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Contents

SYMPOSIUM

Alexander Balthasar
Foreword to the ELI-SIG Papers 7

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

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

Anna Simonati
Administrative Transparency Through Access to Documents and Data in Italy: Lights and Shadows of a Principle in Transformation 29

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

ARTICLES

Sára Fekete
Preserving Intra-Corporate Mobility Between the UK and the EU After Brexit 73

Biljana Grbić
The Liberalisation of the Serbian Electricity and Gas Markets 87

Tomáš Mach
Legitimate Expectations as Part of the FET Standard: An Overview of a Doctrine Shaped by Arbitral Awards in Investor-State Claims 105

Emőd Veress
Some Remarks on Shareholders' Agreements in the Context of Hungarian Law 123

LECTURES

Klaus Rennert
Administration, Administrative Jurisdiction and Separation of Powers 147

Klaus Rennert*

Administration, Administrative Jurisdiction and Separation of Powers**

I

Administrative jurisdiction is a tricky business: state sovereignty is subject to judicial control. In point of fact, this corresponds to the principle of separation of powers in its original, unadulterated form: in its legislative function, the state passes laws; in its administrative function it implements these laws; and as the judiciary it verifies whether or not the administration is actually complying with these laws. This is how we learnt it at school.

It goes without saying that it is not that simple, though. This is immediately obvious if one looks back into history. The three sovereign powers did not emerge simultaneously but instead consecutively. Modern statehood was initially based on the executive branch, on government and administration. That was the age of absolutism. It was not until the 19th century, in the aftermath of the major popular revolutions in the USA and France, that a democratically elected legislature emerged and gradually assumed primacy supported by civil liberties, or as we would say today, based on basic and human rights. True, the judiciary as the third sovereign power is far older, but it was merely an uninvolved observer: it confined itself to civil and criminal jurisdiction; it had nothing to do with the exercise of sovereignty on the part of state administration. At most, it awarded damages if the exercise of sovereignty was unlawful and additionally led to material loss. Any direct judicial control of administration was, however, out of the question.

In Germany, this situation only changed in the course of the 19th century, and then only gradually. First, a supervisory body was installed within the administration, usually at a higher-level administrative authority, which was entitled to intervene *ex officio* but which also took complaints raised by aggrieved citizens. It was not until 1863 that independent administrative courts were established above these internal administrative appeals bodies, which, admittedly, initially only had the authority to set aside decisions, i.e. were authorised to reverse an incorrect administrative decision and refer the matter back to the administration. In a number of federal states it was only after World War I and, throughout West Germany, only after

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** Lecture at the Eötvös Loránd University on 12 October 2018.

World War II that administrative jurisdiction with a three-tier structure evolved and was not only authorised to set aside administrative decisions but also to oblige the administration to issue such acts.

II

a) This is all the more remarkable since the need for administrative control is and has been entirely uncontested for a long time. There are essentially three justifications for administrative control to be performed by the courts.

From the historical perspective, the first motive was fighting corruption, a motivation that supported and still supports the necessity of independent control over the executive. Unfortunately we are continually confronted with ministers, senior officials and other public servants who are not unreceptive to perks of all kinds that boost their often paltry salaries. Supervision and control are the only remedies in this regard, and control exercised by an external, independent body is better than supervision by one's superior. This truth is once again reaffirming its validity these days when the independence of the courts is challenged to avoid the discovery and punishment of instances of corruption.

This motive was then supplemented by a second one: guaranteeing that the administration is bound by law. This is a genuinely democratic concern and the way in which the democratically elected legislature enforces its primacy over the administration. Those in particular who advocate the constitutional principle of democracy must champion independent oversight by the administrative courts. It is by holding democratic elections that the people legitimise their representation in parliament. The parliament's instrument of power is the law: and it is in laws that the people, represented by parliament, express their political will. The administration is tasked with enforcing the law in all parts of the country, at all times and in respect of all people. It is only when the administration respects the law and acts in accordance with it that the people are actually in the position to steer the fate of the state. Ensuring this is among the most important functions of judicial administrative control.

Only in the 20th century did a third motive finally come forth, which was to secure the protection of citizens' rights. This primarily relates to the protection of their basic rights. Adherence to the law alone already realises one of the two main basic rights – the principle of equality of all citizens before the law. Although the other major basic right, i.e. the right of freedom – which includes freedom in numerous respects – was incorporated into constitutions in southern Germany quite quickly in the aftermath of the French Revolution, it took quite some time until it gained legal effectiveness, and did so fully only after World War II. It was not until then that the Basic Law unmistakably stipulated that the state was bound to observe basic rights in all of its acts. At the same time, the constitution provided everyone with recourse to the courts if their rights were violated by any public authority. In this way, the protection of the rights of the individual became another major function of judicial administrative control.

b) In summary, our Basic Law calls the Federal Republic of Germany a democratic state governed by the rule of law. This wording combines the two most significant constitutional principles: democracy and rule of law. In a nutshell, the democratic element determines the content of the political will to dominate in the state, whereas the rule of law moderates and restricts this will to dominate. Moderation and restriction are the two sides of the rule-of-law coin. Moderation insofar as it shapes and conforms the state's will to dominate to the form of the law; enforcing the law rests with the administration which, in doing so, is subject to judicial control. And at the same time, restriction: in a state governed by the rule of law, the state's political will to dominate is restricted through certain inviolable civil and minority rights that must also be respected by the democratic majority within the state. This serves to secure two things: firstly, civil liberty, for the sake of which power has been conferred to the state in the first place, and secondly political freedom, the indispensable basis of any democracy. It guarantees the chance that today's opposition could become tomorrow's majority. Only this type of free society can also offer an open atmosphere that welcomes new ideas and competition to develop good and better solutions for private life, business and politics, which further the common good. Seen historically, systems that lack freedom have altogether failed in the end.

What I am describing here in brief is the result and achievement of a long historical development that has, for the greater part, been quite painful. Just remember the National Socialist and fascist regimes in Germany, Italy, or Spain and the Stalinist dictatorships in the former Eastern Bloc. The link between democracy and rule of law therefore forms the core of the common constitutional convictions of the peoples in Europe and far beyond. It is a tremendous asset that must be preserved.

III

The two state functions of executive and judiciary or, more precisely, of administration and administrative jurisdiction, fit into this overall picture of a power-separating state governed by the rule of law. Yet the relationship between administrative jurisdiction and administration is not free from tension in Germany and other European states. It does not come as a surprise that the administration is not a fan of being controlled and even less of being corrected. This repeatedly triggers system malfunctions.

A number of recent events and measures have hit the headlines in this regard, although they definitely differ in terms of intensity. That said, there is a degree of intensity that should not be exceeded, because overstepping it would be tantamount to abandoning the rule-of-law system. This includes measures aimed squarely at the very independence of judges themselves, i.e. measures to sanction unpopular judgments. Also included are instances in which the administration reserves the right to review the content of and approve court rulings, such as when it makes the entry into force of such court rulings dependent on itself officially publishing them – or intentionally failing to do so. In the following I will not discuss measures

of this kind. A discussion about this topic would require addressing the sense and nonsense of independent administrative jurisdiction, and ultimately the sense and nonsense of liberal democracy governed by the rule of law itself. This has been done numerous times, and I am hardly in the position to add anything new.

Germany, too, has occasionally seen some resentment about the relationship between administration and administrative jurisdiction, including – and perhaps more often – in the more recent past. Naturally, this resentment has remained far below the critical degree of intensity that would endanger our democracy governed by the rule of law. Resentment like this therefore does not call the system as such into doubt; rather, it should be discussed within the system. It is precisely under these circumstances that dealing with this subject is likely to yield additional insight. It goes without saying that there are voices, specifically in the press, which turn individual events into scandals and point to the decline of liberal civilisation in the West. However, such voices only detract from the heart of the matter and hinder us from learning from various past events.

IV

Resentment between administration and administrative jurisdiction definitely arises on both sides. At times, the judiciary is outraged by acts on the part of the administration. At other times, the administration is annoyed at the courts. Let me provide a few examples:

a) The administrative courts are outraged if the administration fails to comply with their judgments. In this context, one must be aware that in Germany, administrative courts are authorised to oblige the administration to issue sovereign acts if citizens are entitled to this. However, whether or not the administrative authorities will actually act upon such a judgment is another question altogether. Generally speaking, this is the case. Of course, there are indeed cases in which the administration fails to comply with judgments. Fortunately, this happens only rarely; but if it happens, it attracts that much more attention.

This is often the case when the rights of politically unwelcome parties are at stake. It is the National Democratic Party of Germany (NPD) in particular that causes a stir over and over again. The party is openly right-wing extremist and nationalist and clearly pursues aims that are hostile to the constitution; however, as long as it has not been prohibited by the Federal Constitutional Court, the party is entitled to claim equal treatment with all other parties.

It is quite evident that no Lord Mayor wants to be suspected of supporting the NPD in any way, shape or form. He will therefore not voluntarily allow the NPD to hold its local party congress in the town hall in 'his' town, and he will repeatedly forbid NPD demonstrations, even without a viable reason. The Lord Mayor knows full well that, legally speaking, he is actually obliged to enable the NPD to carry out its political activities, but on the other hand he also knows with certainty that this would result in negative publicity for him, and this is

what he wants to avoid at all costs. Naturally, the NPD will then turn to the administrative court, and of course, the administrative court will then oblige the Lord Mayor to meet the NPD's demand: to make the town hall available to the party, to allow and possibly even have the police protect their demonstration.

Responding to such a judgment, the Lord Mayor will at minimum rail against the administrative court, while the administrative court in turn might react to such a public statement with a sober press release. As long as the Lord Mayor complies with the substance of the judgment, no further damage will be done; the press back-and-forth is part of the game, to a certain degree. However, it occasionally happens that the Lord Mayor fails to comply with the judgment. This recently happened in Wetzlar. In such an event, the principle of separation of powers is overtly disrespected, and this attracts a lot of attention.

b) In these examples, the administrative authorities know full well that they are at fault. However, there are also cases in which the administration considers itself to be in the right, reproaching the administrative courts for overstepping their powers and interfering with the sphere of competence of the administration. In such cases the administration is aggravated by the courts. A prominent current example is the judgments on air pollution control in our cities.

It is a well-known fact that, in many city centres in Germany, certain air pollutants exceed threshold values and older diesel vehicles have been identified as the main source of this pollution. European law now dictates that everything possible must be done to comply with these thresholds as soon as possible. This dictate gives rise to two fundamental questions. On the one hand, we must figure out what 'as soon as possible' means. At what point must the values be below the thresholds, and how intensely must we pursue this result? On the other hand, a determination must be made about what disadvantages might arise elsewhere in connection with reducing pollution. Driving bans place serious limitations on residents, delivery people and tradespeople, as well as on municipal transportation and waste disposal services, and they lead to macroeconomic consequences for industry, and by extension, on the labour market and social safety nets. Who is responsible for taking decisions on all this?

Recently some German administrative courts have obliged cities that have been sued to issue driving bans on older diesel vehicles. Administrative authorities and politicians in turn would rather avoid driving bans, if possible; they seek alternative solutions. They see the fact that the courts have forced them to take what they consider radical measures to be an overreach: the courts have encroached on the administration's original leeway and sphere of responsibility. Here again, the administration displays little willingness to comply with judicial rulings. However, other than in the case of the NPD, it believes itself to be in the right.

V

The conflicts I have described are rare exceptions in Germany. Generally, the separation of powers between the administration and administrative courts works like a well-oiled machine. But there are voices that warn about an increase in the number of critical situations like these. That raises the question of whether solutions are possible within the confines of the principle of the separation of powers and what these could be.

a) We have therefore touched upon the 'never-ending story' of whether and how administrative authorities could be forced to implement court judgments. In this context, there are three general models for resolving this situation, from which the legislator can choose when creating procedural law.

The oldest model historically puts the courts in a comparatively weak legal position. In this case, the administrative courts are limited to setting aside administrative acts they view as unlawful, and then the administration must do its job again. If that does not happen, or if its actions are insufficient, a new suit can be brought, in the best case ending with the same result of reversing the act. The threat then is a game of ping-pong between the judiciary and the administration; time passes, and the claimant fails again and again to obtain redress. This situation is not compatible with the German constitution, which stipulates that the administrative courts must provide effective legal protection. The simple authority of the courts to set aside an act would not meet this standard.

Like many European legal systems, Germany therefore acknowledges the administrative courts' authority to oblige the administration to issue certain administrative acts by issuing judgments. If the administration does not comply, the prevailing citizen can compel enforcement of the judgment. The law of civil procedure is clearly the guiding principle behind this model. However, in a worst-case scenario, the model works on an intractable government agency only when the issue in question is monetary claims. If, in contrast, the administration is obliged to issue a sovereign act, the downside is that the court cannot itself enact it. It is left with only penalties to force the administration to enact the sovereign act. Penalty payments are not really motivating; the administration is to a certain degree paying the money to itself. Coercive detention against civil servants or ministers is unlikely to be an option, even if such action is openly being discussed these days. Such penalties therefore prove mostly symbolic. The mere fact of their being imposed would result in such bad press that no politician would risk tarnishing his or her image in this way. To date, the worst case scenario has not occurred, apart from a few individual cases.

Other countries choose not to risk a crisis at all. They authorise the courts to issue the required administrative act themselves, in the place of the administration. It goes without saying that that is very effective, but ultimately causes the courts to encroach on the sphere of responsibility of the administration. This blurs the separation of powers between the executive and judicial branches. In historical terms, the explanation for this in some countries is that the predecessors of the administrative courts were supervisory authorities, in other

words, themselves part of the executive branch. Now that they have been separated from the public agency hierarchy, this is actually outdated. The admonitory reference to the concept of separation of powers is not just a meaningless insistence on principles, either. Through their assignment to the executive-branch hierarchy, supervisory authorities, like the executive as a whole, obtain their legitimacy by democratic means, while the courts generally do not. In addition, the judiciary's responsibility is only to stand behind the legality of its rulings, not to answer for their appropriateness and political expediency. Imagine in our example here, if the court itself were to issue a driving ban. To which streets would it apply? Which diesel vehicles would be covered? Those up to Euro 4 standard, or Euro 5 or even the top group, Euro 6, as well? Should there be exceptions? For municipal refuse vehicles or public buses? For doctors heading to the scene of an emergency? For tradespeople and delivery people? Or for severely disabled people? What times of day should the ban be in effect each day and how long overall? Questions breed more questions. Are judicial proceedings really suited to reviewing and providing answers to all of these highly complex issues? And who is liable if the courts fail to consider every last detail?

German law therefore takes the middle-of-the-road approach. Here, the courts – and claimants – basically have to count on the administration to comply with court rulings voluntarily. That almost always happens. And it has to be that way. The system is built on the idea that the worst-case scenario will not happen.

b) A description of the relationship between the administration and administrative jurisdiction in Germany would be incomplete, however, if we left it at the enforcement problem I outlined. The enforcement issue only comes up when the case has been decided. A complete picture is obtained only when we consider future comparable cases, when the effects and consequences of judicial rulings are applied to parallel situations and future cases.

Although, generally speaking, court rulings apply to a specific individual case only, administrative court decisions not infrequently end up having a wide-ranging impact, because administrative authorities have numerous comparable cases to settle. The opportunity therefore arises for the administration to exercise a particular kind of disobedience: administrative authorities may indeed comply with the court ruling in an individual case, but then refuse to transfer the *ratio decidendi* to comparable cases. In some instances, this is even decreed from above in the form of what is known as a 'non-application decree' by the competent minister. Here as well, the courts most frequently react with indignation, but not always justifiably so. We must take a closer look.

The starting point must be the principle that, by law or normatively, a judgment has a binding effect in a specific individual case only. A legal effect *inter omnes* is ascribed only to judgments in judicial review processes that declare a law or an administrative legal standard to be against the law and invalid, and certain statements by the Federal Constitutional Court interpreting the Basic Law. In all other cases, there is no far-reaching normative effect beyond the individual case.

Of course, at the same time, there is a need for this type of wide-ranging impact, for instance in what we call 'mass administration', which must issue similar sovereign acts in

numerous comparable individual cases, such as in social services or tax administration. In this instance, it makes no sense to fight every single case in court. Instead, a test case is pursued, in which the disputed issue is decided by the court and then holds to that ruling thereafter. The rules of procedure themselves provide for formal test cases as long as all of the affected parties are known and participate in the proceedings. Otherwise, once a court has handed down a ruling, that ruling must be respected, even if it is only binding in a normative sense on the initial case. Any other approach would be a waste of resources.

However, even in certain areas of this type of mass administration, new cases can arise or new arguments can be put forth and, in other fields, similar cases may not turn out to be completely parallel situations once looked at more closely, but instead be found to have unique circumstances. This illustrates the advantage of a lack of a widespread normative impact: the administration is not prevented from bringing a new case before a court and attempting to convince the court to issue a new, maybe different ruling.

As you can see, the relationship between the administration and administrative jurisdiction, viewed as a whole and over time, is structured as a dialogue based on argumentation back and forth and continual progress. Therefore, the most important reason for taking a legal dispute to the third instance and to the highest court is that its ruling promises to advance jurisprudence. The administration itself is the courts' most important conversation partner in bringing about this progress.

VI

What can we learn from this? Essentially, three things:

a) The first finding is sobering from the point of view of administrative courts: they are actually powerless with respect to the administration. However, they can – and should – monitor the administration to ensure this branch is complying with the law and in particular respecting the rights of citizens. They cannot, however, themselves enforce their rulings. That was something even Montesquieu knew: the power of the judiciary 'is in some measure next to nothing.' In civil and in criminal law the third state 'power' may wield the sword symbolising the execution of sentences or the bailiff's position with respect to citizens, but in administrative law, its only weapons against the other state power, the executive branch, are words and arguments.

That is not insignificant in view of the fact that it frequently has public opinion on its side. Precisely because administrative courts enforce the law not with force, but with intellectual means, with an appeal to the persuasiveness of its arguments, it finds followers among those who also use intellectual weapons – the press and journalists, in political and cultural discourse. That gives their decisions considerable weight. Of course, two key conditions must be fulfilled to this end: for one, a free society with freedom of speech where free speech carries weight; second, administrative courts that use analytical reasoning to underpin their rulings, thereby striving for sophisticated argumentation.

b) That leads to the second conclusion. This relates to the courts themselves. They derive their authority solely from the law that they apply and enforce; and lose this authority as soon as they act outside the law, drawing suspicion that they themselves want to take political action. It is a difficult undertaking, especially because the law is not always clear, and the courts are called in precisely when the law is unclear. Particularly in such instances, the crux is not deciding that specific case; the point then is always also the authority of the judiciary as such. The courts must make it clear that they are using the law alone as a guide in such cases, that their sole aim is to derive a logical rule from the unclear law. To achieve this, they must formulate an argument. Rulings by the highest court therefore require justification arrived at by analytical reasoning, which makes the connection back to the law transparent and, on top of it all, one hopes that it is persuasive as well.

Only people who can accomplish that should be judges. That requires not only professional expertise and judicial excellence but also internal independence and sovereignty. Any system for appointing judges should be designed to elevate such personalities to judgeships. This is the sole source of legitimacy for judges. Political orientation is immaterial in this regard, and allegiance to a political party even damaging.

c) The third realisation relates to state administration. Our expectation is that the administration respects and complies with judicial rulings unconditionally. Naturally, it will not be pleased with every ruling and, of course, an incorrect decision will be handed down on occasion. However, that is not the point. The issue at hand is the authority of the judiciary and therefore the constitutional order of the state as a power-separating state governed by the rule of law.

And if we have just determined that a state governed by the rule of law relies on personally and professionally excellent judges, it follows further that administration and politics must take care to ensure the excellence of these judges and their institutional, personal and professional independence so that any overreach by the judiciary remains a one-off mistake and does not raise the suspicion that this is the result of political control of the judiciary.

ELTE LAW JOURNAL

CONTENTS

SYMPOSIUM

ALEXANDER BALTHASAR: Foreword to the ELI-SIG Papers

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

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

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

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

ARTICLES

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

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

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

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

LECTURES

KLAUS RENNERT: Administration, Administrative Jurisdiction and Separation of Powers