Conference EFFECTIVE JUSTICE: CHALLENGES AND PRIORITIES FOR (ADMINISTRATIVE) COURTS

in commemoration of the establishment of the Division of Administrative Courts of the Lithuanian Association of Judges, Law Institute of Lithuania and the Law Faculty of Vilnius University

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JUSTIFICATION AS A LIMITATION OF DISCRETIONARY POWER OF THE ADMINISTRATIVE JUDGE

In this context it is worth appealing to aretic model of adjudication, whereby in addition to the content of legal norms and the analysis of the effects of the judgment, the judge is guided by his permanent dispositions, worked out by him in the legal practice, which are based also on an understanding of the objectives of the specific legislation, the general functions and social significance of the court. The judge extends the decision-making grounds to add the content resulting from the reference to juridical virtues – created by judicial practice – such as courage, wisdom, temperament, and in particular the virtue of justice. In accordance with its assumptions, aretic model provides the possibility to combine stability with the flexibility of the law, if only the judge has the authority, maturity, argumentative abilities and certain juridical virtues (and thus starts to resemble the judge Hercules). Moreover, the very process of adjudication constitutes a mechanism for the development, learning and maturity of judges who are not "camels of justice", but sensitive subjects approaching each situation on an individual basis, seeking to combine hard evidence and legal arguments with the requirements stemming from the analysis of a specific situation. Such correction is enabled by the proficiency in referring to the principles and making use of functional interpretation.

Such an assumption is also justified by the principle of the democratic state of law, which shows that any decision should find its justification in the current law. In order to properly justify the judicial decision it also becomes necessary to appeal to the "code of practical reason". Thanks to this, the decision will be limited not only by the rules and

principles resulting directly from the applied statute, but it will also comply with the complex rules which also include the content of the law itself. In the context of "the revolution of law" taking place in Europe, consisting in the legal systems being based on the structure of the protection of the fundamental rights, a crucial role is also played by the principle of proportionality, which becomes the primary contemporary justification and instrument for controlling the discretion of the legislature and the executive. It is referred to in the literature (not unreasonably - E. Egle, The History of the General Principle of Proportionality) as "methodological culmination of the current post-positivist and neo-naturalistic approach to the law which combines the positive and the natural law".

The principle of proportionality is superbly placed in the broader framework of contemporary jurisprudence, because it forces one to change the views on what is legal with regard to interference in the rights of the individual and, additionally, on what is proportional. As already mentioned, such a perspective forces a proactive judicial approach, because it assumes judges' axiological sensitivity, consisting in referring to "the fundamental rights of the individual and the principles of the system, including those resulting from transnational law". At this point it is characteristic to refer to the decision of the ECJ on Kücükdeveci, in which the Court ordered the appeal to the primary sources of the EU law in order to justify the principle of equality and non-discrimination. Professor Ewa Łętowska very accurately notes in this regard that an axiologically sensitive judge is the one who realizes that there takes place a "deficit of interpretation".

In such conditions, the solid element of the judicial practice of the administrative courts is provided by the activities undertaken within the framework of the adopted jurisprudential strategies whose value is expressed in taking into account the need to build the foundations for the possibility to carry out the widest possible dialogue both in the field of constitution as well as European one.

Presenting rationality as a structure that gives sense to the activities undertaken within it allows to present the practice of law as a sphere of Praxis, which reproduces the values, categories of description of reality and interpretative assumptions of certain types of rationality.

The use of the model of a creative action for the analysis of hard cases allows us to understand that the activity constantly transforms them. Action indeed requires the description in terms of an active process, rather than static forms, and thus allows the judge to interpret and transform institutionally shaped knowledge (or, in other words, shared knowledge).

Judicial activism is based on familiarising with the law which depends on the ethical requirements posed to the legal discourse. There are rejected the concepts of the law as being such an object of cognition which is objective and purely external to the lawyer. It assumes that the law has many sources, and the statute is only one of them. According to it, the law is justified by the authority of the nation, and therefore the will of the legislator can be for the judge only one of the benchmarks. The legal text only clarifies the law, which, however, is not exhausted in the legal provision, and the judge becomes the guarantor of such a broadly defined law against the arbitrariness of the legislator. The court is also presented here as an instrument that protects the citizen from the arbitrariness of the legislator. The result of the criticism of textualism is the emergence of a new conception of the role of the judge and the judging process. In this way the judiciary becomes a reality, because by judging the judges are given the power over the integration of the normative meanings in the culture.

In order to do that, however, they need to properly justify their decisions, in a manner free from the argument of inertia (*Traegheitsprinzip*) understood as an uncogitative reliance on the judgements rendered in similar cases, critical attitude to the so-called reticence of judges (characteristic, for example, of the Supreme Court in Norway, when using overruling) and be guided by the principle of *summa iniuria summa lex*.

What becomes utterly significant in this context in order to achieve the effect of understanding and acceptance of the judicial settlement is a demand of the claim to justifiability. According to the latter, everyone, when claiming something, has to believe it, yet it must be at the same time justifiable in order to be true, rational and correct. The claim to justifiability requires that the speaker was able to justify his claims at any time and in respect of anyone, unless he is able to provide the argument which justifies the refusal of justification. This rule is referred to as the "general rule of justification". The decision is justifiable if it is possible to find a justification for it, namely to demonstrate arguability (in the strictest sense, in the strict sense or in the large sense on the ground, respectively, of formal aletheic logic, deontic or normative logic or argumentation theory) of the ruling from the theoretical and (or) axiological premises.

An optimally correct ruling must be inferred only by way of a rationalizing justification of a choice between acceptable alternatives. The ruling should be constructed in such a way that allows the control within respective instances (and thus to ensure verifiability and communication) of the judgment under appeal, which increases its clarity and acceptability, and further the implementation of the sense of procedural fairness, as defined by John Rawls. The function of the justification of the judgment is expressed in the fact that its

addressee – in addition to the parties themselves – is also the Supreme Administrative Court (although for obvious reasons, any observations also apply to its justifications). Therefore, the case law of the Supreme Administrative Court also shows that the justification of the judgment of the administrative court, in the situation when it is accompanied by the deficit referring to "the clarification of the legal basis of the decision", does not have the function of controlling its relevance, or a persuasive function and is also far from carrying out the legitimizing function. Accordingly, there is disrupted its discursiveness, whose fundamental element is the justifiability of the judicial decision. In a situation where the body applying the law does not try to convince its "imaginable and indivisible" audience that the issued decision is rational, it does not undertake a comprehensive illocutionary act of justifying its decision. The objective of the justification is in fact to guarantee the absence of arbitrariness, eliminating the impact of purely personal preferences of the entity that applies the law, respecting the possibilities of defending one's reasons by the party and, finally, a chance to inspect the decision-making reasoning.

The obligation of proper justification is particularly important in a situation when the administrative court has to decide in respect of the merits. As an expression of the fulfilment of the requirements stemming from the right to the court (especially in terms of the postulate of hearing a case within a reasonable time) there have been introduced significant changes in the Polish Act on proceedings before the administrative courts. One of the most significant changes designed to improve the conduct and to strengthen the effectiveness of the administrative courts control over the public administration is to grant to the administrative courts in art. 145a in specific and exceptional circumstances the power to rule on the merits of the case (art. 145a § 1 "In the case referred to in art. 145 § 1, subparagraph 1 (a) or subparagraph 2, where the circumstances of the case so justify, the court shall oblige the authority to render a decision or order within a specified time limit, indicating the manner in which the case should be handled or determined, unless the determination was left to the discretion of the authority.").

The remaining principle is still, naturally, the adjudication of last resort appeal, consisting mainly in the possibility of setting aside by the administrative court the contested decision of the administrative authority and obliging it to settle the case taking into account the judgment of the court. As a consequence, the analysed change grants to the administrative court the right to issue a substantive decision, and not just to confine itself to set aside the contested act. The power of the court will be excluded only when the provisions leave the decision to the discretion of the administrative body. Such authority of the court, however, is

carried out by the action of the administrative authority. The court in fact decides directly about the rights or obligations of the parties, however, in order to ultimately settle a given administrative case it is indispensable to issue a decision or a ruling by an administrative body of the content of the settlement "imposed" by the administrative court. The court, by deciding on the essence of the administrative case, would at the same time oblige the administrative authority to give that settlement the form provided by law, namely, respectively, a decision or a ruling.

Art. 145a of the Act on proceedings before administrative courts grants to the administrative courts the competence to specify in the judgment granting the complaint the manner of settling a case and even a future settlement, if circumstances of the case justify so. This means that due to the judgement rendered under art. 145a the party becomes aware of its legal situation in terms of both substantive as well as procedural law. It is also important that the new regulation prevents cases of non-performance of the court's guidelines (art. 145a § 2).