to make decision provided that the extended time is not over 30 days; the competent officer is not allowed to make decisions imposing fines if he or she fails to comply with time limit requirements.

4 See: H. Thanh, *supra* note 2.

Admittedly, the strict compliance with administrative procedures needs to be emphasised and one may argue that the decision of the Supreme People's Court in *Lan Huong and Thanh Nam Enterprises v. the People's Committee of Hochiminh City* is convincing as the law applicable to the case clearly determines the validity of the decision in case of failure to comply with procedural rules. However, a rigid opinion about the validity of administrative decisions (acts) that fail to observe procedural requirements, especially when the law is silent to the validity of such decisions (acts) are fairly debatable.⁵ In fact, breaches of administrative procedures vary from case to case; some may be substantial, whereas others may be minor and insubstantial to the quality of an administrative decision (act). For example, one of the procedural requirements the Supreme People's Court of Vietnam construed as an administrative decision must be shown in a legally prescribed written form.⁶ However, the question of whether the court should quash a decision of wrongly written form whose substantive contents are legal is arguable. It seems to be somewhat impractical if the Supreme People's Court of Vietnam opined that any breach of procedures in relation to the making of an administrative decision could make the administrative decision in question fatal. This viewpoint is strongly supported by reference to the law and legal practice of some foreign countries like Australia and China.

In Australia, the validity of a judicially challenged administrative decision (behaviour) failing to comply with prescribed procedures is differently treated depending on whether there is a legislative intention that to comply with prescribed administrative procedures is a legal precondition to the exercise of a power. Generally speaking, if the breach of procedural requirements clearly affected the quality of the decision in question, those requirements should be mandatory, and therefore, the impugned decision should be held invalid; where the breach is minor and insubstantial, the validity of the decision in question should not be affected.⁷

China's courts also have the same approach as seen in the case of Australia to the issue of the validity of an administrative decision that does not comply with procedural requirements. Although it has been suggested a "long-term" goal that

5 See: Le Xuan Than, Some viewpoints regarding the organisation and functioning of administrative courts [Mot so y kien ve to chuc va hoat dong cua Toa hanh chinh], STATE & LAW [NHA NUOC VA PHAP LUAT], (July 2002), p. 33; see also Nguyen Thanh Binh, Concept of the People's Courts' Jurisdiction to Resolve Administrative Law Complaints [Khai niem tham quyen cua toa an nhan dan trong giai quyet cac khieu kien hanh chinh cua cong dan], JURISPRUDENCE REVIEW [LUAT HOC], (October 2001), pp. 25-27.

6 See: ADMINISTRATIVE DIVISION – THE SUPREME PEOPLE'S COURT [TOA HANH CHINH-TOA AN NHAN DAN TOI CAO], supra note 1.

7 See: *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; 153 ALR 490 at CLR 390, [93] per McHugh, Gummow, Kirby and Hayne JJ.

courts will treat all administrative decisions that do not comply with legal procedural requirements as invalid ones, the validity of those decisions is assessed by Chinese people's courts based on the nature of procedural errors.⁸ Basically, Chinese legal scholars divide administrative procedures into non-legal administrative procedures (or customary administrative procedures) and legal administrative procedures. The former refers to the ones formulated by administrative organs themselves as long as they are not contradictory to general legal principles. Compliance with non-legal administrative procedures is non-compulsory; therefore, the breach of these procedures does not affect the validity of administrative decisions. The latter refers to the ones set out by legislation and compliance with them is compulsory. However, minor breaches of legal administrative procedures, which are usually construed as the ones that do not cause any harm to the substantive rights and interests, are not fatal to the impugned administrative decisions. Administrative decisions which violate compulsory legal procedures otherwise will be held invalid.

2. Challenging the legality of administrative decisions by Vietnamese courts on the ground of failure to comply with rules of 'procedural fairness' ('natural justice')

In developed legal systems, denial of 'procedural fairness' or 'natural justice' is set out as a ground for judicial review of administrative decisions.⁹ The term "natural justice" which stemmed from the Romans refers to situations where *audi alteram partem* (the right to be heard) and *nemo iudex in parte sua* (no person may judge their own case) apply".¹⁰ The principles of natural justice primarily govern all judicial making processes by judges and then quasi-judicial decision processes by tribunals for guaranteeing that those processes must be just and fair. More recently, the rule of natural justice has extended its scope of application to the administrative decision making process due to the growth of administrative decisions in both quantity and their importance.

In principle, one can establish denial of natural justice as a ground for judicial review of administrative action by demonstrating the breach of either or both of the two fundamental rules: (i) in the making-decision process, the decision-maker must give a hearing to a person whose legitimate rights and interests will be affected by

8 L FENG, ADMINISTRATIVE LAW PROCEDURES AND REMEDIES IN CHINA (1996) p. 190. Feng mainly cited LUO HAO CAI, JUDICIAL REVIEW SYSTEM IN CHINA [ZHONG GOU SI FA SHEN CA ZHI DU] (1993) for his discussions about procedural errors in relation to the making of administrative decisions.

9 In the US law, the term that is analogous to 'natural justice' or 'procedural fairness' is 'due process'.

10 See: DUHAIME'S ONLINE LEGAL DICTIONARY, available at <http://www.duhaime.org/dictionary/dict-no.aspx> ac.

the decision; (ii) in the course of making the decision, the decision maker must not be or appear to be biased. An administrative decision that fails to comply with the 'natural justice' (or 'procedural fairness') principle will be quashed.

Under the law of Vietnam, what are called rules of 'procedural fairness' or 'natural justice' in the making of administrative decisions have not been comprehensively developed. This practice is easily understandable in the context of a transitional legal system. In the past, in many fields of administration, procedural rules for protection of individuals and organisations whose legitimate rights and interests may be affected by the administrative decision making process such as 'fair hearing', 'right to reasons' or 'information disclosure' were almost all absent in Vietnamese administrative law. For example, although the making of an administrative decision imposing administrative penalties on administrative law offenders directly involves restrictions on the rights, interests, freedom, property, and money of offenders, no rules in relation to procedural fairness were seen in the 2002 Ordinance on handling of administrative law offences of Vietnam (this Ordinance is currently replaced by the 2012 Law on handling of administrative law offences which came into force on July 1st 2013). This means that at that time administrative law offenders almost all did not have opportunities for explanation and rebuttal, or opportunities to know reasons for making administrative decisions imposing penalties on them.

It, however, should be noted that rules of procedural fairness, though limited, are able to be found in some recent laws of Vietnam. Those laws require administrative decision makers to comply with some particular procedural requirements in order to ensure that their decisions will not adversely affect legitimate rights and interests of individuals and institutions. Below are three typical examples:

- To make of decisions reclaiming of land for public interest, before reaching the final decisions, decision makers are required by the 2013 Land Law to inform land users of the reasons for reclaiming, time and plan to execute the decision and their possible compensation; land users are closely consulted about the concerned administrative decisions.¹¹

- The 2011 Law on complaints requires that in the course of decision making, decision makers must directly communicate with the respondent and the appellant for clarifying the case and to propose possible resolutions to the case; in other words, "fair hearing" is given to the appellant whose legitimate rights and interests might be adversely affected by the administrative decision dealing with the complaint.¹²

11 See: article 69 of the 2013 Land Law [Luật Đất đai].

12 See: article 30 of the 2013 Law on Complaints [Luật Khiếu nại].

- The 2012 Law on handling of administrative law offences confers on the offender the right to make explanations prior to making administrative decisions imposing penalties on offenders in certain cases prescribed by the Law.¹³

To some extent, those kinds of procedural requirements as mentioned above also express the ideas procedural fairness under Vietnamese administrative law. An administrative decision fails to comply with those requirements can be challenged on the ground of failure to comply with procedural requirements. In other words, when challenging the legality of administrative decisions, Vietnamese courts do not treat 'denial of procedural fairness' as a separate ground for judicial review. However, given the importance of rules for procedural fairness, a serious consideration should be given to the issue in question by Vietnamese lawmakers. On the one hand, rules for procedural fairness need to be fully incorporated in Vietnamese administrative law. On the other hand, if Vietnamese administrative law would adopt a flexible approach to the effects of procedural errors as above suggested, the procedural errors which adversely affect legitimate rights and interests of individuals and institutions (denial of procedural fairness) must be treated as fatal to administrative decisions.

3. The need for a general law of administrative procedures in Vietnam

The 2013 Constitution of Vietnam states that "The Socialist Republic of Vietnam is a socialist rule of law state of the people, by the people and for the people".¹⁴ To pursue this goal, much attention should be paid to the improvement of administrative procedural law. This is because the administrative procedure plays an important role in ensuring the effective and efficient implementation and enforcement of the law in a manner of respecting the rule of law and legitimate rights and interests of individuals and entities. The above analysis of challenging the legality of administrative decisions by Vietnamese courts on the grounds of failure to comply with procedural requirements suggests several ideas of improving Vietnamese administrative law by enacting a general law of administrative procedures.

First, although detailed administrative procedural rules can be found in many special laws, a general law of administrative procedures is of significant importance. This law will be able to offer general provisions based on which detailed administrative procedure rules are consistently made in special laws. As noted above, these general provisions should include:

- Guiding principles of administrative law such as flexibility, simplicity,

¹³ See: article 61 of the 2011 Law on handling of administrative law offences [Luật xử lý vi phạm hành chính].

¹⁴ See; Article 2 of the 2013 Constitution of Vietnam.

appropriateness, quickness of administrative procedures and impartiality of state officials conducting administrative procedures.

- Fundamental rights of participants in administrative procedures such as right to be heard, right to inspection of files, right to advice and information by public authorities.

- General procedures requirements for state officials conducting administrative procedures and participants in administrative procedures.

Second, for the purpose of reviewing administrative decisions, the general law of administrative procedures can be served as source of law proving general grounds involving procedural requirements. During the course of administrative or judicial review of administrative decisions, reviewers can be able to set up firm grounds for review by referring to both these general procedural requirements and specific procedure requirements set out by special laws.

Third, also for the purpose of reviewing administrative decisions, it is relevant for the general law of administrative procedures to provide general rules for determining the validity of administrative decisions with procedural errors. These rules appear to be very important for courts to decide whether an administrative decision in question must be quashed if relevant procedural errors can be found. However, although statutory law can easily produce such general rules, but finding what is exactly entailed in each rule is not an easy task and usually needs reference to cases in which legal rules in this regard are specifically interpreted and consistently applied. Responding this issue in question, it should be noted that the latest Law on organisation of people's courts of Vietnam (the 2014 Law) has officially introduced the adoption of a case law system in Vietnam. Article 22 of the Law states that "the Council of Judges of the Supreme People's Court (CJSPC) has rights and duties to select cassation decisions of the CJSPC and standard enforced decisions of other courts for developing precedents which will be published for study and application by all courts".

References:

1. *Duhaime's online legal dictionary*, available at : <http://www.duhaime.org/dictionary/dict-no.aspx> ac (accessed : 13.04.2015).
2. H. Thanh, Hearing the case in which the People's Council of Ho Chi Minh City is challenged by the two enterprises [XÉT XỬ VỤ UBND TP HCM BỊ HAI DOANH NGHIỆP KIẾN]. *VNNEXPRESS* from July 21, 2005, available at : <http://vietbao.vn/An-ninh-Phap-luat/Xet-xu-vu-UBND-TP-HCM-bi-hai-doanh-nghiep-kien/10918862/218/> (accessed : 24.04.2015).
3. L. Feng, *Administrative Law Procedures and Remedies in China*, 1996.
4. Le Xuan Than, Some Viewpoints Regarding the Organisation and Functioning of Administrative Courts [MỘT SỐ Ý KIẾN VỀ TỔ CHỨC VÀ HOẠT ĐỘNG CỦA TÒA HÀNH CHÍNH]. *NHA NUOC VA PHAP LUAT - State & Law*, July 2002.
5. Luo Hao Cai, *Judicial Review System in China* [ZHONG GOU SI FA SHEN CA ZHI DU]. 1993.
6. Nguyen Thanh Binh, Concept of the People's Courts' Jurisdiction to Resolve Administrative Law Complaints [KHAI NIEM THAM QUYEN CUA TOA AN NHAN DAN TRONG GIẢI QUYẾT CÁC KHIẾU KIẾN HÀNH CHÍNH CỦA CÔNG DÂN]. *LUẬT HỌC - Jurisprudence Review*, October 2001.
7. The Administrative Division of the Supreme People's Court [TÒA HÀNH CHÍNH - TÒA AN NHAN DAN TÔI CAO]. *SỐ TAY TRAO ĐỐI NGHIỆP VỤ GIẢI QUYẾT AN HÀNH CHÍNH - The Manual for Resolving Administrative Cases*, 2001.