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Contents

Preface to the *Wandel des Rechtsstaats* Papers

Still amid the uncertainties of the pandemic, the Faculty of Law of Eötvös Loránd University (ELTE) Budapest decided to organise a conference with the title *Wandel des Rechtsstaats*. You may wonder why we chose to give a German title to an international conference. Initially, we only thought about organising the next event of our biannual conference together with the Faculty of Law of Georg August University Göttingen, which had already turned into a tradition over the last twenty years. But then, due to our enthusiasm for restarting conferences and the generous subsidy from the National Agency for Research, Development and Innovation in the *Mecenatúra* Programme, we decided to expand and turn this conference into a three-tier event with three sections in three different languages. To the French section we invited our long-time partner, the Faculty of Law of Université Panthéon-Assas Paris and the third section was set up as an English section.

Another difference between the sections was a topical one: as the French and the German-speaking sections were based on the cooperations between our Faculties, there were no restrictions as to the topic of the sections. This allowed for a great variety of themes overarching all fields of law. The English-speaking section was based on an open call for papers with a topical restriction, namely to topics that reflect the challenges of the principle of rule of law in the daily practice of administrative tribunals and constitutional courts. This was due to the fact that effective judicial protection against the administration and in general against the state is the *Schlussstein im Gewölbe des Rechtsstaats* (the keystone in the vault of the rule of law), an essential focal point for any investigation on transformations of the content of this notion. We retained the German title not only to emphasise the roots of the conference, but also considering that the notion of *Rechtsstaat* is universal and used in scholarly literature in all three languages (as well as out of fear of possible losses in translation).

The selection of papers you can read in this issue of the *ELTE Law Journal* is based on the third section[1] and gives a deep insight into the multifaceted subject of administrative adjudication, which is tied up in the multilevel system of national, European and international courts, and at the same time closely linked to administrative organisation and procedure. It is in this multilevel system where Emilie Chevalier and László Szegedi are looking at the dialogue between the ECJ and national courts, which continuously shapes administrative court procedures and administrative law itself, whereas Bernadette Somody and Dominika Kincső Hollós tackle questions of constitutional adjudication

[1] The papers from the French and German sessions are to be found in Vol. LXI (2022) of *Annales*, the other international (and multi-language) periodical of the Faculty of Law of University ELTE Budapest.

following and affecting administrative court procedures. Article 6 of the ECHR lies at the heart of Wojciech Piątek's and Andrzej Skoczylas's paper on the different models of the appointment of administrative judges, as well as of the paper from Andrzej Paduch, who tackles questions of fair trial affected by the pandemic. Of course, questions of fair trial and constitutionality are also raised by Denisa Skladalova writing on the very important questions of interim protection, and in connection with the judicial review of automated decision-making by Igor Gontarz. The paper of Kristína Slámková, Matúš Radosa and Matej Horvat addresses some problems of mass administrative court procedures – a real challenge for the legislature and the tribunals to strike the right balance between timeliness and fairness. To complete the picture, Thomas Mann tackles the questions of effective legal protection in the interdependence of administrative and administrative court procedure, as does my paper, too.

I think I can say in the name of all the authors in this issue that it is a pleasure for us that this issue of ELTE Law Journal starts with the paper from Prof. Dr. Dres. h. c. Andreas Voßkuhle, former president of the German Federal Constitutional Court, an eminent scholar of public law, which is the written version of his inaugural lecture held on the occasion of receiving the honorary doctor title from University ELTE Budapest.

Budapest, January 5, 2023

Prof. dr. Krisztina F. Rozsnyai
head of the organising committee,
vice dean for international relations of the Faculty of Law, ELTE Budapest

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Mecenatúra

Andreas Voßkuhle*

Constitutional Comparison by Constitutional Courts: Twelve Observations from Twelve Years of Constitutional Practice

Abstract

Constitutional comparison is part of the everyday work of constitutional courts. What this means exactly, however, is unclear, as only a small part of constitutional comparisons is explicitly reflected in decisions. Only the tip of the 'comparative iceberg' is visible. The author reports on twelve years of judicial practice at the German Federal Constitutional Court and summarises his analysis in twelve observations.

Keywords: comparative constitutional law, comparative reasoning, constitutional jurisprudence, constitutional practice, Federal Constitutional Court of Germany, judicial dialogue, judicial self-reflection

I Introduction

There have been a large number of publications and discussions on the topic of comparative constitutional law in recent years. In my lecture, I would like to focus on a small section of this topic, namely the practice of comparative constitutional law[1] at the Federal Constitutional Court of Germany. To this end, I will share twelve observations from twelve years of constitutional practice with you.

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[1] In Germany, this practice is commonly referred to as 'constitutional comparison' *(Verfassungsvergleichung)* instead of 'comparative constitutional law' *(Verfassungsrechtsvergleichung)*, for a specific insight into the German and international terminology see Karl-Peter Sommermann, 'Funktionen und Methoden der Grundrechtsvergleichung' in Detlef Merten and Hans-Jürgen Papier (eds), *Handbuch der Grundrechte* (C.F. Müller 2004) vol I § 16, para 5 with further references.

II Twelve Observations I Have Made in My Twelve Years as a Constitutional Judge

1 Comparative Constitutional Law in the Narrow Sense Is Not Normatively Binding

In order to be able to examine the practice of constitutional comparison precisely, it seems helpful to distinguish comparative law in the narrow sense from those constellations in which domestic law expressly refers to a foreign legal system. Examples for the second case are the primacy of EU law or the duty to take into account the European Convention on Human Rights.[2] The latter cases raise their own problems of legal harmonisation in multi-level governance. Also, the simple application of foreign law, for example in the context of private international law, is not a case of comparative legal analysis in the narrow sense.[3] In these instances, judges decide autonomously whether to make use of the possibility of comparative law or not.[4] I follow the understanding that comparative constitutional law only takes place

– if *firstly* a reference is made to aspects of another legal system for argumentative purposes,

– if *secondly* that system is comparable in one respect,

– if *thirdly* it is not normatively binding for one's own legal system, and

– *finally*, if the comparison is made in order to promote the application and interpretation of one's own law.[5]

2 The Federal Constitutional Court Increasingly Uses Comparative Law Arguments

A closer look at the judgments' reasonings reveals that comparative law certainly does not take the place of a fifth method of interpretation in German constitutional jurisdiction,

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[2] Likewise Anna-Bettina Kaiser, 'Verfassungsvergleichung durch das Bundesverfassungsgericht' (2010) 18 (4) Journal für Rechtspolitik 203, 204; Stefan Martini, *Vergleichende Verfassungsrechtsprechung* (Duncker & Humblot 2018) 42; Susanne Baer, 'Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus' (2015) 63 (1) Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge 389, 390. Otherwise Susanne Baer, *Renaissance der Verfassungsvergleichung?* (2022) manuscript, 3.

[3] For further information on the Federal Constitutional Court's jurisprudence regarding cases with a foreign element see Baer, 'Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus' (n 2) 391–392 with further references in fn 12.

[4] Explicitly stated in the same manner by Michael Bobek, *Comparative reasoning in European Supreme Courts* (Oxford University Press 2013) 19: 'situations in which the judge has a choice'.

[5] Martini (n 2) 360.

as the German constitutional lawyer Peter Häberle[6] once called for. From a quantitative perspective, a comparative approach is the exception rather than the rule.[7] However, one may doubt whether one can speak of a general deficit of comparative law in the jurisprudence of the Federal Constitutional Court.[8] Contrary to some of the opinions expressed in the academic debate,[9] the use of comparative law arguments by the Federal Constitutional Court has increased in the last 20 years. This observation is supported by the highly commendable and well-supported study by Stefan Martini. He has meticulously examined the first 131 volumes of the Federal Constitutional Court's official collection of decisions for comparative legal references, using quantitative and qualitative methods of analysis.[10] Over the entire period of the study, he has identified comparative law references in approximately every twentieth decision, which corresponds to a rate of about 5%. In an international comparison of supreme and constitutional courts, the Federal Constitutional Court thus ranks in the middle, ahead of the supreme courts in the USA, Japan and Russia, but behind those in South Africa, Australia and Israel.

From its early decisions on,[11] the Federal Constitutional Court considered other legal systems.[12] In the so-called *Lüth*-judgement, the fundamental right to freedom of expression (Article 5 para. 1 s. 1 of the Basic Law) was compared with the Declaration of the Rights of Man and of the Citizen of 1789 and it was stated that this was one of the most noble human rights of all.[13] Furthermore, the decision explicitly refers to the liberal US Supreme Court Justice *Benjamin N. Cardozo* (1870–1938), sharing his conviction that the right to

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[6] Cf. Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat' (1989) 44 (20) JuristenZeitung 913, 916; Peter Häberle, *Rechtsvergleichung im Kraftfeld des Verfassungsstaates* (Duncker & Humblot 1992); Peter Häberle and Markus Kotzur, *Europäische Verfassungslehre* (8th edn, Nomos 2016) paras 699 et seq.

[7] Likewise Baer, 'Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus' (n 2) 391–392, 397. For further comparison Claus-Dieter Classen, 'Das Grundgesetz in der internationalen Verfassungsvergleichung' in Wolfgang Kahl, Christian Waldhoff and Christian Walter (eds), *Bonner Kommentar zum Grundgesetz* (C.F. Müller 2019) para 51.

[8] Peter Häberle, 'Das deutsche BVerfG, eine „Nachlese" zu 60 Jahren seiner Tätigkeit' in Peter Häberle (ed), *Verfassungsgerichtsbarkeit – Verfassungsprozessrecht* (Duncker & Humblot 2014) 251, 256–257.

[9] Cf. for example Sommermann (n 1) para 86; Angelika Nußberger, 'Wer zitiert wen?' (2006) 61 (15) JuristenZeitung 763, 770; Cheryl Saunders, 'Judicial engagement with comparative law' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar Publishing 2011) 571, 574; Bobek (n 4) 150.

[10] Martini (n 2) 72 et seq.

[11] Comparative legal remarks are most commonly found in senate-decisions and less common in chamber-decisions [formerly known as 'three-person-committees' *(Dreier-Ausschüsse)*], as these decisions are not the place to elaborate complex questions of constitutional legal doctrine and usually considerably less far-reaching than the senate-decisions; see also Baer, 'Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus' (n 2) 395–396.

[12] An overview of the comparative legal remarks in the Federal Constitutional Court's early decisions is supplied by Jörg Manfred Mössner, 'Rechtsvergleichung und Verfassungsrechtsprechung' (1974) 99 (2) Archiv des öffentlichen Rechts 193, 228 et seq.

[13] BVerfGE 7, 198 (208) – Lüth.

express one's opinion is the foundation of almost every other freedom.[14] A few years later, comparative legal considerations appear in a decision dealing with the tension between freedom of the press (Article 5 para. 1 s. 2 of the Basic Law) and national security: In the *Spiegel*-ruling, there are many references to other legal systems.[15] However, the court did not only engage in comparative law in decisions on the fundamental rights of freedom of expression and freedom of the press. It also took on a broader view beyond the boundaries of its own constitutional order in more specific issues. This applies, for instance, to the right to conscientious objection (Article 4 of the Basic Law)[16] or the interpretation of the concept of 'home' in the context of the right to privacy (Article 13 of the Basic Law)[17] and to the former ban on marriage in cases where one partner has been in a premarital relationship with a relative of their new partner (Article 6 of the Basic Law)[18]. Over the years, court decisions from diverse legal systems[19] have found their way into the official collection of the rulings of the Federal Constitutional Court.[20]

The current jurisprudence of the Federal Constitutional Court is influenced by other constitutional courts as well: In its *Fraport*-decision from 2011, for example, the Court referred to criteria developed by the highest courts of the United States and Canada on the doctrine of the 'public forum'. This doctrine was used in order to clarify the conditions under which the freedom of assembly (Article 8 of the Basic Law) includes places that lie outside public streets, roads and squares.[21] Furthermore, the Federal Constitutional Court's practice of directly applying the European Charter of Fundamental Rights in fully harmonised areas of law was introduced with reference to the legal situation in Austria, Belgium, France and Italy.[22] Another example for detailed comparative law considerations is the decision on assisted suicide from 2020.[23] Moreover, when the Court ruled on the subject of the European Central Bank's OMT-programme, it intensively consulted the case law of other European constitutional and supreme courts on the fundamental question of the primacy of European Union law.[24] The same applies to the application of the principle of proportionality in the so-called *PSPP*-ruling.[25]

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[14] BVerfGE 7, 198 (208) – Lüth; see also Justice Benjamin N. Cardozo in *Palko v. Connecticut*, 302 U.S. 319, 327 (1937).

[15] BVerfGE 20, 162 (208, 220-221) – Spiegel.

[16] BVerfGE 28, 243 (258-259) – Kriegsdienstverweigerung.

[17] BVerfGE 32, 54 (70) – Betriebsbetretungsrecht.

[18] BVerfGE 36, 146 (165) – Eheverbot.

[19] On the systematics of legal systems cf. Uwe Kischel, *Rechtsvergleichung* (C.H. Beck 2015) § 4.

[20] Cf. not only the work by Martini (n 2) for the Federal Constitutional Court's jurispridence between the years 1951 and 2007, but also the empirical analysis by Aura María Cárdenas Paulsen, *Über die Rechtsvergleichung in der Rechtsprechung des Bundesverfassungsgerichts* (Verlag Dr. Kovač 2009).

[21] BVerfGE 128, 226 (253) – Fraport.

[22] BVerfGE 152, 216 (236, para 50) – Recht auf Vergessen II.

[23] BVerfGE 153, 182 (200-206, paras 26–32) – Suizidhilfe.

[24] BVerfGE 142, 123 (197-198, para 142) – OMT.

[25] BVerfGE 154, 17 (99 et seq., paras 123–125) – PSPP.

3 The Increase in Comparative Law in Constitutional Jurisprudence Is Embedded in the General Academic Trend towards More Comparative Constitutional Analysis

The increase in comparative law in constitutional jurisprudence is due to various factors. However, it is probably no coincidence that it goes hand in hand with an increased academic interest in comparative constitutional law over the last two decades. This is my third observation. Comparative law seems to meet the needs of the time.[26] Some also speak of a 'renaissance of constitutional comparison'.[27] Looking back, modern comparative law[28] has indeed gone through different periods: phases of flourishing alternated with phases of disillusionment. This applies not only to comparative private law, which was for a long time the main domain of comparative law,[29] but also to comparative constitutional law. Particularly in the early years of the Federal Republic of Germany, the main focus was on the German constitution.[30] Only the Basic Law's legislative materials feature a few references to comparative law.[31] Possible reasons for this introverted attitude are

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[26] Christoph Schönberger, 'Verfassungsvergleichung heute: Der schwierige Abschied vom ptolemäischen Weltbild' (2010) 43 (1) Verfassung und Recht in Übersee 6. András Jakab, *European Constitutional Language* (Cambridge University Press 2016) 55, who speaks of a 'global phenomenon or trend'.

[27] Ran Hirschl, *Comparative Matters, The Renaissance of Comparative Constitutional Law* (Oxford University Press 2014). Hirschl's primary concern is a methodical realignment of comparative constitutional law. Critical towards this Armin v. Bogdandy, 'Zur sozialwissenschaftlichen Runderneuerung der Verfassungsvergleichung' (2016) 55 Der Staat 103 et seq. For further elaboration on this issue see Baer, *Renaissance der Verfassungsvergleichung?* (n 2) 1 et seq.

[28] The 1900 Congress of Comparative Law *(Congrès international de droit comparé)* in Paris is seen as an important initiator of modern comparative law, cf. Ralf Michaels, 'Im Westen nichts Neues? 100 Jahre Pariser Kongreß für Rechtsvergleichung – Gedanken anläßlich einer Jubiläumskonferenz in New Orleans' (2002) 66 (1) Rabels Zeitschrift für ausländisches und internationales Privatrecht 97, 98 et seq. On the history of comparative law Konrad Zweigert and Hein Kötz*, Einführung in die Rechtsvergleichung* (3rd edn, Mohr Siebeck 1996) 47 et seq.; see also Walther Hug, 'The History of Comparative Law' (1931/32) Harvard Law Review 45, 1027, 1029 et seq.

[29] Cf. Zweigert and Kötz (n 28) 3; regarding the history of comparative administrative law see for instance Eberhard Schmidt-Aßmann, 'Zum Standort der Rechtsvergleichung im Verwaltungsrecht' (2018) 78 (4) Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 807, 813 et seq.; Nikolaus Marsch, 'Rechtsvergleichung' in Andreas Voßkuhle, Martin Eifert, Christoph Möllers (eds), *Grundlagen des Verwaltungsrechts* (3rd edn, C.H. Beck 2022) vol. I, § 3 paras 4 et seq.

[30] Schönberger (n 26) 7 et seq., speaks of the 'constitutional lawyers' Ptolemaic conception of the world'; cf. in the context of administrative law Schmidt-Aßmann (n 29).

[31] For instance, occasional comparative approaches taken up by the Parlamentarischer Rat can be found regarding the principle of democracy [Jahrbuch des öffentlichen Rechts der Gegenwart 1 (1951) 197] and the transfer of sovereign rights [Jahrbuch des öffentlichen Rechts der Gegenwart 1 (1951) 223 including fn. 3]; further examples: Jahrbuch des öffentlichen Rechts der Gegenwart 1 (1951) 65 (Art. 2 Basic Law), 409 including fn. 7 (Art. 56 Basic Law), 897–898 including fn. 2 (Art. 139 Basic Law). For information on the alignment of the Parlamentarischer Rat with the Allies' desires see Carlo Schmid, *Erinnerungen* (S. Hirzel Verlag 1979) 368 et seq. Furthermore Heinrich Wilms, *Ausländische Einwirkungen auf die Entstehung des Grundgesetzes* (Kohlhammer 1999). In general see also Walter Haller, 'Verfassungsvergleichung als Impuls für die Verfassungsgebung' in Peter Hänni

> language barriers, a lack of personnel capacity to examine and evaluate foreign material, a concentration on overcoming the law established during the National Socialist era and implementing the new law created after the war, as well as a rather underdeveloped comparative legal method within German public law, and, somewhat later, possibly also satisfaction with the 'successful model' of the Basic Law.[32]

Comparative methods in public law received a new impetus in the late 1980s. Initiated primarily by the work of Peter Häberle,[33] the study of the public law of other states increased significantly in Germany.[34] This applies to comparative constitutional law in particular.[35] Of the many publications, only the monographs by Bernd Wieser,[36] Aura Maria Cárdenas Paulsen,[37] Albrecht Weber,[38] Nick Oberheiden,[39] Triantafyllos Zolotas[40] and Uwe Kischel,[41] as well as the handbook *Ius Publicum Europaeum* edited by Armin von Bogdandy and Peter M. Huber,[42] which has meanwhile grown to nine volumes, shall be mentioned here, in addition to the study by Stefan Martini[43] already cited above. Interest in the subject has also increased outside Germany since the end of the 1990s. The number of relevant essays,[44]

(ed), *Festgabe für Thomas Fleiner zum 65. Geburtstag* (Editions Universitaires Fribourg Suisse 2003) 311 et seq.; also Claudia Fuchs, 'Verfassungsvergleichung und Gesetzgebung' (2013) 21 Journal für Rechtspolitik 2 et seq.

[32] Andreas Voßkuhle, 'Rechtspluralismus als Herausforderung' (2019) 79 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 481, 489. Regarding further reasons cf. Schönberger (n 26) 12 et seq.

[33] Häberle (n 6) 913 et seq.; Peter Häberle, 'Die Entwicklungsländer im Prozeß der Textstufendifferenzierung des Verfassungsstaates' (1990) 23 (3) Verfassung und Recht in Übersee 225 et seq.; Peter Häberle, 'Gemeineuropäisches Verfassungsrecht' (1991) 18 Europäische Grundrechte-Zeitschrift 261; Peter Häberle, 'Die Entwicklungsstufe des heutigen Verfassungsstaates' (1991) 22 Rechtstheorie 431 et seq. See also n 6.

[34] Instead of many, cf. Christian Starck, 'Rechtsvergleichung im Öffentlichen Recht' (1997) 52 (21) JuristenZeitung 1021 et seq.; Rainer Grote, 'Rechtskreise im öffentlichen Recht' (2001) 126 (1) Archiv des öffentlichen Rechts 10 et seq.; Carl-David von Busse, *Die Methoden der Rechtsvergleichung im öffentlichen Recht als richterliches Instrument der Interpretation von nationalem Recht* (Nomos 2015).

[35] Cf. for example Rainer Wahl, 'Verfassungsvergleichung als Kulturvergleichung' in Rainer Wahl (ed), *Verfassungsstaat, Europäisierung, Internationalisierung* (Suhrkamp 2003) 96 et seq.; Susanne Baer, 'Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz' (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 735 et seq.; Hans-Peter Schneider, 'Verfassung und Verfassungsrecht im Zeichen der Globalisierung – zwischen nationaler Entgrenzung und transnationaler Entfaltung' (2017) 65 (1) Jahrbuch des öffentlichen Rechts der Gegenwart neue Folge 295, 309–310.

[36] Bernd Wieser, *Vergleichendes Verfassungsrecht* (2nd edn, Verlag Österreich 2020).

[37] Paulsen (n 20).

[38] Albrecht Weber, *Europäische Verfassungsvergleichung* (C.H. Beck 2010).

[39] Nick Oberheiden, *Typologie und Grenzen des richterlichen Verfassungsvergleichs* (Nomos 2011).

[40] Triantafyllos Zolotas, *Gerichtliche Heranziehung der Grundrechtsvergleichung* (Carl Heymanns 2012).

[41] Kischel (n 19); Uwe Kischel, 'Fragmentierungen im Öffentlichen Recht: Diskursvergleich im internationalen und nationalen Recht' (2018) 77 Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 285 et seq.

[42] Armin von Bogdandy and Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum,* vol I until vol IX, (C.F. Müller 2007–2021).

[43] Martini (n 2).

[44] Selected overview: Ran Hirschl, 'The Question of Case Selection in Comparative Constitutional Law' (2015) 53 American Journal of Comparative Law 125 et seq.; Vicki C. Jackson, 'Constitutional Comparisons: Convergence,

monographs and comprehensive compendia[45] on the subject of comparative constitutional law and the use of 'Foreign Precedents by Constitutional Judges'[46] is overwhelming.

One of the reasons for this development is certainly the emergence of new comparative material.

> After the downfall of the socialist constitutional systems at the end of the Cold War, the states of Eastern Europe oriented themselves towards Western models in their transformation into democratic constitutional states. This fact must be urgently recalled in view of the current and very worrying events in Poland and Hungary. In other parts of the world, such as South Africa and some South American states, new constitutions have been created as well. In general, the growing international integration and the increasing harmonisation of law have certainly promoted interest in comparative methods in public law. Today, the problems associated with the emergence of new technologies or social change no longer originate at a national, but at a global level.[47]

Resistance, Engagement' (2005) 119 (1) Harvard Law Review 109 et seq.; Eric A. Posner and Cass R. Sunstein, 'The Law of Other States' (2006) 59 (1) Stanford Law Review 131 et seq.; Mark C. Rahdert, 'Comparative Constitutional Advocacy' (2007) 56 (3) American University Law Review 553 et seq.; Nathan J. Brown, 'Reason, Interest, Rationality, and Passion in Constitution Drafting' (2008) 6 (4) Perspectives on Politics 675 et seq.; Eyal Benvenisti, 'Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts' (2008) 102 (2) American Journal of International Law 241 et seq.; David Fontana, 'The Rise and Fall of Comparative Constitutional Law in the Postwar Era' (2011) 36 Yale Journal of International Law 1 et seq.; David S. Law and Mila Versteeg, 'Sham Constitutions' (2013) 101 (4) California Law Review 863 et seq.; Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 (2) Cornell Law Review 391 et seq.

45 Cf. for example Francois Venter, *The Language of Constitutional Comparison* (Edward Elgar Publishing 2000); Norman Dorsen, Michel Rosenfeld, András Sajó and Susanne Baer, *Comparative Constitutionalism. Cases and Materials* (3rd edn, West Academic Publishing 2016); Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2012); Mark Tushnet (ed), *Comparative Constitutional Law*, vols I-III (Edward Elgar Publishing 2017); Aydin Atilgan, *Global Constitutionalism* (Springer 2018); Roger Masterman and Robert Schütze (eds), *The Cambridge Companion to Comparative Constitutional Law* (Cambridge University Press 2019); Philipp Dann, Michael Riegner and Maxim Bönnemann (eds), *The Global South and Comparative Constitutional Law* (Oxford University Press 2020, Oxford); Xenphon Coutiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge 2021).

46 Tania Groppi and Marie-Claire Ponthoreau (eds), *The Use of Foreign Precedent by Constitutional Judges* (Hart Publishing 2013). For specific information on comparative constitutional law practiced by courts see for example Ulrich Drobning and Sjef van Erp (eds), *The Use of Comparative Law by Courts* (Kluwer Law International 1999); Guy Canivet et al. (eds), *Comparative Law before the Courts* (British Institute of International and Comparative Law 2004); Andrew Harding and Peter Leyland (eds), *Constitutional Courts. A Comparative Study* (Wildy, Simmonds & Hill 2009); Mads Andenas and Duncan Fairgrieve (eds), *Courts and Comparative Law* (Oxford University Press 2015); Giuseppe Franco Ferrari (ed), *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems* (Brill 2020).

47 Voßkuhle (n 32) 491–492.

To name a few keywords: globalisation and digitalisation, or more concretely: migration and climate change.

Apart from this, the appeal of comparative constitutional law lies in its subject matter. Constitutional law differs from non-constitutional law by the larger number of indeterminate legal concepts. The combination of these legal concepts with general legal principles, constitutional purposes and the state's structural principles increases the interpretative leeway even more. This leeway invites comparison,[48] but does not automatically make comparative legal analysis easier.[49] As constitutions and constitutional law are closely tied to a specific state as their object of reference and to a specific legal culture,[50] constitutional comparisons are also subject to some preconditions that inhibit comparative legal analysis.

4 Judicial Constitutional Comparison Is Difficult to Observe in Practice

Even if the international trend towards more constitutional comparison is indisputable, the analysis of constitutional comparative practice continues to prove difficult. In most cases, the considerations behind the judgement are only partially reflected in the court's decision.[51] Genesis and presentation of a decision are – according to my fourth observation – each subject to their own requirements.[52] Therefore, only the tip of the 'comparative iceberg' is

[48] Cf. only Manfred Mössner, 'Rechtsvergleichung und Verfassungsrechtsprechung' (1974) 99 (2) Archiv des öffentlichen Rechts 193, 214; Armin von Bogdandy, *Gubernative Rechtssetzung* (Mohr Siebeck 2000) 11; Bobek (n 4) 256; Martini (n 2) 45.

[49] On the occasionally shared conviction that comparative legal analysis is especially hard within the area of public law, cf. only Claudia Fuchs, 'Verfassungsvergleichung und Gesetzgebung' (2013) 21 (1) Journal für Rechtspolitik 2.

[50] Brun-Otto Bryde, 'Warum Verfassungsvergleichung?' (2016) 64 Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge 431, 438.

[51] This view is shared by the former constitutional judges Brun-Otto Bryde, 'The constitutional Judge and the International Constitutionalist Dialogue' in Basil Markesini and Jörg Fedke (eds), *Judicial Recourse to Foreign Law. A New Source of Inspiration?* (Routledge 2006) 295 (297); Wolfgang Hoffmann-Riem, 'Constitutional Court Judges Roundtable' (2005) 3 (4) International Journal of Constitutional Law 556 (559); Peter M. Huber and Andreas L. Paulus, 'Cooperation of Courts in Europe' in Andenas and Fairgrieve (n 46) 281 (293). Kaiser (n 2) 204, who descriptively refers to this practice as 'implicit constitutional comparison'.

[52] In the present context cf. Martini (n 2) 48–50 with further references. The inner life of the highest courts continues to be a blackbox to outsiders. However, an insight into the Federal Constitutional Court's consultational culture is provided by Gertrude Lübbe-Wolff, 'Die Beratungskultur des Bundesverfassungsgerichts' (2014) 41 Europäische Grundrechte-Zeitschrift 509 et seq.; Gertrude Lübbe-Wolff, *Wie funktioniert das Bundesverfassungsgericht?* (Universitätsverlag Osnabrück, V & R unipress 2015) and Uwe Kranenpohl, *Hinter dem Schleier des Beratungsgeheimnisses* (VS Verlag für Sozialwissenschaften 2010). Cf. also Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (Doubleday 2007); Dominique Schapper, *Une sociologue au Conseil Constitutionnel* (Gallimard 2010); Laszlo Sólyom and Georg Brunner, *A Constitutional Judiciary in a New Democracy. The Hungarian Constitutional Court* (University of Michigan Press 2010); Sabino Cassese, *Dentro la corte: Diario di un giudice costituzionale* (il Mulino 2015).

visible.[53] The repeatedly suggested publication of the court's internal votes and comparative working principles[54] is no solution but would instead prove to be dysfunctional. Courts need an arcanum to try out solutions and pursue half-baked thoughts without being observed.

5 Judicial Constitutional Comparison Is Legitimate – Provided that Its Limits Are Respected

Despite the existing practice of the constitutional courts, there is no lack of fundamental criticism of constitutional comparison. As an example for this fifth observation, I would like to point to the conflict between the judges of the US Supreme Court. Especially among those who advocate in favour of originalism[55], a comparative approach is met with vehement rejection. They argue that one's own constitutional order cannot be interpreted by comparison with the norms and concepts developed within another jurisdiction and its jurisprudence.[56] To quote the late US Supreme Court Justice Antonin Scalia, in whose opinion comparative law may be inspiring but is irrelevant from a constitutional perspective as it violates the democracy principle: 'It is quite impossible for the courts, creatures and agents of the people of the United States, to impose upon those people of the United States norms that those people themselves (through their democratic institutions) have not accepted'.[57] Even within German constitutional law, there are many reservations with regard to comparative law. It is claimed that arguments derived from foreign constitutional law, constitutional jurisprudence or literature can only be viable if they remain within the binding boundaries set out by the content of the German Basic Law itself. Otherwise, it is argued, such an approach would infringe upon 'the proprium of jurisprudence': 'The

[53] Mattias Wendel, 'Richterliche Rechtsvergleichung als Dialogform' (2013) 52 Der Staat 339, 342 who refers to the metaphorical image from Jaakko Husa, 'Methodology of Comparative Law Today: From Paradoxes to Flexibility' (2006) 58 Revue Internationale de Droit Comparé 1095.

[54] Cf. for example Peter Häberle, 'Gemeineuropäisches Verfassungsrecht' (n 33) 261, 271; Armin von Bogdandy, 'European Law Beyond "Ever Closer Union" Repositioning the Concept, its Thrust and the EJCs Comparative Methodology' (2016) 22 European Law Journal 519, 537–538, with a reference to the existing practice of the Italian *Corte Costituzionale*.

[55] Cf. Werner Heun, 'Original Intent und Wille des historischen Verfassungsgebers als Interpretationsmaximen' in Werner Heun (ed), *Verfassung und Verfassungsgerichtsbarkeit im Vergleich* (Mohr Siebeck 2014) 213 et seq.

[56] For some time, those who emphasise the benefit of constitutional comparison have been gaining traction, cf. the references at Sebastian Müller-Franken, 'Verfassungsvergleichung' in Otto Depenheuer and Christoph Grabenwarter (eds), *Verfassungstheorie* (Mohr Siebeck 2010) § 26 para 31 and fn. 110 (906–907).

[57] Antonin Scalia, 'Commentary' (1996) 40 St. Louis U. L. J. 1119. Cf. also *Thompson v. Oklahoma*, 487 U. S. 815, 868 with fn. 4 (1988) (Scalia, J., dissenting opinion). Cf. also Norman Dorsen, 'The relevance of foreign legal materials in U.S. constitutional cases: A conversation between Justice Antonin Scalia and Justice Stephen Beyer' (2005) 3 International Journal of Constitutional Law 519 et seq. Despite this debate, the US Supreme Court itself has repeatedly engaged in comparative law, cf. for example Christoph Bezemek, 'Dangerous Dicta? Verfassungsvergleichung in der Rechtsprechung des US Supreme Court' (2010) 18 Journal für Rechtspolitik 207 et seq.

practitioners would operate outside the law'.[58] Ultimately, this proves to be a question of democratic legitimacy. To put it in the words of *Christian Walter*[59]: 'If judicial review as such always needs to be justified by the democracy principle, how much more must this apply if it is to be carried out on the basis of foreign norms?'

In contrast to this debate, there are other states whose constitutions explicitly encourage their constitutional courts to use comparative legal arguments. The Constitution of South Africa, for example, explicitly allows the courts to take foreign law into account.[60]

Nevertheless, such an explicit reference to foreign law is not a necessary requirement for legitimising judicial constitutional comparisons. If – as continuously practiced by the Federal Constitutional Court of Germany – the interpretation of a law is based on the objectified will of the legislature rather than its original intent, comparative legal arguments can be integrated into the teleological legal interpretation quite easily.[61] In this manner, comparative legal argumentation causes an 'implicit normativity of the other law in one's own'.[62]

6 A Court's Motives to Conduct Constitutional Comparison Can Be Various

As I stated before, comparative law in constitutional jurisdiction is – in general – legitimate. This must not obscure the fact that constitutional courts can have various motives for

[58] Müller-Franken (n 56) para 29. Generally critical towards this already Hans Nawiasky, *Die Gleichheit vor dem Gesetz im Sinne des Art. 109 der Reichsverfassung* (Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer 3, 1927) 25 (26): 'Just as it is impossible to gain interpretative aspects from two states of law separated by history, it is impossible to gain interpretative aspects from two states of law separated by jurisdiction.' (Translation by the author). A practical objection against constitutional comparison (at least when practiced by courts) emphasises that comprehensive comparative practice would require great manpower and that courts are already faced with a great strain from decision-making, cf. Christian Hillgruber, *Die Bedeutung der Rechtsvergleichung für das deutsche Verfassungsrecht und die verfassungsgerichtliche Rechtsprechung in Deutschland* (2015) (3) Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge 367 (385). On this aspect, cf. also Kaiser (n 2) 206, who pleads for restraint when it comes to using comparative constitutional legal arguments. Cf. also Anna-Bettina Kaiser, '"It Isn´t True that England Is the Moon": Comparative Constitutional Law as a Means of Constitutional Interpretation by the Courts?' (2017) 18 German Law Journal 293, 304 et seq.

[59] Christian Walter, 'Dezentrale Konstitutionalisierung durch nationale und internationale Gerichte' in Janbernd Oebbecke (ed), *Nicht-normative Steuerung in dezentralen Systemen* (Franz Steiner Verlag 2005) 205, 225. (Translation by the author).

[60] Art. 39 Section 1: 'When interpreting the Bill of Rights, a court, tribunal or forum (a.) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b.) must consider international law; and (c.) may consider foreign law.'

[61] Likewise in his conclusion Müller-Franken (n 56) para 31. Cf. for example also Starck (n 34) 1021, 1024. Classen (n 7) para 29, favours the historical interpretation as the place for comparative constitutional law.

[62] Thomas Coendet, *Rechtsvergleichende Argumentation. Phänomenologie der Veränderung im rechtlichen Diskurs* (Mohr Siebeck 2012) 75 (translation by the author).

conducting constitutional comparison and disclosing this fact in a decision.[63] This brings me to my sixth observation. I can think of four possible reasons for constitutional comparison:

– The court can expect new insights with regard to the concretisation of constitutional principles and norms. This function is referred to as 'interpretative assistance'[64] in the academic debate. I would call it the *epistemological function.*[65]

– Constitutional comparison can also have a *confirming function* when it serves to confirm an interpretation derived from national law.

– Furthermore, it can serve to signal the existence of a consensus across legal systems – I call this the *standardisation function.*[66]

Finally, the comparative legal references can also serve to make one's own argumentation more convincing by referring to foreign legal systems and judicatures of other courts to confirm, contrast or illustrate one's own view. In this case the references are used as 'persuasive authority'. This is the *justification function* of constitutional comparison.[67]

Sometimes, however, arguments based on comparative law are also misused to legitimise problematic legal opinions.[68] A recent example is the reference to the PSPP ruling of the Federal Constitutional Court of Germany by the Polish Constitutional Court to justify the fundamental relativisation of the primacy of EU law.[69]

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[63] Similarly to the following remarks but with a different terminology and extensive examples from the Federal Constitutional Courts' jurisprudence Martini (n 2) 127 et seq. Generally on the reasons for constitutional comparison Hirschl (n 27). Hirschl identifies eight main types of constitutional comparisons: (1) freestanding, single-country studies, (2) genealogies and taxonomic labelling of legal systems, (3) surveys aimed at finding the 'best' or most suitable rule across cultures, (4) surveys aimed at self-reflection, (5) concept formation through descriptions of the same constitutional phenomena across countries, (6) normative or philosophical contemplation of abstract concepts, (7) 'small-N' analysis aimed at illustrating causal arguments that may be applicable beyond the studied cases, (8) 'large-N' studies that draw upon multivariate statistical analyses of a large number of observations in order to determine correlations among pertinent variables. Cf. also Baer, *Renaissance der Verfassungsvergleichung?* (n 2) 23–24.

[64] Sommermann (n 1) para 39.

[65] Regarding this function see Sommermann (n 1) paras 26 et seq.

[66] Wendel (n 53) 357 et seq., who outlines the standardisation function under reference to the works of Peter Häberle under the heading 'European genealogic evolutionary context' (Translation by the authour; original: „europaweiter genealogischer Entwicklungszusammenhang").

[67] Wendel, 'Richterliche Rechtsvergleichung als Dialogform' (n 53) 359. For corresponding examples from the Federal Constitutional Court's jurisprudence, see Classen (n 7) para 53.

[68] Insightful and with a lot of examples Rosalind Dixon and David Landau, *Abusive Constitutional Borrowing* (Oxford University Press 2021).

[69] Cf. also Andreas Voßkuhle, 'Applaus von der falschen Seite. Zur Folgenverantwortung von Verfassungsgerichten' in Andreas Voßkuhle (ed), *Europa, Demokratie, Verfassungsgerichte* (Suhrkamp 2021) 334 et seq.

7 So Far, the Focus of the Federal Constitutional Court's Constitutional Comparisons Has Been on Europe and the USA. This Is Understandable but It Does Not Have to Stay That Way

The focus of the Federal Constitutional Court's comparative constitutional analysis has traditionally been on the other EU member states and the US.[70] I can think of several reasons for this seventh observation: On the one hand, there is a particular need for intra-European comparative law. The European legal area is characterised by a unique combination of European primary law, the European Convention on Human Rights and the national constitutions. As Armin von Bogdandy has observed, the legal area unites different regimes of constitutional normativity by law, without merging them into one legal order, as the different regimes retain their autonomous self-conception.[71] On the other hand, the jurisprudence of the US Supreme Court concretises the oldest liberal constitutional order in the Western world. When the Federal Constitutional Court of Germany began its work in 1951, *Marbury v. Madison* (1803) was almost 150 years old, and no other court came close to the radiance of the SCOTUS.

In the meantime, the situation has changed somewhat. European fundamental rights jurisprudence is faced with the challenge of putting its own Eurocentric world-view into perspective and must overcome colonial patterns of thought. At the same time, the nationally introverted and over-politicised US Supreme Court hardly serves as a good example anymore.[72]

8 There Is No Methodologically Sound Concept for Constitutional Comparisons

This brings me to my eighth observation. Those who conclude from existing practice that constitutional comparison follows a methodologically sound concept will soon find themselves disappointed.[73]

The Federal Constitutional Court conducts constitutional comparisons without methodological reflection as well.[74] Whether a comparison is made, what is compared and how it is compared remains arbitrary to a certain extent.[75] There is agreement insofar as

[70] Cf. Martini (n 2) 114 et seq. with further references. Cf. also Baer, 'Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus' (n 2) 392; and the overview by Paulsen (n 20) 44 et seq.

[71] Bogdandy (n 27) 114. Cf. also instead of many Sommermann (n 1) para 22 with further references.

[72] Both developments are impressively illustrated by Baer, *Renaissance der Verfassungsvergleichung?* (n 2).

[73] This is the *basso continuo* of comparative legal literature since the 19th century, as correctly pointed out by Sommermann (n 1) para 50 and fn. 162. Cf. also the contributions in Anna Gamper and Bea Verschraegen (eds), *Rechtsvergleichung als juristische Auslegungsmethode* (Jan Sramek Verlag 2013).

[74] Martini (n 2) 101 et seq. with further references.

[75] Explicitly Kaiser (n 58) 304 et seq. Cf. also von Busse (n 34) 538 et seq. and Classen (n 7) paras 32 et seq., all with further references. For the different motives underlying constitutional comparison cf. Section II. 6. of this text.

the comparison must go beyond merely compiling differences and similarities or comparing concepts or norms.[76] Instead, sophisticated legal comparison regularly goes through several stages: The comparison begins with sifting and describing the material, which is followed by an explanatory stage. The actual core of the comparison consists of contrasting and evaluating the material.[77]

As constitutional jurisprudence is concerned with the concrete application of the law, a comparative method that is directed towards the solution of a specific problem is of interest in this context.[78] Functional comparative law, which compares the solutions that different legal systems provide for a specific problem, meets these needs.[79] Hence, it dominates the practice of the Federal Constitutional Court.

However, as I have already emphasised elsewhere,[80] comparative constitutional law should not be blind to the specific cultural context in which a specific legal solution is embedded[81]: 'Comparative constitutional law always requires a certain degree of cultural comparison or at least sufficient sensitivity for the cultural character of normative statements. Constitutions reflect – albeit to different degrees – the realities of 'their' state. People's needs and mentalities are not the same everywhere. Comparative law therefore does well to recognise the cultural dimension of this reality and to take it seriously.' A certain form of 'osmosis' (Peter Häberle) between the world's constitutions can be observed in many places.[82] The interest in solutions from other cultural circles and the cooperation in a universal constitutionalism is inherent in every comparative law argument. However, this

[76] Konrad Zweigert and Hein Kötz (n 28) 42–43.

[77] Cf. in general already Léontin-Jean Constantinesco, *Rechtsvergleichung*, vol II (Heymann 1972) 137 et seq., who divides the methodological process in three phases (Knowledge – Comprehension – Comparison). Cf. also the clear outline by Sommermann (n 1) paras 53 et seq. and Franz Reimer, *Juristische Methodenlehre* (2nd edn, Nomos 2020) paras 395–396.

[78] Accordingly, the specific work of constitutional courts is the place where the practicability of comparative law can be put to the test, likewise Andenas and Fairgrieve, 'Introduction – Courts and Comparative Law: In Search of Common Language for Open Legal Systems' in Andenas and Fairgrieve (eds), *Courts and Comparative Law* (n 46) 4: 'courts have become the laboratories of comparative law'.

[79] For further details see Kischel (n 19) § 1 paras 14 et seq., § 3 paras 6 et seq. with further references; cf. also already Fritz Münch, 'Einführung in die Verfassungsvergleichung' (1973) 33 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 126 (139 et seq.). Regarding the criticism cf. the overview given by Susanne Augenhofer, 'Rechtsvergleichung' in Julian Krüper (ed), *Grundlagen des Rechts*, (4th edn, Nomos 2021) § 10 para 47 and Baer, *Renaissance der Verfassungsvergleichung?* (n 2).

[80] Voßkuhle (n 32) 499–500 with further references.

[81] For further details see Wahl (n 35) 96 et seq.; Susanne Baer, 'Verfassungsvergleichung und reflexive Methode: Interkulturelle und intersubjektive Kompetenz' (2004) 64 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 735 et seq.

[82] In this context, the metaphor of 'migration' is also happily used, cf. only Soujid Choudhry (ed), *Migration of Constitutional Ideas* (Cambridge University Press 2007) and Élisabeth Zoller (ed), *Migrations constitutionelles d`hier et d`aujourd´hui*, (Éditions Panthéon-Assas 2017). Cf. further Susanne Baer, 'Travelling Concepts: Substantive Equality on the Road' (2010) 46 (1) Tulsa Law Review 59 et seq.

should not lead to the neglect of one's own constitutional identity. Finding the right balance between development and preservation is a particular challenge.

9 Constitutional Comparison Does Not Only Take Place Occasionally but Is Part of a Permanent Judicial Dialogue

Constitutional comparison is not only vital when dealing with concrete cases, but also an important topic within the personal interaction of judges of European and international constitutional and supreme courts.[83] According to my ninth observation, the insights gained when judges meet to exchange knowledge and experience often find their way into constitutional jurisprudence.[84] Opportunities for this *'dialogue des juges'* arise during mutual visits of European or foreign courts[85], symposia, larger conferences or personal meetings and discussions. There are also multilateral meetings, for example within the framework of the Conference of European Constitutional Courts[86], the World Conference on Constitutional Courts, the so-called *Sechsertreffen*, a meeting of the German-language constitutional courts, the Court of Justice of the European Union and the European Court of Human Rights, or the Heidelberg Discussion Group 'Constitutional Court Network', and bilateral meetings. For example, the Federal Constitutional Court meets regularly with colleagues from the Austrian Constitutional Court, the French Conseil Constitutionnel, the UK Supreme Court and the Italian Corte Costituzionale. Another important place for exchange is the Venice Commission.[87] There, judges from different countries can find out whether (constitutional) case law on specific issues already exists in the member states of the Council of Europe. In addition, the Federal Constitutional Court also keeps itself informed of the current case law of other constitutional courts from North America to Africa and Asia. Since 2017, the monthly 'Newsletter International' has been published in-

[83] Cf. also Monica Claes and Maartje de Visser, 'Are You Networked Yet? On Dialogues in European Judicial Networks' (2012) 8 Utrecht Law Review 100 et seq.; Michael Nunner, *Kooperation internationaler Gerichte. Lösung zwischengerichtlicher Konflikte durch herrschaftsfreien Diskurs* (Mohr Siebeck 2009).

[84] Cf. Anne-Marie Slaughter, 'Global Community of Courts' (2003) 44 Harvard International Law Journal 191 et seq.; Jutta Limbach, 'Globalization of Constitutional Law through Interaction of Judges' (2008) 41 (1) Verfassung und Recht in Übersee 51 et seq.; Susanne Baer, 'Praxen des Verfassungsrechts: Text, Gericht und Gespräche im Konstitutionalismus' in Michael Bäuerle et al. (eds), *Demokratie-Perspektiven. Festschrift für Brun-Otto Bryde*, (Mohr Siebeck 2013) 3 et seq.

[85] On average, the Federal Constitutional Court welcomes five delegations from European and international Courts a year and likewise pays five other highest or constitutional courts a visit.

[86] For further details see Karl-Georg Zierlein, 'Entwicklung und Möglichkeiten einer Union: Die Konferenz der Europäischen Verfassungsgerichte' in Walther Fürst, Roman Herzog and Dieter C. Umbach (eds), *Festschrift für Wolfgang Zeidler*, vol I (De Gruyter 1987) 315 et seq.

[87] The Venice Commission, for instance, publishes a bulletin on Constitutional Case-Law for the Council of Europe's area since 1993 (all issues since the year 2003 are available under <http://www.venice.coe.int/WebForms/pages/?p=02_02_Bulletins> accessed 30 December 2022); it also provides the electronic database 'CODICES', which can be accessed under (http://www.codices.coe.int/NXT/gateway.dll?f=templates&fn=default.htm).

house, which presents foreign decisions in condensed form and is directly accessible to the judges and all other employees.

10 Constitutional Comparison by Constitutional Courts Is Dependent on Academic Support

Despite the personal exchange between the judges of the constitutional and supreme courts and the establishment of numerous databases, the constitutional courts remain dependent on academic support. As my former colleague at the Federal Constitutional Court, Brun-Otto Bryde, once vividly remarked: 'A constitutional court is not a comparative law institute and never will become one'.[88] This leads to my tenth observation. The Federal Constitutional Court receives support, for example, from the multi-volume series 'Constitutions of the Countries of the World (CCW)', which has been published by the Max Planck Institute for Comparative Public Law and International Law for over ten years now. Also of great use is the online database 'Max Planck Encyclopedia of Comparative Constitutional Law (MPECCoL)'[89], maintained by the Max Planck Foundation for International Peace and the Rule of Law. The database aims to cover all areas of constitutional law from a comparative perspective, taking into account all legal cultures and the various methods of comparative constitutional law. Other works that are popular as an introduction in everyday life are, for example, the short textbook by Albrecht Weber on comparative European constitutional law,[90] the textbook *Französisches und Deutsches Verfassungsrecht* by Nikolaus Marsch, Yoan Vilain and Mattias Wendel,[91] the already mentioned textbook by Armin v. Bogdandy and Peter M. Huber,[92] or the various English-language handbooks on comparative constitutional law.[93] Specifically related to comparative constitutional law practice are, for example, the works *Comparative Constitutional Reasoning* edited by András Jakab and others[94], *Courts and Comparative Law* edited by Mads Andenas and Duncan Fairgrieve and the compendium *Judicial Cosmopolitanism. The Use of Foreign Law in Contemporary Constitutional Systems*.[95] As such, there is no lack of support.

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[88] Bryde (n 51) 298.

[89] Accessible under http://oxcon.ouplaw.com/home/MPECCOL.

[90] See the reference in n 38.

[91] Nikolaus Marsch, Yoan Vilain and Matthias Wendel (eds), Französisches und Deutsches Verfassungsrecht. Ein Rechtsvergleich (Springer, Berlin u. Heidelberg 2015).

[92] See the reference in n 42.

[93] Cf. the references in n 38, 42, 44 and 91.

[94] András Jakab, Arthur Dyevre and Giulio Itzcovich (eds), *Comparative Constitutional Reasoning* (Cambridge University Press 2017).

[95] See for both the references in n 46.

11 Comparative Law by Constitutional Judges Has a Personal Component

Nevertheless, according to my eleventh observation, the willingness of the judges of the Federal Constitutional Court to engage in constitutional comparison seems to differ. This certainly has something to do with personal preferences,[96] language skills and the respective professional background. International lawyers are more inclined to comparative law than, for example, former judges of the Federal Supreme Court, but there is also a link to the training of German lawyers, which still places too little emphasis on the comparative perspective. The model of the 'European lawyer' is not yet sufficiently internalised.[97]

12 Constitutional Comparison Stimulates Judicial Self-Reflection

Let me conclude with a final personal observation. We have observed the following that comparative constitutional law is part of the everyday life of constitutional judges but it remains a difficult and usually not very transparent business, which is supported by neither a clear motive nor clear methodological guidelines. Nevertheless, as Susanne Baer rightly points out, it remains heuristically valuable, because not just any ideas, but very specific information is introduced into a debate.[98] This promotes the deliberative process within internal discussions and stimulates self-reflection.[99] It is often the engagement with the unfamiliar that leads to a deeper understanding of the well-known. Perhaps this is even the most important function of judicial constitutional comparisons.

[96] On the significance of the personal experiences of the acting persons Classen (n 7) paras 12–13.

[97] For further details see Andreas Voßkuhle, 'Das Leitbild des „europäischen Juristen"' in Voßkuhle (n 69) 19 et seq. with further references.

[98] Baer, 'Zum Potenzial der Rechtsvergleichung für den Konstitutionalismus' (n 2) 398.

[99] Plainly on this aspect Markus Kotzur, '„Verstehen durch Hinwegdenken" und/oder „Ausweitung der Kampfzone"' (2015) 63 Jahrbuch des öffentlichen Rechts der Gegenwart. Neue Folge 355, 356–357.

Emilie Chevalier*

Preliminary Reference on Validity and the National Court: What Contribution to the Rule of Law and Effective Judicial Protection in the EU? A Focus on the French Administrative Judge

Abstract

While the cases of preliminary ruling on validity are not numerous before the European Court of Justice, particularly in comparison with the preliminary ruling on interpretation, this mechanism plays an essential role in promoting the legality of the European legal order. Since direct access to the courts is ultimately very restrictive for individual claimants, indirect access to the Union courts is an essential means of ensuring that Union norms are subject to judicial review. However, because of the conditions set up for its implementation, the national judge has a certain margin of appreciation, and in the end, as the analysis of the practice of the French administrative judge shows, the hypotheses for triggering a valid preliminary ruling remain limited. However, this does not mean that the national court is resisting, as this practice can be part of a dialogue between judges. However, it leads us to put into perspective the capacity of the preliminary ruling on validity to compensate for the very limited access to actions for annulment before the European Court of Justice.

Keywords: preliminary ruling in validity, national judge, French administrative judge, *acte clair*, case law, European Court of Justice, *Conseil d'Etat*

I Introduction: Why Is It a Question?

The role of the national judge and, more broadly, that of the dialogue between judges, in the dynamics and deepening of the integration process has for long been stressed[1] and

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1 Robert Lecourt, *L'Europe des juges* (Bruylant 1976).

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is frequently analysed. The national judge is a pillar of the integration process, and this central role has had repercussions on its office and its powers.[2] Indeed, in the name of the imperative of the effectiveness of Union law, its powers have increased.[3] At the same time, its responsibilities in the Union's legal order towards the concrete enforcement of the European Union law and principles have also increased. This led to the greater involvement of the European Court of justice in monitoring the national courts. Since the *Köbler* case,[4] a Member State may be held liable if the national court violates its obligation to make a reference for a preliminary ruling. Hence, the national court has an obligation, based on Article 267 TFEU, to make a reference for a preliminary ruling to the Court of Justice when a question concerning the interpretation or validity of a Union rule arises during proceedings, in the case it is a court against whose decisions there is no judicial remedy under national law.[5]

One of the reasons for the increased supervision of the national court is its essential role for the implementation of Union standards and thus their effectiveness. In this context, the national court is the decisive level, not only for the daily application of Union norms, but especially their uniform application in all the Member States of the Union.[6] The national court is also a core element in guaranteeing the Rule of Law in the European Union legal order.[7] This is not contrary to the principle of the Court of Justice's monopoly on interpreting and assessing the legality of Union rules.[8] In this context, the national judge is a relay. Such a role is regularly stressed, particularly since the famous UPA ruling.[9] While the Court of Justice was invited, following the Court of First Instance,[10] to relax its interpretation of the standing of individuals, natural or legal persons, in the context of an action for

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[2] Oliver Dubos, *Les juridictions nationales, juge communautaire* (Dalloz, 2001); Mariolina Eliantonio, *Europeanisation of Administrative Justice?* (2009 Europa Law Publishing 2009); Jan H. Jans, Sacha Prechal, Robert J. G. M. Widdershoven (eds), *Europeanisation of Public Law* (Europa Law Publishing 2015).

[3] Emilie Chevalier, 'Chapter 7 Remedies' in Chris Backes, Mariolina Eliantonio (eds), *Cases, Materials and Text on Judicial Review of Administrative Action* (Hart Publishing, 2019) 555–690.

[4] ECJ, 30 September 2003, *Gerhard Köbler v Republik Österreich*, C-224/01, ECLI: ECLI:EU:C:2003:513.

[5] Of course, the prerogatives of the national courts are slightly different according to the type of preliminary ruling, on interpretation or on validity. While the Court of Justice has the monopoly of interpretating and ruling on the validity of EU norms (art. 19 TEU), the national judge has a wider margin of discretion while applying EU law and may, to a certain extent, be in a position of interpreting EU norms. On the contrary, it is never possible for the national judge to review the legality of EU norms.

[6] Alec Stone Sweet, 'The Juridical *Coup d'État* and the Problem of Authority: *CILFIT* and *Foto-Frost*' in Miguel Poiares Maduro, Loïc Azoulai (eds), *The Past and Future of EU Law* (Hart Publishing 2010) 201; Rob van Gestel, Jurgen de Poorter, *In the Court We Trust: Cooperation, Coordination and Collaboration between the ECJ and Supreme Administrative Courts* (Cambridge University Press 2019).

[7] ECJ, 23 April 1986, *Parti écologiste 'Les Verts' v European Parliament*, 294/83, ECLI:EU:C:1986:166.

[8] Article 19 TEU.

[9] ECJ, 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union*, C-50/00 P, ECLI:EU:C:2002:462.

[10] CFI, 3 May 2002, *Jégo-Quéré & Cie SA v Commission of the European Communities*, T-177/01, ECLI:EU:T:2002:112.

annulment, based on Article 263 §4 TFEU, the EU supreme judge confirmed the strict interpretation retained in the *Plaumann* case.[11] According to the Court, this restrictive approach is still compatible with the fundamental right to access to the court[12] and to right of effective judicial protection,[13] whereas, in practice, it is it almost impossible for individuals to challenge acts of general application. In fact, the Court bases the argument of the systemic nature of the remedies, according to which all the direct and indirect remedies developed within the legal order of the European Union constitute a consistent system, the articulation of which safeguards the right to an effective remedy against the acts of the Union.[14] In this context, the role of the national court is emphasised, a role enforced through the preliminary ruling on validity.[15]

The aim of this paper is to analyse the practice of preliminary rulings on validity by the French administrative courts. The analysis is based on an empirical approach, which aims to assess the extent to which this practice effectively guarantees the Rule of Law at the level of the Union or, on the contrary, constitutes an obstacle. Indeed, if the national court does not refer a preliminary ruling on validity, the submission of Union norms to judicial review, especially acts of general application such as regulations, may be potentially non-existent, even if review by way of a plea of illegality remains possible.[16] However, the approach of the French administrative courts in this respect is ultimately nuanced, their practice being characterised by a cautious use of the preliminary ruling on validity. This paper will first stress the importance of the use of the preliminary ruling of validity by the national judge (2) and the peculiarity of the position of the French administrative judge in this respect (3). Then, it will offer an analysis of the practice of the French administrative judge (4), before developing some concluding remarks (5).

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[11] ECJ, 15 July 1963, *Plaumann & Co. v Commission of the European Economic Community*, 25-62, ECLI:EU:C:1963:17.

[12] Articles 13 ECHR and 47 of the Charter of Fundamental Rights.

[13] ECJ, 13 March 2007, *Unibet (London) Ltd and Unibet (International) Ltd v Justitiekanslern*, C-432/05, ECLI:EU:C:2007:163.

[14] ECJ, 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union*, C-50/00 P, ECLI:EU:C:2002:462

[15] ECJ, 25 July 2002, *Unión de Pequeños Agricultores v Council of the European Union*, C-50/00 P, ECLI:EU:C:2002:462, para 40 and 41: '40 By Article 173 and Article 184 (now Article 241 EC), on the one hand, and by Article 177, on the other, the Treaty has established a complete system of legal remedies and procedures designed to ensure judicial review of the legality of acts of the institutions, and has entrusted such review to the Community Courts (see, to that effect, *Les Verts* v *Parliament*, paragraph 23). Under that system, where natural or legal persons cannot, by reason of the conditions for admissibility laid down in the fourth paragraph of Article 173 of the Treaty, directly challenge Community measures of general application, they are able, depending on the case, either indirectly to plead the invalidity of such acts before the Community Courts under Article 184 of the Treaty or to do so before the national courts and ask them, since they have no jurisdiction themselves to declare those measures invalid (see Case 314/85 *Foto-Frost* [1987] ECR 4199, paragraph 20), to make a reference to the Court of Justice for a preliminary ruling on validity. 41. Thus it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective judicial protection.'

[16] Article 277 TFEU.

II The Importance of the National Court's Practice of Referring a Preliminary Ruling on Validity

In the light of the Court of Justice's approach to the system of legal remedies, the national court's practice of preliminary rulings on validity brings a decisive contribution to guaranteeing the effectiveness of the right of access to court and effective judicial protection, and thus ultimately to guaranteeing the Rule of Law for the Union legal order. The contribution of the national court to the effectiveness of the right to access to court is different from its contribution in the case of a reference for a preliminary ruling on interpretation. In the case of an action brought before it, the national court has a role to play in censoring national rules that do not comply with Union law, if necessary, by requesting a preliminary ruling on interpretation. As far as the practice of referring matters for a preliminary ruling on validity is concerned, one needs to analyse another side of the national court's action, which is that of guaranteeing the legality of Union norms. As mentioned above, this role is not self-evident, due to the monopoly of the Court of Justice. However, according to the systemic conception of legal remedies within the Union, its intervention is then decisive in guaranteeing that the legality of EU norms can finally be reviewed, even if happening at a very late stage. The triggering of a preliminary ruling on validity is therefore a prerequisite for the full effectiveness of the right of access to court in the EU legal order.

The use of preliminary rulings on validity by the national court seems to have received less attention in the academic literature.[17] This may first be justified by the fact that fewer judgments are given on validity references. In terms of litigation strategy, references for preliminary rulings on validity are part of a defensive strategy on the application of Union law, which, from the point of view of the claimants, may seem less interesting and useful, since in this case they seek to prevent the application of Union law. On the contrary, when a reference for a preliminary ruling on interpretation is requested, it is from a protective perspective, and the applicants seek to obtain the application of Union law to their benefit. Through the integration process, the claim of the application of Union law is intended to challenge or set aside a national rule, and then is a source of increased protection for the applicants. The objective of the integration process is first and foremost to apply the Union's norms within the Member States. This lesser quantitative status therefore justifies a more limited interest since, *de facto*, references for preliminary rulings on validity have a more limited visibility. Moreover, the attention paid to the dynamics of the integration process leads mainly to focus on enforcement of secondary Union law within the national legal orders.

Nevertheless, in the face of the *status quo* of the European Court of Justice on the conditions of standing in actions for annulment, the national court has no less responsibility

[17] T. L. Early, 'The scope of preliminary rulings on the validity of Community law' (1980) 15 (2) The Irish Jurist (new series) 237–262; Nial Fennelly, 'The role of the national judge in ensuring access to community Justice Reflections on the case law of the community courts four years on from Jégo-Quéré/UPA' (2006) (7) ERA Forum 463–475.

than in the context of the positive application of European Union law. Although the preliminary ruling on validity neutralises the application of an illegal Union norm,[18] the national court nevertheless participates, *in fine*, in the application of Union law and, more especially, fundamental EU norms. Moreover, the intervention of the national court, by means of the preliminary ruling on validity, is essential to guarantee the promotion of the Rule of Law, since it opens a possibility not only to guarantee the legality of the norms of the Union, but also of the national implementing acts. Indeed, in the perspective of the development of the European administrative space,[19] there are many acts adopted through co-administration procedures in different areas. Whether these mechanisms are horizontal or vertical, they all generate a chain of national and European acts, usually of a different nature, binding or non-binding. This category of acts creates challenges for judicial review.[20] For example, the legality of the national act may be conditional on the legality of the Union norm.[21] Therefore, the effectiveness of the review of the legality of the national implementing act may remain conditional on the review of the legality of the national norm. Such hypotheses are developing, whether through mechanisms of administrative cooperation or co-administration, or when national acts are adopted 'on the basis' of Union norms.

III The Particularity of the French Administrative Courts Regarding Preliminary Rulings on Validity

This paper, which does not claim to offer an exhaustive analysis of the issue, will focus primarily on the French administrative court, with the ambition of giving an overview of the practice of national courts. The French administrative judge is undeniably comparable to any

[18] ECJ, 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 314/85, ECLI:EU:C:1987:452

[19] Herwig C.H. Hofmann, Alexander Türk (eds), *EU Administrative governance,* Cheltenham/Northampton, *Elgar*, 2006; Herwig C.H. Hofmann, 'Mapping the European Administrative Space' (2008 July) 31 (4) West European Politics 662; Emilie Chevalier, 'Espace administratif européen' in Jean-Bernard Auby, Jacqueline Dutheil de la Rochère (eds), *Traité de droit administratif européen* (Bruylant 2022, Bruxelles) 907.

[20] Herwig C.H. Hofmann, Alexander Türk, *Legal challenges in EU Administrative Law: Towards an Integrated Administration* (Elgar 2009); Jarle Trondal, Michael Bauer, 'Conceptualizing the European multilevel administrative order: capturing variation in the European administrative system' (2017) 9 European Political Science Review 73; Matthias Ruffert, 'European Composite Administration: the Transnational Administrative Act' in Oswald Jansen, Bettina Schöndorf-Haubold (eds), *The European Composite Administration* (Intersentia 2011) 277–306; Eberhard Schmidt-Aßmann, 'Le modèle de l'administration composée et le rôle du droit administratif européen' (2006) Revue Française de Droit Administratif 1246–1255.

[21] Brito Bastos, 'An Administrative Crack in the EU's Rule of Law: Composite Decision-making and Non justiciable National Law' (2020 March) 16 (1) European Constitutional Law Review 63–90; see for example Emilie Chevalier, 'Précisions sur l'accès au juge national dans le cadre d'une procédure administrative composée (CJUE, 29 janvier 2020, GAEC Jeanningros, C-785/18)' (2020) (2) Jus Vini/ Journal of Wine & Spirits Law 257–268.

other judge of a Member State, as far as their obligations based on Union law are concerned. Behind the reference to the 'administrative judge', the paper refers here to the judges of first instance *(Tribunal administratif),* the administrative courts of appeal and finally the Council of State. It is interesting to note that a preliminary reference on validity has not yet been made by the judge of emergency (interim relief judge). This can easily be explained: when an application for a ruling is made in emergency cases, the judge limits themself to a 'manifest' control of the legality of the act that is the subject of the appeal.[22] To question the validity of an EU act would lead to a return to a classic review of legality. Furthermore, regarding the judges who rule on the merits of the case, it should be remembered that they are not all in the same position regarding the exercise of the preliminary ruling procedure. Only the court 'against whose decisions there is no judicial remedy' is under an obligation imposed by Union law to make a reference for a preliminary ruling.[23] In the case of France, it is the Council of State, with a few exceptions.[24] Nevertheless, it remains relevant to include all judges in the analysis, since, if any doubts arise concerning the validity of an EU norm, any national judge is under an obligation to refer to the European Court of Justice.[25] The mention of a few additional elements may help here to highlight what may characterise the position of the French administrative judge and explain the general background of the study.

1 Conditions of Access to a French Administrative Judge

First of all, in France, by virtue of the principle of jurisdictional dualism, the judicial judge and the administrative judge co-exist, the latter being responsible for reviewing the legality of the acts and actions of the public authority.[26] In this respect, a focus on its use of the preliminary ruling on validity is particularly relevant, since it is while reviewing the legality of national administrative acts that questions arise most frequently as to the validity of a Union norm. Indeed, this question is dealt with the logic of the exception of illegality.[27] The challenge of the illegality of the European norm is then part of the arguments raised by the plaintiff to obtain the annulment of the national act implementing the Union regulation. The Union norm challenged indirectly may be a legislative act or an executive act of the Union,[28] and the national norm an administrative act. Moreover, it is relevant to stress

[22] Article L521-2 of the Code of Administrative Justice.

[23] Article 267 TFEU.

[24] Article L111-1 of the Code of Administrative Justice, Art. L311-2 and s. of the Code of Administrative Justice.

[25] See ECJ, 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 314/85, ECLI:EU:C:1987:452.

[26] Chris Backes, Mariolina Eliantonio (eds), *Cases, Materials and Text on Judicial Review of Administrative Action* (Hart Publishing 2019).

[27] Mariolina Eliantonio, Dacian Dragos, *Indirect Judicial Review in Administrative Law – Legality vs Legal Certainty in Europe*, Routledge, 2023.

[28] For the distinction, see Olivier Dubos, François-Vivien Guiot, "Actes d'exécution de l'Union', in Jean-Bernard Auby, Jacqueline Dutheil de la Rochère (eds), Traité de droit administratif européen, Bruxelles, Bruylant, 2022, p. 93.

that administrative courts represent a potentially very accessible way for individuals to succeed in indirectly challenging Union norms. Indeed, the standing requirements before the French administrative judge are broadly assessed, as they are based on interest rather than on subjective right.[29] In order for an action for annulment *(recours en excès de pouvoir)* to be admissible,[30] the applicant must show that they are individually and directly affected by the act, namely. that their personal situation must be impacted following the adoption of the act. Thus, insofar as a Union norm implies a national implementing act or generates implementing acts, the French administrative court may be regarded as accessible to compensate for the narrowness of direct access to the Union court.[31]

2 Relationship between the French Administrative Judge and the Court of Justice

Relations between the Court of Justice and the French administrative courts have not always been smooth. Indeed, one may identify a certain lack of confidence on the part of the French administrative courts in making a reference for a preliminary ruling. First, in the case of the ordinary courts, courts have sometimes recalled the freedom of the ordinary courts, the decisions of which are subject to remedy, to refer for preliminary rulings, even if the parties request them to do so. For example, in a press release, a member of the Administrative Court of Appeal of Lyon recalled the importance of the principle of procedural autonomy, while deciding whether to refer to the Court of justice or not.[32] Of

[29] Backes, Eliantonio (n 26).

[30] Obviously, action for annulment is not the only way for an applicant to challenge the validity of an EU norm indirectly. The action in liability may also be used and is available before the French administrative judge. However, it is a much less relevant remedy in this respect.

[31] In accordance with the reservations expressed by Advocate General Jacobs in his conclusions in the UPA ruling (Opinion of Advocate General Jacobs delivered on 21 March 2002 under Case C-50/00 P, Unión de Pequeños Agricultores) the accessibility of this route remains conditional on the existence of national implementing acts, and therefore cannot be used in cases where the Union norm does not require implementing acts.

[32] Comment by Marc CLEMENT, 1st Councillor at the Administrative Court of Appeal of Lyon, 'Right to be heard, right of defence and obligation to leave the territory: about the decision of the Administrative Court of Appeal of Lyon of 14 March 2013, M.X. n°12LY02704, available at <http://www.gdr-elsj.eu/2013/04/29/asile/droit-detre-entendu-droit-de-la-defense-et-obligation-de-quitter-le-territoire-a-propos-de-larret-caa-lyon-du-14-mars-2013-m/> accessed 30 December 2022: 'In view of all the difficulties described above, it is legitimate to ask whether it would be appropriate to refer a question to the Court of Justice for a preliminary ruling. This is not the route taken by the Court of First Instance and the Administrative Court of Appeal. […H]is right, which in the past may have been confined to specialised and technical disputes, is now a matter of everyday life in the courts. The current system of dialogue between the Court of Justice and the national courts means that the number of references for preliminary rulings remains limited (of the 423 references for preliminary rulings registered in 2011 for the 27 Member States of the European Union, 31 came from French courts). Preliminary references are therefore an exceptional measure. Furthermore, it should be stressed that the mechanism of the preliminary ruling aims to provide a general overview and does not transfer the decision from the national court to the European court.'

course, such a position is not contrary to EU law., however, it reflects a certain claim to the freedom of whether or not to use the mechanism of Article 267 TFEU. The position of the Council of State is even more delicate. First, the French Council was at the origin, very early on, of the theory of the clear act *(acte clair)*. Indeed, in the *Société des pétroles Shell-Berre* ruling,[33] the Council of State considered, from 1964, that it could itself interpret a European norm when this interpretation did not pose any serious difficulty. This approach was subsequently confirmed by the Court of Justice itself in the *CILFIT* case.[34] The President of the Administrative Jurisdiction Division, Bernard Stirn, who later became Vice-President of the Council of State, considered that such a position was part of a context of 'mistrust', and, 'behind this decision there is a desire to limit the number of preliminary questions: it was not until 1970 that the first preliminary reference was made, 13 years after the entry into force of the Treaty of Rome.[35,36] The Council of State subsequently became more open to the EU legal order from the 1980s onwards, incorporating European principles and solutions and recognising the specific nature of EU law. However, there are still points of friction. Regarding the practice of referring cases for preliminary rulings, France was recently condemned for failing to comply with EU law because of the refusal of the Council of State to refer a case for preliminary rulings on interpretation.[37] Clearly, there is no 'war of judges' between the French administrative courts and the Court of Justice of the European Union, but the exercise of preliminary rulings can crystallise tensions, and the decision on whether or not to make a reference for a preliminary ruling is a means of expressing the sovereignty of the judge.

3 The Place of the Preliminary Ruling on Validity in the System of Domestic Remedies

One point that also reflects the specificity of the administrative court's approach to the validity of preliminary rulings is the place of this mechanism within the domestic remedies. Two elements shall be explained.

First, the enforcement of the preliminary ruling of validity may be linked to the implementation of the Priority Question of Constitutionality *(question prioritaire de constitutionnalité – QPC)*. This mechanism, introduced following a constitutional revision in 2008, allows the ordinary court to suspend the proceedings before it and to refer the matter to the Constitutional Council for a ruling on the constitutionality of the legislation,

[33] CE, 19 June 1964, *Société des pétroles Shell-Berre*.

[34] ECJ, 6 October 1982, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health*, 283/81, ECLI:EU:C:1982:335

[35] V. CE, 10 July 1970, *Synacomex*.

[36] Bernard Stirn, Le Conseil d'Etat et l'ordre juridique européen, available at <https://www.conseil-etat.fr/publications-colloques/discours-et-interventions/le-conseil-d-etat-et-l-ordre-juridique-europeen#_edn7> accessed 30 December 2022.

[37] ECJ, 4 October 2018, *Commission v. France*, C-416/17, ECLI:EU:C:2018:811

insofar as such a question is important for the resolution of the dispute submitted before it.[38] However, it may happen that, in addition to the plea of unconstitutionality of the law, in the same case, the invalidity of the Directive which is implemented by the challenged legislation is raised. This latter plea then has the same purpose, which is to set aside the challenged national norm. The question then arises as to the articulation, from a temporal point of view, between the priority question of constitutionality and the preliminary reference for a preliminary ruling on validity. The use of the word 'priority' to describe the preliminary reference to the Constitutional Council obliges the national court to refer the matter first to the Constitutional Council, and, if the legislation is declared in compliance with the Constitution, it can then refer the matter to the Court of Justice to challenge the validity of the Directive. This approach was in line with Union law and the principle of primacy of EU law, since the obligation to bring the case before the Constitutional court only has the consequence of potentially postponing the referral to the ECJ.[39] On the contrary, if the legislation is declared unconstitutional, it shall be repealed, and consequently a preliminary reference on validity becomes irrelevant for the dispute. As a result of this articulation, some references for preliminary rulings on validity are not made, to the European Court of Justice, and this means that some opportunities to assess the validity of the EU norm may potentially be lost.

Second, the preliminary ruling on validity is a mechanism of primary importance for the implementation of the principle of primacy in the French legal order, since it is a condition of the legality of EU norms and implementing national norms *in fine*. It is well-known that guaranteeing compliance with the supreme norms of the Union's legal order, and especially with fundamental rights, has been a decisive factor in implementing the principle of primacy of the Union's norms, and above all in removing the obstacles specified over the decades by the various supreme courts of the Member States.[40] In the French system, and especially with regard to the implementation of the principle of primacy before the administrative court, the Council of State has developed a conciliatory case law in the *Arcelor* judgment, delivered in 2007.[41] Indeed, the administrative judge considered that, in principle, the national court does not review the legality of national regulatory acts that implement a directive into the domestic legal order, except in two cases: first, in the event of infringement of a principle inherent in the constitutional identity of France; second, when the national act is challenged towards a fundamental constitutional right that has no equivalent in European Union law. Nevertheless, in the most frequent cases, the argument raised aims at challenging the regulatory act in relation to a fundamental constitutional right

[38] Constitutional Law N° 2008-724 of 23 July 2008 on the modernisation of the institutions of the Fifth Republic (JORF of 24 July 2008, p. 11890); Organic Law No 20091523 of 10 December 2009 on the application of Article 611 of the Constitution (JORF of 11 December 2009, p. 21379).

[39] ECJ, 22 June 2010, *Aziz Melki and Sélim Abdeli*, C-188/10 and C-189/10, ECLI:EU:C:2010:363.

[40] Ruling of the German Constitutional Court, 'Solange I', 29 May 1974.

[41] CE, 8 February 2007, *Société* Arcelor Atlantique et Lorraine et autres, n° 287110.

which has its equivalent within the European legal order. Then, the administrative judge considers that he is not competent to review the implementing regulatory act in relation to the constitutional right, since it would lead the national judge to review the directive with a refence to a constitutional right indirectly. Consequently, and complying with the reasoning of the Court, the only possible means of reviewing the legality is to refer the matter to the Court of Justice for a preliminary ruling to review the validity of the implemented directive. This would make it possible to obtain an indirect review of the legality of the national regulatory act. Specifically, in this case, the Council of State subsequently referred to the Court of Justice for a preliminary ruling on the validity of Directive 2003/87/EC.[42] After having reviewed the Directive with the EU principle of equality, the European judge confirmed the validity of the Directive.[43] In this way, the mechanism of a preliminary ruling on validity in this context appears to be a central means of guaranteeing the legality of national law itself and of the effectiveness of remedies.[44]

IV Analysis of the Practice of Preliminary Ruling in Validity by the French Administrative Courts

In order to carry out an empirical analysis of the practice of preliminary rulings on validity, two distinct but complementary points of view are considered: an analysis based on the judgments of the Court of Justice on preliminary rulings on validity referred by the French administrative courts, and an analysis of French administrative case law on judgments in which the question of submitting a reference to the Court of Justice for a preliminary ruling on validity has been raised but was declined by the administrative judge.

1 Assessment of ECJ Ruling Following a Referral to the French Administrative Courts for a Preliminary Ruling on Validity

Unsurprisingly, noticeably for the above-mentioned reasons, the number of rulings of the Court of Justice held on references for preliminary rulings on validity is relatively limited.

[42] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community (OJ L 275, 25.10.2003, p. 32–46).

[43] ECJ, 16 December 2008, *Société Arcelor Atlantique et Lorraine and Others v Premier ministre, Ministre de l'Écologie et du Développement durable and Ministre de l'Économie, des Finances et de l'Industrie*, C-127/07, ECLI:EU:C:2008:728.

[44] For a similar approach of constitutional review of legislation by the Constitutional Council, see CC, 30 November 2006, *Loi relative au secteur de l'énergie*, 2006-543 DC; CC, Décision n° 2013-314P QPC of 4 April 2013, M. Jeremy F.

As a result, the number of rulings on references from French administrative courts is even more limited.[45]

First, it is worth noticing that there are more questions referred by the Council of State, in comparison to those referred by other administrative judges. This prevalence can be explained by an objective element. The Council of State, where the majority of its rulings are not subject to appeal, is under an obligation to make such a reference if a question arises before it. Moreover, for certain types of litigation, the Council of State is the judge of first and last resort, meaning that there is only one level of jurisdiction. This is particularly the case for appeals against administrative acts adopted at government level by ministers. The Council of State is also directly competent for acts adopted by national agencies. In the case of a centralised state such as France, this type of act may constitute, *par excellence*, acts of application or implementation of Union legislation. This is the case regarding decisions authorising GMOs, marketing of plant protection products or others.

Second, the areas concerned are limited but still diverse. They mainly refer to the main important EU policies, which require enforcement measures at the national level. Thus, from the 1980s onwards, references for preliminary rulings were made in the agricultural sector.[46] From the 2000s, the preliminary questions also concern the environmental field, whether on waste management,[47] or the control of gas emissions.[48] Finally, in 2021, the Council of State referred a question concerning the banking sector.[49] These areas seem to have one thing in common, they are highly technical, which would give the national judge a more significant incentive to question the EU judge.

Beyond the quantitative approach, an analysis can be made from a qualitative point of view, and in particular assessing what the contribution of the French administrative court can be to guaranteeing the legality of the European Union's norms. First, all, the preliminary requests initiated by the French administrative judge led to the confirmation of the legality of the challenged Union norms. However, it does not mean that the interest of those preliminary rulings is limited from the perspective of the Rule of Law. Indeed, for example,

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[45] 31 preliminary rulings in validity have been referred by French courts. In comparison, it is about 70 for the German courts, about 50 for Italian courts.

[46] ECJ, 8 March 2007, *Roquette Frères contre Ministre de l'Agriculture, de l'Alimentation, de la Pêche et de la Ruralité*, C-441/05 : ECJ, 11 May 2000, *Gascogne Limousin viandes SA v Office national interprofessionnel des viandes de l'élevage et de l'aviculture* (Ofival), C-56/99, ECLI:EU:C:2000:236 ; ECJ, 24 January 1991, *Société industrielle de transformation de produits agricoles (SITPA) v Office national interprofessionnel des fruits, des légumes et de l'horticulture (Oniflhor),* C-27/90, ECLI:EU:C:1991:32 ; ECJ, 8 June 1989, *Association générale des producteurs de blé et autres céréales (AGPB) v Office national interprofessionnel des céréales (ONIC)*, 167/88, ECLI:EU:C:1989:234.

[47] ECJ, 10 November 2016, *Eco-Emballages SA v Sphère France SAS e.a. and Melitta France SAS e.a. v Ministre de l'Écologie, du Développement durable et de l'Énergie*, Joined Cases C-313/15, C-530/15, ECLI:EU:C:2016:859.

[48] ECJ, 26 July 2017, *ArcelorMittal Atlantique and Lorraine SASU v Ministre de l'Écologie, du Développement durable et de l'Énergie*, C-80/16, ECLI:EU:C:2017:588.

[49] ECJ, 15 July 2021, *Fédération bancaire française v Autorité de contrôle prudentiel et de résolution (ACPR)*, C-911/19, ECLI:EU:C:2021:599.

the last reference for a preliminary ruling on validity gave rise to an interesting ruling, confirming the contribution of this mechanism to the general case law of the Court. In the judgment of 15 July 2021, *Fédération bancaire française v. Autorité de contrôle prudentiel et de résolution (ACPR)*,[50] the Court of Justice ruled on the Union acts that may be the subject of a reference for a preliminary ruling on validity, considering that they may also be non-binding acts, such as guidelines issued by the European Banking Authority, the approach of Article 267 TFEU being distinguished from that of Article 263 TFEU, and this judgment recalled the conditions for admissibility of a reference for a preliminary ruling on validity, as regards the applicants: whereas a preliminary ruling on validity is not accessible to an applicant that would have standing for a direct action for annulment, the applicant does not have to prove, during the action before a national court and the objection of illegality raised, that the act is of direct and individual concern to them.

Finally, to complete the study of preliminary references on validity triggered by the French administrative court, we can mention the case of the 2018 ECJ ruling on mutagenesis organisms.[51] This judgment has been widely noted as bringing an important limit to the commercialisation of GMOs. However, the contribution of the judgment, which decided to include organisms obtained by mutagenesis in the category of GMOs, and therefore in the scope of EU regulation, results from the answer given to the Court of Justice on the question on interpretation requested by the French Council of State. However, here, the Council of State had also requested a preliminary ruling on validity, seeking a review of Articles 2 and 3 of Directive 2001/18 in relation to the precautionary principle. According to the Court of Justice, such a review had become unnecessary because of the interpretation given by the Court of the Union. Indeed, the question of validity used to have an interest if the Court would have considered that mutagenesis organisms would not fall within the scope of the Directive. Thus, the purpose of the reference for a preliminary ruling on validity would potentially have been to seek increased protection of human health by EU law, but this judgment could confirm the secondary interest in the preliminary reference on validity, compared to the preliminary reference on interpretation. Interpretation has priority over validity review, since the former makes it possible to preserve the existence of the Union norm. In addition, in the case of a preliminary ruling on interpretation, the Court has developed a dynamic interpretation of Union law. This is especially the case in the field of environmental and human health protection. Indeed, the existence of guiding principles, such as the precautionary principle, gives the European Court of Justice a certain room to manoeuvre while interpreting of EU norms, 'in the light of the precautionary principle', as the saying goes. In the aforementioned ruling, the Court of Justice clearly makes a constructive interpretation of the 2001 Directive, an updated interpretation in a way,

[50] ECJ, 15 July 2021, *Fédération bancaire française v Autorité de contrôle prudentiel et de résolution (ACPR)*, C-911/19, ECLI:EU:C:2021:599.

[51] ECJ, 25 July 2018, *Confédération paysanne and Others v Premier ministre and Ministre de l'agriculture, de l'agroalimentaire et de la forêt*, C-528/16, ECLI:EU:C:2018:583.

because mutagenesis techniques were not particularly developed at the time the Directive was adopted.

An analysis of the case law of the Court of Justice on references for preliminary rulings on validity is an important first step in understanding the practice of the administrative courts and its effects. This level of analysis may be regarded as the positive side of the reference for preliminary rulings on validity, namely when the national court has enforced it. In order to complete the picture, it is necessary to analyse the practice from the national level. From this point of view, the negative side, when no reference for a preliminary ruling on validity has been made, becomes visible.

2 Analysis of French Administrative Case Law: The Case of Judgments Refusing to Refer a Preliminary Ruling

The analysis of domestic case law is necessary because of the very small number of references for preliminary rulings on validity to the Court of Justice. This analysis will help to identify why a reference is not made. The submitted analysis of French administrative case law focuses on judgments handed down by administrative courts, administrative courts of appeal and the Council of State, in which a plea concerning a request for a preliminary ruling on validity was raised, but no reference was made. The aim is therefore to present and discuss reasons for refusal, if any. A qualitative approach is adopted, while referring to rulings reflecting the main trends followed by the French administrative courts.

What can be noted first is that pleas aiming to raise the invalidity of a Union standard are quite regularly present among those submitted by applicants. This may be explained by the main purpose of appeals before the administrative judge, which is to review the legality of administrative acts. The argument relating to the invalidity of a Union standard is then invoked as part of the pleas raised to challenge the legality of the national administrative decision. Moreover, the procedure before the French administrative court is mainly a written one, which favours a practice of the applicants which consists of listing all the possible arguments, without always developing them with the same intensity. In this context, the exception of illegality of a Union norm is an argument frequently raised, but often insufficiently developed for the administrative judge to pay particular attention to it. As such, in most cases, the French administrative does not even respond to it. Apart from the case of an unsubstantiated plea, there are various reasons for the administrative court to refuse to make a reference for a preliminary ruling on validity.

First, rarely, the administrative court considers the application to be inadmissible because of the status of the applicants. Going before the national court may be a way of compensating for the limited direct access to the EU courts. According to the *TWD* ruling,[52]

[52] ECJ 9 March 1994, *TWD Textilwerke Deggendorf GmbH v Bundesrepublik Deutschland, C-188/92*, ECLI: ECLI:EU:C:1994:90.

the admissibility of a reference for a preliminary ruling on validity is conditional on the inadmissibility for the same applicants of the action for annulment against the allegedly invalid act, based on Article 263 TFEU. The administrative judge is then competent to assess the admissibility of the reference for a preliminary ruling on validity requested by the applicants. The Administrative Court of Appeal of Paris considered that, although the action for annulment had been declared admissible by the Court of First Instance against a decision of the Commission related to State aid, it was admissible for the applicants to ask for a preliminary ruling on validity. Indeed, in this case, the Court of Justice had declared direct action inadmissible at the appeal stage. By referring to these rulings, the administrative court of appeal was able to declare admissible the reference for a preliminary ruling on validity requested by a company to challenge the legality of the Commission's decision, even if, in this case, the judge did not send a preliminary ruling to the ECJ.[53]

Another ground for refusal of reference is when the question raised is regarded as not relevant to the dispute.[54] Besides, a reference for a preliminary ruling on validity is refused is when the contested national act is annulled on another basis, in particular because of a violation of a domestic norm, which, for the judge, makes it unnecessary to refer to the Court of Justice.

Furthermore, the national administrative court relies on the absence of a serious difficulty in assessing the legality of the Union norm to justify the non-referral to the Court of Justice. Indeed, the national judge, whose decision is subject to appeal, has the possibility of not referring a preliminary ruling on validity if the question does not raise any difficulty regarding the assessment of its validity.[55] It is a transposition of the *acte clair* theory, applicable to the preliminary ruling on interpretation. However, its enforcement concerning the *validité claire* seems to be delicate. Indeed, while considering that the validity of an EU norm is evident, the border is narrow and the effective review of the legality of the EU norm is close. In order to review the merits of the request for a preliminary ruling, the administrative judge systematises the consideration of the argument relating to the exception of invalidity of the Union norm by recalling the scope of their obligations under Union law. The administrative court quotes the relevant case law of the Court of Justice, namely the *Foto-Frost* and *UPA* judgments. Thus, the powers of the national judge are based

[53] Administrative Court of Appeal of Paris, 10 July 2018, 16PA03523.

[54] Council of State, 2 October 2006, 277722: 'Considering that, contrary to what is maintained by the applicant, the question of the validity of the regulation of the European Parliament and of the Council of 31 March 2004 and of the interpretation of its article 15 has no bearing on the solution of the present dispute; that, therefore, the conclusions tending to have a preliminary question referred to the Court of Justice of the European Communities can, in any event, only be rejected;'.

[55] ECJ, 22 October 1987, *Foto-Frost v Hauptzollamt Lübeck-Ost*, 314/85, ECLI:EU:C:1987:452, para 14: 'Those courts may consider the validity of a community act and, if they consider that the grounds put forward before them by the parties in support of invalidity are unfounded, they may reject them, concluding that the measure is completely valid. By taking that action they are not calling into question the existence of the community measure.'

on the system of legal remedies, noting that 'as the Court held in its judgment of 25 July 2002 in *Unión de Pequeños Agricultores* (Case C-50/00), the Treaty established a complete system of remedies and procedures intended to ensure the review of the legality of the acts of the institutions of the Union.' Moreover, the judge recalls the scope of their powers as regards the assessment of the validity of a Union regulation, noting 'that, on the one hand, as the Court of Justice of the European Union held in its judgment of 22 October 1987 in *Foto-Frost v Hauptzollamt Lübeck-Ost* (aff. 314/85), while the national courts may review the validity of an act of the institutions of the Union and, if they do not consider the pleas of invalidity put forward by the parties before them to be well-founded, reject those pleas by concluding that the act is fully valid, they do not, on the other hand, have jurisdiction to declare those acts invalid themselves.'[56] Thus, the limit of the national court's power lies in the finding the illegality of the Union norm, since it has consequences for the existence of the norm. Thus, only the Court of Justice can call into question the validity of the norm within the Union legal order. The national court can therefore refuse to refer the question on validity if the legality of the EU norm is evident. The division of roles, as established by the Court of Justice, ultimately gives the national court a wide margin of appreciation in deciding whether to make a reference for a preliminary ruling on validity, especially when its decision is subject to appeal. In the case of a court where its decision is not subject to appeal, the position is more delicate and the margin of assessment more limited.

However, at the stage of assessing the relevance of bringing a case before the Court of Justice, the national court may find itself in the position of the European judge, and almost replace it, given that it assesses the legality of the Union norm. Indeed, the national court has considerable latitude in finding whether the difficulty is serious or not. Generally, to reject the request for a preliminary ruling on validity, the administrative court relies heavily on the rulings and even on the reasoning of the Court of Justice itself.[57] The idea is that such a reference reveals that there is no serious difficulty to assess the legality of the norm. It is particularly easy when the European judge had intervened in similar cases. [58] Such a case is quite common, particularly in the field of state aid.[59] In other cases, following the same approach, the administrative court may refuse to make a reference for a preliminary ruling on validity, whereas preliminary rulings have already been made in other cases, even though the reference is on interpretation of EU law.[60] For example, the Council of State mentioned that the British High Court already referred a question to justify the refusal to ask itself to the Court of Justice, in the context of an emergency procedure. Indeed, in this case, one may

[56] Administrative Court of Appeal of Paris, 10 July 2018, 16PA03523.

[57] See for example Administrative Court of Appeal of Paris, 10 July 2018, 16PA03523, referring to case C-33/14 P.

[58] See for example Administrative Tribunal of Nantes, 17 May 2016, n° 1008276.

[59] Administrative Court of Appeal of Paris, 10 July 2018, 16PA03523, Administrative Tribunal of Nantes, 17 May 2016, n° 1008276

[60] Council of State, 21 April 2017, 392317.

assume that when the final ruling would be handed by the French administrative judge, the ECJ would have adopted its own ruling on the question on validity.[61]

While considering the seriousness of the plea related to the invalidity, the position of the national court may sometimes be ambiguous, and the border related to its lack of competence to decide on the invalidity of the EU norm, is thin. Indeed, in some cases, the supreme administrative Court seems to enforce the review of the legality of the EU norm. For example, in the case of 13 April 2018, the Council of State has thus assessed the Commission's exercise of its state aid control function.[62] Then, the reasoning is quite long in comparison with the classic style of rulings, and the reasoning of the Council of State is the implementation of a judicial review. Another example is the ruling of 6 October 2021 where the Council of State reviews the validity of Article 54 of Directive 2018/1972 establishing the European Electronic Communications Code, not only in relation to the Aarhus Convention, but also to Articles 11 and 191 TFEU, and specially the precautionary principle.[63] Here, the Council of State ruled also on the direct effect of the Aarhus Convention, ratified by the EU. Thus, the assessment of the absence of serious doubt concerning the validity of an EU norm should not be understood as referring to a limited review of its manifest illegality. If it is not a full review, comparable to that of the Court of Justice itself, it is still a detailed review for the national stage.

Finally, another way of avoiding referral to the Court of Justice is for the administrative court to use the method of *interprétation conforme*, to finally circumvent the request for a preliminary ruling on validity. In the ruling of the Administrative Court of Strasbourg of 21 January 2016, the national judge interpreted Article 39 of Council Regulation 889/2008 on organic production and labelling of organic products, whereas the applicants asked for a preliminary ruling on validity. It considers that this provision shall be interpreted as requiring that tethered animals must have access to open air areas at least twice a week,

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[61] Council of State, Ord., 29 October 2003, 260768: 'Considering therefore that the enforcement of the provisions of Article 4 of the Decree of 1 August 2003 should be suspended; that, on the other hand, there is no need to refer to the Court of Justice of the European Communities for a preliminary ruling on the validity of the Directive of 28 January 2002, since the High Court of Justice has provided for a preliminary ruling with the same scope as that which could result from the present applications'.

[62] Council of State, 13 April 2018, 412098: 'it results from the decision of 5 May 2017 that the Commission, contrary to the applicants' contention, examined compliance with the transparency obligations imposed on the Member States by points 104 to 106 of its guidelines. The plea that it vitiated its decision with a manifest error of assessment on that point is not accompanied by sufficient details to enable its merits to be assessed'; see also Council of State, 9 March 2016, 384092.

[63] Council of State, 6 October 2021, 446302: 'The applicants argue that the insufficient number of studies on the available 5G frequency bands and the doubts about its health effects should have led to the non-adoption of Article 54, Despite the uncertainties and scientific studies on this subject, which are not the subject of any consensus in view of the current state of scientific knowledge available, it does not appear that compliance with the precautionary principle would require, in addition to compliance with the limit values for exposure to electromagnetic fields, additional protective measures against a risk linked to the use of 5G technology. In those circumstances, the pleas alleging disregard for the precautionary principle and the protection of human health must be rejected'.

where access to pasture is not possible.[64] Such interpretation is complying with the labelling requirements, and therefore considers that it is not necessary to accept the applicants' request to refer the matter to the Court of Justice for a preliminary ruling on validity.

V Conclusion

The essential role of the national judge in the process of European integration no longer needs to be demonstrated. The national court is the decisive relay for the day-to-day application of Union law. Although the tensions surrounding the use of the preliminary ruling on interpretation have gradually diminished, especially on the part of the supreme courts, the use of the preliminary ruling on validity remains specific and seems to fall within the scope of powers of the national court, especially in the case of a national court such as the French administrative court, the competence of which is to review the legality of national rules. In this context, the triggering of a reference for a preliminary ruling on validity may be perceived as encroaching on its traditional function, which may explain the development of ways of avoiding referring to the Union court.

Could we really speak of attempts from the French administrative judge to circumvent or avoid the obligation to make a reference for a preliminary ruling on validity? This is not certain. Rather, it is a matter of the national court finding ways of fulfilling its function, i.e. of reviewing the legality of the national act submitted to it, since the reference to the Court of Justice may be only one means among others to review the illegality of the national norm. Obviously, the administrative judge may be more inclined to preserve the control of legality, and to exploit to the maximum the means that limit the dispute to their own courtroom. On top of that, the national court tries to favour the quickest means of action, bearing in mind that referral to the Court of Justice will lead to a suspension of the proceedings for at least ten or fifteen months.

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[64] Administrative Tribunal of Strasbourg, 21 January 2016, 1404968 : '[...] that the aforementioned provisions of Article 39 of Regulation (EC) No 889/2008 require that, when they are tethered, cows must have access to an open-air area at least twice a week, in order to promote their welfare; however, these provisions cannot be interpreted as requiring cows to be kept outside at least twice a week, even in the event of climatic conditions or the state of the ground that do not allow them to be taken outside or make it particularly difficult, which would run counter to the intended purpose; that this interpretation appears to be in conformity, on the one hand, with recital 21 of Regulation (EC) No 834/2007, which recommends flexibility "to allow for the adaptation of biological standards and requirements to local climatic or geographical conditions" and, on the other hand, with Article 14(1)(b)(iii) of the same text, which generally makes permanent access to open-air areas subject to the condition that "climatic conditions and the state of the ground so permit"; that, consequently, and without there being any need to refer this point to the Court of Justice of the European Union for a preliminary ruling, in the absence of any serious difficulty, the obligation laid down by the provisions of the aforementioned Article 39 of Regulation (EC) No 889/2008 must be understood as requiring livestock farmers to give their herds access to an open-air area at least twice a week, subject to climatic conditions or the state of the ground not allowing them to be moved out effectively'.

The limited practice of referring questions for preliminary rulings on validity should not lead to question the interest, nor the importance of the relationship between the national court and the Court of Justice. Its contribution to the Rule of Law in the Union's legal order is essential. However, its enforcement remains very random, depending on parameters that are beyond the judge's control in most cases (requests from the parties, quality of the arguments submitted, etc). It is true that concentrating on references made by the administrative courts leads to a certain bias, since certain areas do not appear, which does not mean that they are not dealt with in the context of preliminary rulings on validity. And this study should be extended, both to other judges and to other Member States, since the promotion of the Rule of Law must be assessed globally within the Union's legal order. However, also because of the temporal dimension, since a reference for a preliminary ruling on validity possibly leads to a review of the legality of a Union regulation a long time after its adoption, the reference for a preliminary ruling on validity cannot be seen as a fully adequate way of compensating for the restrictive nature of the conditions of access to the Union courts by way of an action for annulment. A change in the interpretation of standing requirements is undoubtedly desirable, but it cannot be expected solely from the court itself, based on the development of the *Plaumann* case law. It will also require the allocation of additional resources to the Court of Justice, and even changes in its functioning, in order to cope with a potential increase in litigation, while remaining compatible with the requirements of the Rule of Law and effective judicial protection.

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EU Cities Fighting for Cleaner Air with Low-Emission Zones within the EU's Single Market: Future Green Actors or 'Victims' of Procedural Constraints?**

Abstract

The 2015 Dieselgate scandal led to a substantial re-regulation of the EU's emission limits for vehicles. Parallel to that, several member states, especially major European capitals, introduced further environmental measures against air pollution. Among them there were low-emission zones to guarantee cleaner air in formal terms, but they had no vehicle-type approval competences within the single market. In the appeal case before the Court of Justice of the EU, the General Court's (GC) former judgment was set aside, the latter procedure was initiated by three EU capitals against the Commission's specific waiver. The capitals raised their concerns that the Commission's regulation effectively precluded their regulatory power to restrict the movement of certain highly polluting cars within their already created low-emission zones.

In contrast to the GC's approach in dealing with lack of the Commission's competence to issue such a waiver, the Court only referred to the non-fulfilment of the formal requirements by the capitals as plaintiffs, without dealing with the merits of the case. This formal approach goes back to the early days of European integration on restricting individuals' standing rights, while merely focusing on the lack of cities' type approval competences following the strict separation of EU policy areas. This article argues that there is a clear need to reconsider the Court's formal approach by adapting to the new realities of European integration. These realities include the emerging relevance of EU-level protection of fundamental rights in a more sector-neutral way. Additionally, a substantial 'green U-turn' can be identified at national level, as the courts are allowing a broader way of enforcing the green rights in the recent years.

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I Introduction

In the Judgment on Appeals brought by the Federal Republic of Germany (C-177/19 P), Hungary (C-178/19 P) and the Commission (C-179/19 P), the European Court of Justice (hereinafter: ECJ or Court) set aside the judgment of the General Court (hereinafter: GC) dating back to 2018. The GC's judgment annulled the Commission's regulation, which allowed a waiver for certain car emission limits specified by EU standards and reregulated after the Dieselgate scandal of 2015. According to three EU capitals as plaintiffs, this waiver by the Commission effectively precluded their regulatory power to restrict the movement of certain polluting cars within their already erected low emission zones. However, in its reasoning, the Court relied entirely on the non-fulfilment of the formal requirements by the capitals as plaintiffs without dealing with the merits of the case on the contested modification of emission targets by the Commission. In the background lie several rulings of the Court, commonly known as the 'Plaumann test', which introduced the restrictive criteria of individuals' standing rights. This article argues that the Plaumann test should be reinterpreted due to the emerging relevance of the EU-level protection of fundamental rights and guarantees in a more sector-neutral way. Moreover, the new green wave of litigation led to cases, in which the national courts reconsidered allowing a broader way to enforce the green rights.

II Diverse Interpretation of EU Capitals' LEZ Regulatory Powers

1 The General Court's Judgment on Annulment of the Commission's Waiver Provisions

The case concerned the EU's longstanding struggle to regulate the type-approval of light-duty vehicles while ensuring the stricter emission requirements for the protection of Union citizens' health. In this annulment action launched by the cities of Paris, Brussels and Madrid before the General Court (GC), the plaintiffs claimed that the Commission was not entitled to modify the nitrogen oxides (NOX) emission values by making them less stricter compared to the applicable Euro 6 standard.

A multi-layered set of EU norms has been enacted over the last decades to establish a harmonised framework for the approval of motor vehicles in order to facilitate their common registration, sale and entry into service, especially within the single market. According to Directive 2007/46, the car manufacturer is responsible for the (national) approval process

at the national regulatory authority, including all aspects of the approval process and also for ensuring conformity of production.

Several other provisions have also been added to the directive, concerned with technical details such as conformity requirements, including the Commission's emission requirements on the Euro 6 emission limits. The enforcement and supervision of the common EU provisions are mainly based on the activity of national-level authorities.

The shortcomings of this regulatory system, combined with the deficiencies of the enforcement side, were revealed during the so-called Dieselgate of 2015.[1] The software of several diesel-engine models of a number of car manufacturers could detect when the models were being tested and adjust the car's emissions accordingly to minimum requirements. The European Parliament's Inquiry Report pointed out faults, such as main failures in testing procedures, the fraudulent practice of using defeat devices, serious systemic concerns about the EU's type-approval and in-service conformity provisions and the lack of real EU-level powers related to enforcement and penalties for breaching the Directive.[2] However, the EU's response remained relatively weak and mainly focused on reformulating the existing related EU legislation.

This new wave of regulations led to the replacement of the former New European Driving Cycle (NEDC) with the new real driving emission (RDE) testing cycle. However, the post-scandal measures also included the contested Regulation 2016/646 of the Commission.[3] This 2016 Regulation granted some kind of a technical waiver by the Commission regarding the limits prescribed by the Euro6 standard using applied correction coefficients based on statistical and technical uncertainties during RDE tests. This regulation had a crucial impact on the regulatory powers of the three capitals to ban or restrict certain cars within their low-emission zones (LEZ), as they could not include vehicle types meeting the NOX limits modified by the contested regulation.

The individuals – just like cities in this regard – in the actions for annulment before the CJEU only have restricted standing rights. The well-elaborated case law of the Court called the Plaumann test required individuals, as non-privileged plaintiffs, to have a direct and individual concern as standing requirements. Several judgments cited below in the case law elaborated on how direct and individual concern shall be interpreted.[4] These standing requirements have also been reformulated by the Lisbon Treaty. Lisbon's primary law, namely Article 263(4) TFEU[5] has broadened standing rights to a certain extent by

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1 Marco Frigessi di Rattalma, Gabriella Perotti, 'European Union Law' in Marco Frigessi di Rattalma (ed), *The Dieselgate – A Legal Perspective* (Springer International Publishing 2017, Cham) 179–217.

2 European Parliament (2017): Report on the inquiry into emission measurements in the automotive sector [2016/2215(INI)].

3 Commission Regulation (EU) 2016/646 of 20 April 2016 amending Regulation (EC) No 692/2008 as regards emissions from light passenger and commercial vehicles (Euro 6) [2016] OJ L 109.

4 Herwig C. H. Hofman, Gerard C. Rowe, Alexander H. Türk, (eds), *Administrative Law and the Policy of the European Union*, (Oxford University Press, Oxford, 2011) 829–841.

5 Consolidated version of the Treaty on the Functioning of the European Union [2016] OJ C 202.

eliminating the restrictive criteria of individual concern with regard to certain regulatory acts that only require private applicants (individuals) to have a direct concern. This applies to regulatory acts not entailing further implementing measures – even if these terms are subject to further reinterpretation cycles in the case-law.[6]

In its reasoning, the GC also dealt with the formal standing requirements in Article 263(4) TFEU. It was found that the actions of the cities were admissible as not requiring further implementing measures (paras. 38–40), while it also pointed out the direct effect in the legal position of the three capitals. These capitals had already introduced a diverse set of measures including LEZs to fight air pollution within their territory. Moreover, these public entities' regulatory powers had been limited by the contested regulation as a clear direct effect (paras. 74-76). The GC also concluded that traffic restrictions concerning the level of vehicle pollutants, adopted by public authorities that are emanations of the Member States, run counter to the requirements of EU law, insofar as they apply to vehicles compliant with the most recent standards and limits, and the Court held that that was indeed the case (paras. 81-84). Additionally, the GC also pointed out Directive 2007/46 as the relevant legislative act, which prevented the public authorities of the Member States from prohibiting, restricting or impending the road movements of vehicles on grounds related to aspects of their construction and functioning covered by the Directive (paras. 50–77.)

As for the merits of the case, the GC noted that the Commission's contested regulation was adopted as a measure implementing Regulation No 715/2007, relying on the provisions of that regulation, which enable the Commission to determine the specific procedures, tests and requirements for type approval. As a result, the Commission had the power to adopt such measures related to the NOX emission limits (paras. 112-114).

Nevertheless, the question to be answered was how broadly this regulatory power could be extended, notwithstanding the potential modification of the regulation by Union legislators. In this regard, the GC clarified that the Commission had no power to amend those emission limits in RDE tests by applying correction coefficients, especially by making it impossible to know whether the Euro 6 standard is complied with during RDE tests (paras. 119-145). Consequently, the Commission did not have the power to amend the Euro6 emission limits for the new RDE testing cycles.

[6] Somssich Réka, 'Magánszemélyek kereshetőségi joga tíz évvel Lisszabon után: teljes vagy hiányos a jogorvoslati rendszer?' in Bartha Ildikó, Fazekas Flóra, Papp Mónika, Varjú Márton (eds), *Hatékony jogvédelem az Európai Unió jogában – Tanulmányok Várnay Ernő 70. születésnapja tiszteletére* (Társadalomtudományi Kutatóközpont 2021, Budapest) 102–125.

2 The Court's Judgment[7] with Mere Focus on Inadmissibility Requirements

The Court's judgment on appeals originally brought by the Federal Republic of Germany (C-177/19 P), Hungary (C-178/19 P) and the Commission (C-179/19 P) interestingly focused on the admissibility requirements without paying further attention to the merits of the case. Consequently, the Court exclusively dealt with the two cumulative elements of Article 263(4) TFEU, namely the direct effect on the cities combined with the analysis of the need for further implementing measures.

The Court's conclusion was that within the meaning of Article 263(4) TFEU the applicant cities had no direct concern in relation to Article 4(3) of Directive 2007/46.

The Court also analysed the Directive as a framework-type legislative act, laying down the general competences in the type approval processes, yet with a different outcome compared to that of the GC's argumentation.

Article 4(3) of the Directive 2007/46,[8] which was already repealed in 2018, formulated positive as well as negative obligations on type approval processes. According to subparagraph (1) 'Member States shall register or permit the sale or entry into service only of such vehicles […] as satisfy the requirements of this Directive'.

Additionally, subparagraph (2) formulates the negative side of the obligation, as 'They (Member States) shall not prohibit, restrict or impede the registration, sale, entry into service or circulation on the road of vehicles' on grounds related to aspects of their construction and functioning covered by this Directive, if they satisfy the requirements of the latter.

The Court thoroughly analysed these provisions in the light of their wording and context as well as objectives – combined with their legislative history.

First, regarding the wording of the negative obligation (prohibition) on restricting the 'circulation on the road' of certain vehicles, the Court concluded that that provision covered not only the circulation of vehicles in the territory of a Member State but also other activities, such as the registration, sale and entry into service of vehicles. Therefore, these restrictions are meant to serve as a general barrier to access to the vehicle market without any intention of *'cherry picking'* certain elements, with the main focus on the prohibiting the circulation of certain vehicles (paras 83-84).

Second, the Court dealt with the context of the provision concerned. It stressed the complementary nature of the positive/negative obligations. Contrary to the interpretation adopted by the GC, the scope of the negative obligation cannot be wider than the scope of the positive obligation, as the positive side did not mention the *'circulation on the road'*

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[7] Joined Cases C-177/19 P to C-179/19 P *Federal Republic of Germany and Others vs. European Commission*, EU:C:2022:10.

[8] Directive 2007/46/EC of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles (Framework Directive) (Text with EEA relevance) [2007] OJ L 263/1.

of certain vehicles. Moreover, the applicant cities did not have any powers in relation to vehicles' type approval (paras 85–86).

Third, the objective pursued by Directive 2007/46 combined with its legislative history focused on the establishment of a uniform procedure for the approval of new vehicles and, by extension, on the establishment and functioning of the internal market without the objective of extending the scope of the legislation on vehicles' type approval (paras 87–93).

The Court also rejected the line of arguments that an action for failure to act or infringement proceedings may be brought against the related Member States without the measures adopted by the cities in line with the related clean air and environmental requirements. Therefore, the Court has dealt with the case's environment-related issues and single market-related regulatory powers of the cities instead of separated from each other (paras 94–103).

In the view of the Court, as a final conclusion, the GC erred in law, as the applicant cities had no direct concern in relation to the regulation, within the meaning of Article 263(4) TFEU. This interpretation leads us to whether the Plaumann test's formal requirements should be upheld, especially in the era of climate change-related challenges and the EU's green transition.

III Critical Remarks on the Court's Reasoning

1 Still Restrictive Approach Regarding Standing Requirements

The Court's judgment is a clear manifestation of its reluctance to introduce the extended way of individual judicial protection by reinterpreting the formal requirements of the Plaumann test, which has been enacted in the form of Article 263(4) TFEU as part of the EU's primary law.

Upholding the Plaumann test can be explained in different ways, including (1) the absence of CJEU competence to modify the test's requirements embedded in the TFEU, (2) the less strict 'approach' followed by the Court in certain policy areas, (3) the test's special role in reinforcing the fundamental structure of the European Union's judiciary.

First, the general rule of *'praetor ius facere non potest'* still prevails in the European Union's judiciary as well. Hence, the provisions of the Treaties, such as Article 263(4) TFEU are not to be amended by the ECJ.

However, the Court itself reinterpreted or extended the interpretation of the Treaties to safeguard the EU-level procedural requirements and guarantees, even concerning the formal requirements of the annulments. In the *Les Verts* judgment, the European Parliament's acts were acknowledged as the subject of annulments, as 'a complete system of legal remedies and procedures had to be guaranteed' within the EEC Treaty's rule of law requirements.[9] This

[9] Case C-294/83 *Parti écologiste ‚Les Verts» v European Parliament*, EU:C:1986:166. paras 22-23.

circle of reviewable acts has been further extended to EU agencies' acts in the *Sogelma* by referring to the procedural requirements towards a community-based on the rule of law.[10] In the Chernobyl judgment, the Court used a broader interpretation in order to include the European Parliament acting to protect its prerogatives.[11] According to Eliantonio and Stratieva the reinterpretation of the Treaties without formal amendment could confirm the rational choice theory. The Court acted in favour of the European Parliament as a mere redistributor of powers in line with the interests of the Member States. Its choice has been later endorsed by the Member States in the form of the next Treaty revision, which was extended to the EP. [12]

In general, the standing requirements as a provision of the TFEU cannot be considered as an absolute constraint, as the Treaties have been amended by the ECJ many times, even in relation to annulment procedures as described above. Moreover, the Court has always emphasized the role of citizens (even collectively) since its *Van Gend & Loos* judgment in order to enforce community law against the not necessarily loyal national administration.[13] Therefore, the EU uses the wider access to justice for citizens before national courts as a tool to facilitate the enforcement of EU law concerning several policy areas.[14] In contrast, the standing right of individuals (in this regard, cities or green NGOs also included) before the ECJ remained restricted.

Second, there are certain policy areas in which the ECJ followed a much more flexible approach to the test's formal requirements. This test was originally formulated in the Common Agricultural Policy (CAP) cases of the 1960s, which included technical details embedded in the regulatory acts of the Commission. Craig pointed out that the ECJ refused to broaden the individuals' standing rights in cases related to the CAP, since the Commission itself could not adopt a margin of discretion to the market measures.[15] In contrast, the ECJ started to take a more flexible approach in competition-related cases due to the preliminary

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[10] Case T-411/06, *Sogelma – Societá generale lavori manutenzioni appalti Srl v European Agency for Reconstruction (AER)*, EU:T:2008:419, para 37.

[11] Case C-70/88, *European Parliament v Council of the European Communities*, EU:C:1990:217, para 26.

[12] Mariolina Eliantonio, Nelly Stratieva: From Plaumann, Through UPA and Jégo-Quéré to the Lisbon Treaty: The Locus Standi of Private Applicants Under Article 230(4) EC Through a Political Lens (January 21, 2010), (2009) 5 (13) Maastricht Faculty of Law Working Paper 43–57.

[13] Bruno de Witte, 'The Impact of *Van Gend & Loos* on Judicial Protection at European and National Level: Three Types of Preliminary Questions' in Court of Justice of the European Union in Court of Justice of the European Union (ed), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013)*, Conference Proceedings, Luxembourg, 13th May 2013 (CJEU 2013, Luxemburg) 95–96; Joseph Weiler, 'Revisiting Van Gend & Loos: Subjectifying and Objectifying the Individual' in Court of Justice of the European Union (ed), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013)*, Conference Proceedings, Luxembourg, 13th May 2013 (CJEU 2013, Luxemburg) 13–14.

[14] Bernhard W. Wegener, 'Rechtsschutz für gesetzlich geschützte Gemeinwohlbelange als Forderung des Demokratieprinzips?' HFR 2000, Beitrag 3, <http://www.humboldt-forum-recht.de/druckansicht/druckansicht.php? artikelid=35> accessed 5 August 2022.

[15] Paul Craig, 'Legality, Standing and Substantive Review in Community Law' (1994) 14 (4) Oxford Journal of Legal Studies 507–537.

administrative procedure before the Commission, where the procedural rights of the parties involved had been acknowledged in the case law of the Court and later by the EU's secondary legislation.[16] In general, the ECJ seemed to be less reluctant to guarantee standing rights for those parties who were involved in the preliminary administrative procedure-like phase before the Commission.[17]

As for the case concerned, in the environmental sector the standing rights of individuals, especially green NGOs, have not been acknowledged either,[18] even if this could be derived from the EU's international obligation as being a party to the Aarhus Convention[19]. The Convention, as a so-called mixed agreement, has been ratified by the EU, which resulted in the so-called Aarhus Regulation.[20] This latter normative act introduced an administrative procedure-like phase at EU level in environmental cases. However, due to the related case-law of the ECJ, NGOs were only entitled to challenge the EU acts based on the infringement of their procedural rights.[21] Even if the most recent amendment of the Aarhus Regulation[22] could lead to some positive changes, it is still up to the Court to reconsider broadening private plaintiffs' standing rights in environmental cases.

Dieselgate did not lead to substantial changes in terms of establishing an administrative procedure-like phase in relation to road transport either. The Union legislator focussed instead on providing some increased powers for the Commission, combined with the creation of an implementation forum inside the Commission's structures, while new requirements towards national authorities were formulated.[23] Nevertheless, no new EU road transport agency has been created, even if such a proposal was initiated by the European Parliament in light of the

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[16] In state aid law see as most recent case-law reference Case C-99/21 P, *Danske Slagtermestre v European Commission*, EU:C:2022:510, para 55.

[17] Richard Whish, *Versenyjog* (HVG-ORAC Kiadó 2010, Budapest) 242–281; Tóth Tihamér, *Az Európai Unió versenyjoga* (Complex Kiadó 2007, Budapest) 605.

[18] Gombos Katalin, Sziebig, Orsolya Johanna, *Az európai környezetvédelmi szabályozás legújabb irányai* (Ludovika Egyetemi Kiadó 2021, Budapest)

[19] *United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, signed 25 June 1998, UNTS 2161 (entered into force 30 October 2001)

[20] Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies [2006] OJ L264/13.

[21] Justice and Environment: Public Guidance on Practical Application of the Request for Internal Review (Regulation 1367/2006/EC), 2011; [http://www.justiceandenvironment.org/_files/file/2011%20RIR%20Guide%20final.pdf]; accessed: 25th February 2015.

[22] Regulation (EU) 2021/1767 amending Regulation (EC) No 1367/2006 on the application of the provisions of the Aarhus Convention to Community institutions and bodies (OJ L 356, 8.10.2021, 1-7.)

[23] Regulation (EU) 2018/858 of the European Parliament and of the Council of 30 May 2018 on the approval and market surveillance of motor vehicles and their trailers, and of systems, components and separate technical units intended for such vehicles, amending Regulations (EC) No 715/2007 and (EC) No 595/2009 and repealing Directive 2007/46/EC

three already existing other EU agencies for the maritime, railway and air traffic sectors.[24] Instead of creating an administrative procedure-like phase and the related EU-level actor, these type-approval competences have been kept in the realm of the Member States. Consequently, the stricter interpretation of the Plaumann test might prevail in this sector as well.

The Plaumann test's vague nature is also related to the sectoral logics of EU law, combined with the EU-level direct and Member State-level indirect implementation models. The shift towards EU-level direct implementation and the extension of administrative procedure-like phases led to the more flexible interpretation of the Plaumann test in some policy areas. Even after scandals like Dieselgate, vehicle type approval as a policy area belongs to those sectors to which the implementation by EU actors, or at least the spectrum of administrative procedure-like phases, have not been extended. The administrative procedure-like phases related to environmental policy have been reregulated by the amendment of the Aarhus Regulation. However, it is not yet clear whether these amendments will result in any kind of 'green turn' related to the Plaumann test.

Third, the rationale for upholding Plaumann's requirements could also be based on the diverse structures and mandates within the system of the European judiciary. Back in 1980, Rasmussen concluded by investigating the case law of the Court that upholding the test was about to shape a European system of appellate jurisdiction. Therefore, the Plaumann test's restrictive interpretation was intended to keep most of the cases initiated by individuals at the level of the Member States.[25] According to Eliantonio and Stratieva, this motive of the ECJ is confirmed by the historical institutionalism theory, referring to the growing self-interest of the Court regardless of the Member States, as the Court might protect itself against the overload of litigation over individuals' restricted standing rights. [26] Structurally, Leanerts also referred to the later creation of the Court of First Instance, which could also be seen as a preliminary filter, while its competences have kept on broadening since its establishment.[27] This theory can also be justified by the failed attempt to reinterpret the Plaumann test by the GC (Court of First Instance) in the *UPA* and *Jégo Quéré* cases. [28] According to Pilafas, the ECJ's intention was clearly in these later judgments to keep the primary judicial level of individuals' rights' protection at the level of the Member States instead of broadening the direct standing rights before the Court.[29]

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[24] Szegedi László, 'The Crisis Management of the 'Dieselgate' – Transboundary (and) Crisis Driven Evolution of EU Executive Governance with or without Agencies?' (2018) (21) Európai Tükör 85–100.

[25] Hjalte Rasmussen, 'Why is Article 173 Interpreted against Private Plaintiffs?' (1980) 5 European Law Review 122–127.

[26] Eliantonio, Stratieva (n 12) 43–57.

[27] Koen Lenaerts, 'The rule of law and the coherence of the judicial system of the European Union' (2007) 44 (6) Common Market Law Review 1650–1658.

[28] Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union*, EU:C:2002:462.; Case C-263/02 P, *Commission of the European Communities v Jégo-Quéré & Cie SA*., EU:C:2004:210.

[29] Christos Pilafas, *Individualrechtschutz durch Nichtigkeitsklage nach EG-Recht – Unter besonderer Berücksichtigung des Wettbewerbsrecht* (Nomos Verlag 2006, Baden-Baden) 256.

In contrast to these intra-institutional conflicts of the early 2000s, the GC has somewhat adopted the Court's restrictive approach in recent years with some exceptions.[30] The GC had declared the Brussels Capital Region's action for annulment inadmissible, which was later confirmed by the Court as not being directly concerned by the contested regulation renewing the approval of the active substance 'glyphosate'. Similar to the case concerned, the Court referred to the lack of competence of the Brussels Capital Region to 'establish product standards' compared to the federal level, which did have this kind of competence under national law.[31]

In terms of the special structure of the European judiciary and of intra-institutional issues, the judgment of the three capitals fits into the line of the *UPA* and *Jégo Quéré* cases to some extent, since the GC's judgment has been set aside based on the formal concern of inadmissibility, while the Court did not even touch on the merits of the case.

To summarise, the Plaumann test, as a fundamental element of the European – or more precisely EU-level – judiciary, cannot be seen as a static interpretation tool in the Court's case-law, as the Court itself also started to take a much more flexible approach to the test's formal requirements. These modifications have been justified in order to guarantee a complete system of legal remedies and procedures, to reflect the changing nature of EU integration, including the dynamics of implementation competences. Even if the Plaumann test still prevails, the more recent 'green shift' of national judiciaries might lead to the Court's reconsideration of the Plaumann requirements.

2 Judicial Activism of the National Courts in the Recent 'Green' Cases

The Court's reasoning tended to focus on the sectoral categorisation of the directive's specific competence provisions by using the interpretative toolbox of analysing their wording, context and objectives. This led to the conclusion of inadmissibility with a narrow focus on the nature of the competence provisions. The high number of recently introduced LEZs relates to the dilemma that such restrictions are applied by cities as environmental measures for reducing emissions in the targeted urban areas. However, these zones in practice restrict the usage of vehicles without the city concerned having type approval or market access competencies within the single market.[32] Moreover, the action dealt with a waiver as a further extension of less stringent pollution requirements, originally restricted to address the fraudulent practices of the Dieselgate.

Regarding the broader inclusion of environmentally relevant aspects, a further concern over the Court's interpretation originates from the new wave of climate change-related strategic litigation. Several courts, inside and outside the EU, have already started to follow

[30] Somssich (n 6) 121.

[31] Case C-352/19 P *Région de Bruxelles-Capitale v European Commission*, EU:C:2020:978.

[32] Justyna Bazylińska-Nagler, 'Harmonization of automobile emission standards under EU law' (2021) 11 (4) The Lawyer Quarterly 585–594.

a much 'greener' approach, as presented below, which makes the Court's approach even more restrictive.

Considering the implementation deficit of environmental interests, or more precisely environmentally relevant interests, new enforcement strategies have emerged.[33] Cities have become key actors of multi-level climate governance, not just at EU level but globally as well.[34]

This involvement also includes an increased number of climate change-related court cases initiated by cities, which has "grown to a point where litigation is considered by many as a governance mechanism for addressing climate change'.[35] Potential plaintiffs from cities and NGOs form alliances to share the resources and capacities required as part of strategic litigation, while city networks could also be more active as green actors. Most of the recent cases are mainly initiated to compensate damages based on corporate actors' contribution to global warming. New lawsuits against major oil companies have been initiated in the USA since 2017 to seek compensation for the related damages.[36] An alliance of 14 French local governments and 5 NGOs filed a complaint against the energy company Total in January 2020.[37] From the side of the plaintiffs, the case concerned before the ECJ involving three EU capitals facing the same dilemma also fits this global tendency of building up an alliance of cities.

As for the EU-related trend of new *'green'* litigation, the judicial review against air quality plans regulated by Directive 2008/50 could also gain momentum in recent years.[38] In Germany, a new wave of lawsuits has been initiated in the 'fight for clean air' – as a result of different elements, namely, (1) the extended right of NGOs to act before the courts, utilised by the German NGO Deutsche Umwelthilfe (DUH), which led to dozens of air quality cases; (2) combined with the striking failure to adopt alternative measures to reduce NOX concentration significantly; (3) the German administrative courts handled the legal cases filed by the DUH by placing great emphasis on health protection and

[33] Viktor Glied, Attila Pánovics, *Fenntartható fejlődés és környezetpolitika a 21. században – Egy paradigmaváltás küszöbén* (Kontraszt Plusz Kft. 2022, Pécs) 166.

[34] Christina Bakker, 'Are cities taking center stage? The emerging role of urban communities as „normative global climate actors"' (2020) 3 Italian Yearbook of International Law Online 81–106.

[35] Setzer Joanna, Byrnes Rebecca, 'Global trends in climate change litigation: 2020 snapshot' (2020) London: Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science, <Global-trends-in-climate-change-litigation_2020-snapshot.pdf (lse.ac.uk)> accessed 28 July 2022.

[36] Bakker (n 34) 101.

[37] The tribunal ruled in favour of the 5 NGOs and 14 local authorities by confirming its jurisdiction, rejecting the Total's attempt to bring the dispute before the commercial court (Order of the Tribunal Judiciaire de Nanterre of 18 January 2021).

[38] Delphine Misonne, 'The emergence of a right to clean air: Transforming European Union law through litigation and citizen science' (2021) 30 (1) Review of European, Comparative & International Environmental Law (RECIEL) 34–45.

compliance with European law.[39] This third element can also be demonstrated by the German Federal Administrative Court's judgments of 2018.[40] These confirmed the legal possibility for German municipalities to introduce driving bans/restrictions on cars, even based on national regulations originally meant to serve as the basis for federally common road transport signals of car type categories.[41] In contrast to the ECJ's reasoning, this step by the German judiciary required some judicial activism in terms of the legal basis. Additionally, the German Federal Constitutional Court has not dealt with the merits of complaints submitted against the municipalities' driving bans/restrictions.[42] The French courts in 2019 opened a different form of strategic litigation in form of state liability cases, as they confirmed that a link must be drawn between state liability and air quality plans as 'prescribed by Directive 2008/50'.[43]

However, the direction of these cases only partly refers to the extension of driving bans or restrictions, while an alternative form of compensation case has also become a more integral part of enforcing green rights. In light of the more deliberative national approaches presented above, the Court's reasoning in the case concerned seems even more rigid. The ECJ's own case-law has become highly relevant at national level, guaranteeing very wide access to the courts, while having its most positive effects by introducing the obligation to provide access and remedies that did not exist before in national law.[44] Additionally, the 'complete system of legal remedies' envisaged by the abovementioned case law can hardly be achieved with this restrictive approach by the Court – especially if this new tendency of strategic green litigation will become even more common at national level.

IV Conclusions and Further Lessons to Be Learned

The Court's reasoning in the present case cannot be seen as a surprise in light of its elaborated case law over the last decades. Only the procedural constraints elaborated in cases initiated by other types of individual plaintiffs have been applied to the cases brought by cities/capitals, which can be considered as a prevailing procedural constraint for them.

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[39] Annette Elisabeth Töller, 'Driving bans for diesel cars in German cities: The role of ENGOs and Courts in producing an unlikely outcome' (2021) 7 (2) European Policy Analysis 486–507.

[40] Rainer Schenk, 'Dieselfahrzeuge raus aus den Städten? – Das Urteil des BverwG' (2018) 5 Juris 202–207; Constantin Beye, 'Die Voraussetzungen zur Anordnung von Verkehrsverboten für Diesel-Kraftfahrzeuge Zugleich eine Einordnung und Bewertung der Urteile des BVerwG v. 27.2.2018 – 7 C 26.16 und 7 C 30.17' (2018) 6 Zeitschrift für das Juristisches Studium 528–539.

[41] Schenk (n 40) 207.

[42] Order of the German Federal Constitutional Court of 1 October 2019 in cases 1 BvR 1789/19, 1 BvR 1799/19, 1 BvR 1800/19, 1 BvR 1801/19, 1 BvR 1802/19, 1 BvR 1803/19, 1 BvR 1804/19, 1 BvR 1805/19, 1 BvR 1898/19

[43] Judgments of Tribunal Administratif de Paris of 4 July 2019 in cases n° 1709333, n° 1810251 and n° 1814405

[44] Rob Widdershoven, 'National Procedural Autonomy and General EU Law Limits' (2019) 12 (2) Review of European Administrative Law 5–34.

Moreover, this element also precludes cities from becoming future green actors in action for annulment cases before the ECJ.

Theoretically, the dilemma refers to the two overlapping areas of EU law, namely type approval of vehicles as an internal market provision in collision with air quality/environmental measures, while the effectiveness of EU law as one of the main functions of the ECJ must be safeguarded as well. In a broader context, this dilemma, combined with the prevailing Plaumann test, also highlights the potential role of the ECJ within the ever-changing framework of integration.

At the beginning of European integration, the ECJ/CJEU had a pivotal role, to a great extent an activist role, in shaping the fundamental doctrines of EC law. The judgments on *Van Gend en Loos* or *Costa v. ENEL* can be considered as the cornerstones of the European legal framework, which have only been later incorporated into the Treaties. In this regard, the general rule of *'praetor ius facere non potest'* has not been strictly applied. Later, the ECJ/CJEU has reinterpreted or extended the interpretation of the Treaties to safeguard EU-level procedural guarantees and rights. Nevertheless, the Plaumann test still restricts the direct standing rights of individuals as non-privileged plaintiffs, among them cities. This has been upheld in the case concerned – regardless of the fact that their regulatory powers have been restricted by the Commission's waiver. The reinterpretation of the test's formal requirements could lead to a more sector-neutral approach from the side of the CJEU in order to guarantee 'a complete system of legal remedies and procedures' as envisaged by the Court itself in its *Les Verts* judgment. This sector-neutrality might become even more substantial, along with the increasing relevance of effective judicial protection as being bindingly codified in the Charter of Fundamental Rights (Article 47 CFR) and laid down by Article 19(1) TEU. Moreover, the CJEU's sector-specific set of guarantees elaborated in its CFR-related case-law on standing rights, as well as on further procedural issues, has an ever-greater cross-sectoral and at the same time sector-neutral relevance.[45]

The former crisis management steps might provide a proper basis for possible adaptation techniques by the CJEU to the new realities of European integration.[46] In the evaluation of the management of the 2008 financial crisis, the CJEU had three different options in social rights-related debates on the crisis management reforms, where the EU only had weak competences. As Barnard concluded, these options included (1) following the old rules of integration (collision doctrines) or (2) the 'old rules-lite' with a focus on the procedural review (3) or total judicial abstinence.[47] Transport policy, just like the environmental

[45] Catherine Barnard, 'EU 'Social' Policy: From Employment Law to Labour Market Reform' in Paul Craig, Gráinne de Búrca, (eds), *The Evolution of EU Law* (Oxford University Press 2021, Oxford 678–720) 697–698; Widdershoven (n 44) 5–34.

[46] Claire Kilpatrick, 'On the Rule of Law and Economic Emergency: The Degradation of Basic Legal Values in Europe's Bailouts' (2015) 35 (2) Oxford Journal of Legal Studies 325–353.

[47] Catherine Barnard, 'Van Gend & Loos to(t) the future' in Court of Justice of the European Union (ed), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013)*, Conference Proceedings, Luxembourg, 13th May 2013 (CJEU 2013, Luxemburg, 117–123) 120–123.

affairs, as overlapping areas in the present case, are shared competences between the EU and Member States. However, it seems that Court followed an approach that combined the old rules, the mere procedural review, with total judicial abstinence. Nevertheless, the EU's Green Deal also marks a new area, in which green policies might become much more horizontal, with a potential effect on each EU policy area. Even by formally upholding the Plaumann test, which has been done by the GC, the Court could have reconsidered a more deliberative application of the related formal requirements to deal with the merits of the case on the contested modification of emission targets by the Commission. Just like the new wave of strategic green litigation at the national level, this interpretation model of old rules or even 'old rules-lite' could lead to a moderate green turn by the Court. This could be a sign of adaptation, not just to the new realities of European integration, but to the global fight against climate change as well.

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Judges' Appointments to the Administrative Judiciary: How to Guarantee Knowledge and Experience to Adjudicate Disputes in the Area of Administrative Law?**

Abstract

The paper is devoted to the issues connected with the judge`s specialisation in the framework of the administrative judiciary. Its aim is to explore how the special knowledge and experience of judges who are candidates for administrative judiciaries are being verified. The main assumption for the analysis is that judge's specialisation provides knowledge and experience that are indispensable for professional adjudication. Although there is currently no one prevalent system of judicial appointments and there is no need for such, nor one way of equipping courts with specialist and detailed knowledge, in each of the analysed regulations (Austrian, German and Polish) a space for guaranteeing special knowledge and experience is foreseen. In the paper, these regulations are presented and compared in order to find out methods of how to organize the adjudication process professionally.

Keywords: judicial independence, administrative judiciary, judge's specialisation, appointment proceedings, judicial careers

I Introduction

A right to a fair hearing is closely connected with the appointment of judges because the latter has a direct impact on the composition of the judicial panels that adjudicate concrete disputes. This process impacts judicial independence in both the institutional

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and personal spheres[1] and may stimulate public (dis)trust in judicial power,[2] and is crucial for the proper selection of candidates for judicial positions. The present analysis is aimed at the last component. Besides the need for the procedure to be objective and free from undue pressure, the appointment process shall be focused on selecting candidates who will guarantee professional decision-making and ensure a high level of individual protection. This criterion is even more significant for specific branches of the judiciary, for which specialised or additional knowledge and experience are expected. One of those branches is the administrative judiciary,[3] which is responsible for solving disputes between state authorities and individuals.[4]

The starting point for the analysis is based on the importance of the judge's specialisation particularly in those types of courts that exhibit unique characteristics due to the subject or object of adjudication. Those characteristics should be relevant for judicial appointments, creating a basis for the proper selection of candidates for judicial positions, in accordance with their education and legal experience. There are many reasons for treating the administrative judiciary as a judicial branch that needs to be staffed by judges with specialised education and experience. These reasons are combined with the specificity and broad scope of administrative law,[5] the differences between law application in ordinary and administrative courts,[6] the functions performed by the administrative judiciary,[7] the interrelations between national and EU legal orders within the jurisprudence

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1 The division into those spheres is presented both in the jurisprudence of the ECtHR and in the literature. See ECtHR, 09.02.2021, *Xhoxhaj v. Albania*, No. 15227/19, para 291, H.J. Papier, 'Die richterliche Unabhängigkeit und ihre Schranken' (2001) (15) Neue Juristische Wochenschrift 1090–1092; F. Wittreck, *Die Verwaltung der Dritten Gewalt* (Mohr Siebeck 2006) 177–186.

2 ECtHR, 18.06.2019, Rustavi 2 *Broadcasting Company Ltd and Others v. Georgia*, No. 16812/17, para 332, ECtHR, 09.02.2021, *Xhoxhaj v. Albania*, No. 15227/19, para 410.

3 The existence of this special branch of the judiciary is typical for the majority of countries in Europe, either on one or all instance levels. The last new creation of administrative courts was in Slovakia, embracing the Supreme Administrative Court (established in 2021) and the first instance of administrative courts (established in 2022). See M. Davala, R. Chudo, 'Amendment to the Constitution of the Slovak Republic focuses of the reform of the judiciary' HKV Law Firm Blog 2021, <https://www.hkv.sk/en/amendment-to-the-constitution-of-the-slovak-republic-focuses-on-reform-of-the-judiciary/> accessed 16 June 2022.

4 For more on the specificity of this branch of the judiciary, see Ch. Waldhoff, 'Ideengeschichtliche Grundlagen von Verwaltungsrechtsschutz' in A. von Bogdandy, P.M. Huber, L. Marcusson (eds), *Handbuch Ius Publicum Europaeum*. Band IX. (C.F. Müller 2021) 11–48.

5 J. Zimmermann, *Aksjomaty prawa administracyjnego* (WoltersKluwer 2013) 13–29; W. Kahl, 'Allgemeines und besonderes Verwaltungsrecht' in W. Kahl, M. Ludwigs (eds), *Handbuch des Verwaltungsrechts.* Band I. (Grundstrukturen des deutschen Verwaltungsrechts, C.F. Müller 2021) 477–492.

6 J. Wróblewski, Zwroty stosunkowe – wypowiedzi o zgodności z normą, Zeszyty Naukowe UŁ 1969, seria I, z. 62, s. 5–6. See also the report from the seminar organised by ACA Europe, titled: 'How our Courts Decide: The Decision-making Process of Supreme Administrative Courts' <https://www.aca-europe.eu/index.php/en/evenements-en?start=6> accessed 20 May 2022.

7 E. Schmidt-Assmann, 'Funktionen der Verwaltungsgerichtsbarkeit' in H.U. Erichsen, W. Hoppe, A. von Mutius (eds), *System des verwaltungsrechtlichen Rechtsschutzes* (Carl Heymans Verlag KG 1985) 107–108; J.P. Tarno,

of administrative courts,[8] and the interrelations between the administration and the administrative judiciary.[9] High-quality jurisprudence is crucial, not only for individuals but also for public administration, which is bounded by the applications of law made by the administrative courts. In other words, the quality of the administrative courts' jurisprudence directly affects the quality of the decision-making process within the public administration.[10] In this sense, the adjudication performed by administrative courts exceeds the framework of particular disputes and is seminal for the whole state.

The aim of this paper is to explore how the special knowledge and experience of judges who are candidates for administrative judiciaries is being verified. First, the notion of judges' specialisation within the appointment procedure will be presented from the perspective of European law, including the jurisprudence of the ECtHR and CJEU. Second, the conditions for appointing judges to administrative judiciaries within selected national legal orders will be described. Third, new challenges for judges' appointments connected with the specialisation of legal systems and technological progress will be mentioned.

II The European Perspective

Focusing on Article 6 § 1 European Convention[11] and Article 47 EU Charter of Fundamental Rights,[12] one of the conditions for a judge's appointment is the establishment of a court or tribunal by law. This means that the appointment procedure has to find a normative basis that excludes any discretion in this process, which does not depend on the executive but is regulated by law emanating from parliament.[13] It would be not lawful to create an appointment procedure on the basis of an issued administrative act, or a statute passed *ad hoc* for political reasons, or without any conditions that make the appointment procedure objective and verifiable. The procedure should be based on well-known and acceptable criteria and also guarantee the professional-oriented selection of judges, with regard to their qualifications, integrity, ability and efficiency.[14] These criteria should be subject

'Funkcje sądownictwa administracyjnego' in J.P. Tarno, E. Frankiewicz, M. Sieniuć, M. Szewczyk, J. Wyporska (eds), *Sądowa kontrola administracji* (Wydawnictwo Zrzeszenia Prawników Polskich 2006) 24–30.

8 K.P. Sommermann, 'Europäisierung der nationalen Verwaltungsgerichtsbarkeit in rechtsvergleichender Perspektive' in R.P. Schenke, J. Suerbaum, *Verwaltungsgerichtsbarkeit in der Europäischen Union* (Ius Europaeum 64, Nomos 2016) 199 and forth.

9 W. Steiner, 'Verwaltungsgerichte aus Sicht der Verwaltung' (2020) 7 (1) Zeitschrift der Verwaltungsgerichtsbarkeit 49.

10 From this perspective, it can be said that the administrative courts perform an educational function with regard to public administration. See Schmidt-Assmann (n 7) 114.

11 Convention for the Protection of Human Rights and Fundamental Freedoms.

12 Charter of Fundamental Rights of the EU.

13 Report of the Commission, 12 October 1978, *Leo Zand v. Austria*, No. 7360/76.

14 ECtHR, 01.12.2020, *Gudmundur Andri Astradsson v. Iceland*, No. 26374/18, para 110.

to strict scrutiny.[15] Neither the European Convention nor the EU Charter imposes any detailed requirements that candidates for judicial office should meet. The specification of this competence is reserved for national legislators. However, it is remarkable that such special conditions are formulated for judges' posts in European tribunals, treated in the literature as the European administrative judiciary.[16] Among the criteria for ECtHR posts, the candidates should require 'recognised competence', which is understood as referring to 'full satisfaction of the Convention's criteria for office as a judge of the Court, including knowledge of public international law and other national legal systems'[17]. From the perspective of candidates' experience, considerable attention should be devoted to such matters as knowledge of national legal systems, public international law and language skills, being proficient in English or French, and possessing at least a passive knowledge of the other language.[18] When it comes to the CJEU, the appointment criteria for judges are comparable to the qualifications required for appointment to the highest judicial offices of the respective countries.[19] The special criteria for judges' positions in the ECtHR and CJEU are synchronised with the specificity of their adjudication. A general legal education can be evaluated as insufficient to become a judge in the ECtHR or CJEU. These courts are aware of the specificity of their adjudication and therefore try deliberately to gain those candidates who meet the mentioned criteria. It is noticeable that those criteria are verified both at the national level and by special panels established within the Council of State and the EU in order to guarantee a professional-oriented choice of judges.[20] Those strategies can be regarded as a direction for defining criteria appropriate for adjudication in other courts, including national jurisdictions, among them being the conditions to become a judge in an administrative court.

A need for judges to possess high-level qualifications is expressed in international legal acts devoted to judicial status. It is postulated that decisions concerning the selection and career of judges should be based on merit, having regard to the qualifications, skills and

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[15] ECtHR, 08.11.2021, *Dolińska-Ficek and Ozimek v. Poland*, Nos. 49868/19 and 57511/19, para 137.

[16] L. Hering, 'Der Gerichtshof der EU als Verwaltungsgericht' in A. von. Bogdandy, P. Huber, L. Marcusson (eds), *Handbuch Ius Publicum Europaeum*. Band IX. (Verwaltungsgerichtsbarkeit in Europa: Gemeineuropäische Perspektiven und supranationaler Rechtsschutz, C.F. Müller 2021) 649.

[17] High-Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2020, para 8(a) in Philip Alston, Vaughan Lowe (eds), The European Convention on Human Rights. *Oxford Commentaries on International Law*, Oxford 2015, 652.

[18] Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights, CM(2012)40 from 29 March 2012, II. Points 3 and 4. In the previous versions of this document, experience in the field of human rights was also indicated as desirable. See Alston, Lowe (n 17) 654.

[19] Article 253 TFEU.

[20] J.M. Sauvé, Selecting the European Union`s Judges. The practice of the Article 255 Panel, in M. Bobek (ed.), *Selecting Europe's Judges* (OUP 2015) 79–82, H. de Waele, 'Not quite the bed that Procrustes built' in M. Bobek (ed.), *Selecting Europe`s Judges* (OUP 2015) 35–39; A. Drzemczewski, 'Wybór sędziów Europejskiego Trybunału Praw Człowieka' (2021) (10) Europejski Przegląd Sądowy 6–8.

capacity required to adjudicate cases.[21] Those objective criteria should be pre-established by law, or by the competent authorities, and in all cases be prescribed by law.[22] The judges' qualifications and abilities should be extended and improved during their service through training and courses aimed at the development of legal and social skills.[23] The concretisation of these criteria is a matter for national legal regulations and the authorities responsible for judicial appointments, who should also be responsible for guaranteeing independence.[24] They are obliged to act accordingly and scrutinise the content of the criteria, including their practical effect.[25] The final decisions of those authorities should be the subject of control performed by institutions with full jurisdiction to examine all the details of the appointment procedure, including appeals against its course.[26]

The validity of the standards mentioned above is confirmed in legal acts focused exclusively on the administrative judiciary. Judicial review of administrative acts should be conducted by a tribunal established by law and encompass independence and impartiality.[27] The focus on the judge's specialisation is also visible in the reports prepared by administrative judiciaries belonging to the Association of the Council of States and Administrative Jurisdictions of the EU.[28] It has been analysed in connection with case allocation[29] or functions performed by administrative jurisdictions.[30]

Though the criteria for selecting judges for administrative courts are formulated by national legislators to reflect the needs of selected jurisdictions and their legal culture, the above-mentioned requirements, which are general rather than detailed, offer a basis for the creation of specific conditions aimed at professional-oriented adjudication processes within general and special branches of judiciaries. Due to cultural, historic and constitutional differences between national legal systems, it should not be expected that one model of judicial appointments will be adopted by all or the majority of European countries. Instead,

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[21] Recommendation of the Committee of Ministers. Judges: independence, efficiency and responsibilities. CM/Rec (2010)12 from 17 November 2010, para 44.

[22] Explanatory memorandum to the Recommendation CM/Rec (2010)12, para 49.

[23] In the explanatory memorandum to the recommendation CM/Rec (2010)12, it is stressed that such trainings should comprise theoretical and practical teaching methods, including European law, the European Convention and the case law of the ECtHR. See para 58 of the explanatory memorandum.

[24] Magna Carta of Judges (Fundamental Principles) adopted by the Consultative Council of European judges on 17 November 2010.

[25] Opinion no 1 (2001) of the Consultative Council of European Judges on standards concerning the independence of the judiciary and the irremovability of judges, from 23 November 2001.

[26] ECtHR, 07.04.2022, *Gloveli v. Georgia*, No. 18952/18, para 58-59.

[27] Recommendation of the Committee of Ministers to member states on the judicial review of administrative acts. CM/Rec (2004) 20 from 15 December 2004, § 3a.

[28] See <https://www.aca-europe.eu/index.php/en/courts-reports> accessed 20 May 2022.

[29] Report from ACA Europe seminar (n 6).

[30] Report from seminar titled Functions and access to Supreme Administrative Courts, Berlin 13 May 2019, <https://www.aca-europe.eu/index.php/en/evenements-en/725-berlin-13-may-2019-seminar-functions-of-and-access-to-supreme-administrative-courts> accessed 20 December 2022.

it is more reasonable to define similar mechanisms that organise judicial appointments within the administrative judiciary in the most professional way possible.

III National Perspective

The freedom to establish criteria for selecting candidates for administrative judges results in two basic systems, namely a system of separation of judicial careers and the unification of judges' education, including appointment proceedings. The former is present in Austria and Poland. The latter is represented in German legal regulation. In all of the mentioned countries, administrative courts function as specialized jurisdictions separated from ordinary judiciaries competent in civil and criminal matters or even from financial courts, like in Austria,[31] or from financial and social jurisdictions like in Germany.[32] Unlike administrative jurisdictions in France[33] or Italy[34] where separate administrative courts also exist and some of their sections perform consultative tasks towards the executive power,[35] in Austria, Germany and Poland is not possible to appoint a judge to an administrative court for any other tasks than adjudication.

1 Austrian and Polish Legal Regulations – Differences in Similar Approaches to the Appointment of Judges to Administrative Courts

A basic feature of the judges` appointment to administrative courts is that it occurs through a separate judiciary career development path to that of the ordinary judiciary. In Austria and Poland, it is not obligatory for candidates to finish judicial training and pass a judge exam to become administrative judges.[36] However, those similarities do not mean that there are no differences between these two systems.

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[31] W. Steiner, 'Systemüberblick zum Model >>9+2<<' in J. Fischer, K. Pabel, N. Raschauer (eds), *Handbuch der Verwaltungsgerichtsbarkeit* (Jan Sramek Verlag 2014) 132–140.

[32] For more on the German system of administrative courts, see K.P. Sommermann, B. Schaffarzik (eds) *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und in Europa.* Band 1, 871 and forth.

[33] J. Lemasurier, *Le contentieux administrative en droit comparé* (Economica 2001, Paris) 16–17; S. Wittkopp, 'Der französiche Conseil d'Etat – eine aktuelle Bestandsaufnahme' (2021) (2) Verwaltungsarchiv 281–290.

[34] C. Fraenkel-Haberle, D. u. Galetta, 'Verwaltungsgerichtsbarkeit in Italien' in A. von. Bogdandy, P. Huber, L. Marcusson (eds), *Handbuch Ius Publicum Europaeum.* Band VIII. (Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren, C.F. Müller 2019) 303–304.

[35] S. Cassese, *Monismus und Dualismus der Gerichtsbarkeit(en)* in A. von. Bogdandy, P. Huber, L. Marcusson (eds), *Handbuch Ius Publicum Europaeum.* Band IX. (Verwaltungsgerichtsbarkeit in Europa: Gemeineuropäische Perspektiven und supranationaler Rechtsschutz, C.F. Müller 2021) 56–58.

[36] R. Thienel, 'Qualifikation von VerwaltungsrichterInnen – System und Entwicklung' (2020) (1) Zeitschrift der Verwaltungsgerichtsbarkeit 35–37; W. Piątek, 'Ustrój sądów administracyjnych – stan obecny oraz potencjał do zmian, Zeszyty Naukowe Sądownictwa Administracyjnego' *Studia ofiarowane Profesorowi Romanowi Hauserowi* (2021) 391–392.

In the case of the Austrian ordinary judiciary, after finishing legal studies it is obligatory to participate in preparatory service *(der Vorbereitungsdienst)*, pass the judge exam, and complete four years of practice, including one year in the judicial preparatory service.[37] However, those conditions are not binding for candidates to the administrative judiciary. The basic rules of the judicial appointment procedure for administrative courts have a constitutional basis under article 134 § 2-4 B-VG. The judges in administrative courts *(die Mitglieder der Verwaltungsgerichte der Länder)* are obliged to complete their legal studies and acquire five years of legal professional experience *(juristische Berufserfahrung)*, which is increased to ten years for the Federal Administrative Court.[38] The content of the term *'juristische Berufserfahrung'* has not been normatively defined and raises doubts concerning the variety of institutions in which it is possible to gain professional experience. Undoubtedly, it may be gained in public administration, courts, legal scholarship, or by representing parties.[39] It is not obligatory to engage in those practices exclusively or even partially within the administrative judiciary.[40] It is debatable if this experience can be also gained in the private legal market. The emphasis on the need to obtain broad and diversified experience within the administrative judiciary[41] should not exclude this possibility, at least if that experience is enriched by other extensive experiences within public institutions.

Though it is possible for judges from ordinary courts to apply for positions in the administrative judiciary, the reality is that, in Austria, those positions are occupied by employees from the public administration or by research assistants from the Federal Administrative Court, the Constitutional Court or other administrative courts.[42] The most recent scholarship raises questions concerning the uniformity of judges' education and the judges` ability to perform judicial obligations without any judicial experience.[43] As a result, it has been postulated that the entire process of judges' education should be

[37] Article 26 para 1 Bundesgesetzes über das Dienstverhältnis der Richterinnen und Richter, Staatsanwältinnen und Staatsanwälte und Richteramtsanwärterinnen und Richteramtsanwärter (RStDG), BGBl. No. 305/1961. The exceptions from these obligations are regulated in the next two paragraphs. They concern university professors who are exempted from the preparatory service and practice (Art. 26 para 2 RStDG). The Ministry of Justice may also waive a candidate from an obligation of one year's practice in judicial preparatory service (Art. 26 para 3 RStDG).

[38] In practice, those terms are much longer, due to competition between many candidates. See P. Segalla, in *Die Neuordnung der Gerichtsbarkeit öffentlichen Rechts. 20. Österreichischer Juristentag – Öffentliches Recht*. Band I/2, (MANZ'sche Verlags- und Universitätsbuchhandlung 2019) 58.

[39] Thienel (n 36) 35.

[40] G. Grünstäudl, 'Richterausbildung für Verwaltungsgerichte? – Status quo und Ausblick' (2020) (7) Zeitschrift der Verwaltungsgerichtsbarkeit 272.

[41] Segalla (n 38) 62–63.

[42] Thienel (n 36) 37.

[43] In the literature, the status of the administrative judges or their independence is not questioned. See Markus Vasek, 'Berufsbild Verwaltungsrichter*in' (2020) (7) Zeitschrift der Verwaltungsgerichtsbarkeit 499. Simultaneously is stressed, that the deficits of judicial experience should not be left unsaid.

made uniform.[44] However, besides the above-mentioned limitations in typical judicial competencies, the advantages of a separate path to a judicial position connected with experience in administrative law and practice are stressed.[45]

As a reaction to those opposite models of a judge's education, two initiatives are being undertaken. The first is based on cooperation between the administrative judiciary and two Austrian universities (*Johannes Kepler Universität Linz* and *Wirtschaftsuniversität Wien*), which established the Austrian Academy of Administrative Judiciary *(*Österreichische *Akademie der Verwaltungsgerichtsbarkeit).* It offers judges plenty of courses covering both the area of typical judicial competencies, such as scholarships from specialised sub-branches of administrative law, as well as soft skills, encompassing contacts with the media and the public.[46] This initiative, which is not formalised in any statutory regulations, shapes a possibility for deep specialisation in many areas of law, also offering a possibility for cooperation between judges and scholars. In the appointment procedure, this specialisation can be treated as a continuation of the specialising knowledge verified at the beginning of a judicial career.

The second project is aimed at making both judicial career paths uniform *(Richter/innenausbildung neu).* One of the basic assumptions is a division of the education process into four sections, including 'specialisation'[47]. Soft skills are also taken into consideration within the programme.[48] Besides that, the need for flexibility in this process is stressed, both from the theoretical and practical sides. This should be particularly helpful for those candidates who come from outside the judicial system and have other experience pertinent to dispute resolution.[49] At yet this project has not been concretised in any statutory provisions.

As was mentioned above, in Poland, as in Austria, there are two separate systems of judicial appointment, one within the ordinary judiciary,[50] and the second within the administrative judiciary.[51] For the latter, it is not obligatory for candidates to complete judicial training and pass a judicial exam. However, a candidate should show a high level of knowledge in the field of public administration and administrative law.[52] Similarly to the

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[44] Das Projekt ist unter dem Motto „*Richter/innenausbildung neu*" angekündigt. Mehr dazu Thienel (n 36) 37–41.

[45] According to P. Segalla, typical judicial abilities required for leading a public hearing can be acquired through education. See P. Segalla, 'Die Stellung des Verwaltungsrichters' in M. Holoubek, M. Lang (eds), *Die Verwaltungsgerichtsbarkeit erster Instanz* (Linde Verlag 2013, Wien) 160–161.

[46] The current programme is available on the website of the Academy <https://www.jku.at/oesterreichische-akademie-der-verwaltungsgerichtsbarkeit/aktuelles/veranstaltungen/> accessed 21 May 2022.

[47] Thienel (n 36) 39; D. Moser, '5 Jahre der Verwaltungsgerichte – Basis für Weiterentwicklung' (2020) (7) Zeitschrift der Verwaltungsgerichtsbarkeit 46–47.

[48] Grünstäudl (n 40) 274.

[49] Thienel (n 36) 40–41.

[50] It is regulated in the Act of 27 June 2001 on the structure of the ordinary judiciary from (Journal of Laws 2020, item 2072 as amended). See Articles 55–64.

[51] The Act on the system of administrative courts (Journal of Laws 2021, item 137 as am.). See Articles 6–8.

[52] Article 6 § 1 point 6 of the Law on the system of administrative courts.

Austrian model, emphasis is placed on the need to attract candidates with diverse legal backgrounds.[53] In practice, contrary to Austria, the majority of administrative judges come from the ordinary judiciary. For them, promotion to the administrative judiciary is connected with higher salaries[54] and better work conditions[55]. Unlike in Austria, there is no discussion in Poland about the possible reduction of judicial independence among administrative judges if they come from areas of expertise other than the ordinary judiciary. Instead, there is concern about the danger of those candidates lacking professional knowledge, especially if they are from the ordinary judiciary and do not have any contact with administrative law. The requirement concerning high knowledge in the field of public administration and administrative law is too general and therefore hardly verifiable.[56] The vague character of this formulation, connected with a lack of judicial control over presidential acts of judges' nominations,[57] implies that this criterion has almost no practical importance.

Similarly to Austrian solutions, in Poland, the judge's specialisation is deepened by training organised for judges after their appointment. Those are prepared within the administrative judiciary without any institutionalised cooperation with universities or other public or private institutions, but sometimes with the attendance of invited guests, such as professors or employees of the public administration. As yet there have been no legislative reforms initiated, aimed at changing the procedure for judicial appointment to administrative courts. In our opinion, those amendments are not necessary, because the existing regulation creates appropriate conditions for judges` appointments in accordance with the adjudication tasks of administrative courts.

2 The German System of Legal Education as an Example of a Uniform Path to Becoming a Judge

Although the German system of special branches of courts is more diversified than in Austria and in Poland, because it embraces special financial and social courts, there is

[53] R. Hauser, K. Celińska-Grzegorczyk, 'Sądy administracyjne a system sądownictwa powszechnego' in R. Hauser, Z. Niewiadomski, A. Wróbel (eds), *System Prawa Administracyjnego.* Tom 10. (Sądowa kontrola administracji publicznej, C.H. Beck 2016, Warszawa) 106.

[54] While the ordinary judiciary is three-level, the administrative judiciary is two-level. The first instance (voivodeship) administrative courts are at the same structural level as the third instance ordinary (appeal) courts. The Supreme Administrative Court has the same position in the court's hierarchy as the Supreme Court. In reality, every promotion from the first or second level is for ordinary judges automatically connected with a rise in their salaries.

[55] Administrative courts are better equipped with personal and material resources than ordinary courts, due to their financial independence from ordinary courts and competence for budgetary self-preparation (see article 14 § 1 the Law on the system of administrative courts).

[56] Hauser, Celińska-Grzegorczyk (n 53) 106.

[57] According to the stable jurisprudence of the Supreme Administrative Court, those acts are excluded from judicial control. See the judgment of the SAC from 04.11.2021, III FSK 3626/21, accessible at the website <orzeczenia.nsa.gov.pl> accessed 24 May 2022. The whole process of judge's appointment is excluded from judicial control.

no separate path for becoming a judge in any of them. For the guarantees of the judge's position, including appointment and judicial independence, the common constitutional and statutory rules are binding.[58] The judicial training provides the same structure for all candidates *(die Referendare)*, regardless of their later professional development. The training covers all areas of law. As well as other institutions, candidates for the judiciary take part in training within the administrative authority.[59] Candidates may also attend the University of Administrative Sciences in Speyer for judicial training credits.[60] This education may be treated as a compulsory stage in an administrative authority or may be considered a compulsory elective stage

A candidate for a judge should become familiar with both the legal and non-legal aspects of employment in the administration, such as work organisation, staff management, and dealing with citizens' applications[61]. These qualities are not only determined during the judicial training but also during the probationary period, when a judge exercises full jurisdiction that is reduced in terms of employment *(der Richter auf Probe).* After this probationary period of at least 3 years, professional judges are appointed for life.[62] This mechanism can be regarded as a tool for eliminating those judges whose adjudication is not compatible with the professional expectations towards judges for a long-term perspective.[63] The grounds for the decision can be connected with unprofessional adjudication resulting from a lack of specialist knowledge and experience in the field of adjudication.

The details of the judicial training in Germany are regulated by the federal states *(die Länder)*. The duration of the individual stations does not have to be determined uniformly for all trainee lawyers in all states. For this reason, it is possible for trainee judges who wish to work in an administrative court to have a longer practice period with an administrative authority than other trainee judges. A customary rule that has been established in Bavaria's general administrative court system is also noteworthy: during the probationary period, a judge is required to work for a public administration authority for a number of years in order to qualify for the right to adjudicate without time limitation *(der Richter auf Lebenszeit)* in an administrative court. This system, known as rotation *(das Rotationsmodell)*, enables a judge to acquire comprehensive knowledge of the functioning of the public administration in order to make 'factual' and 'life-like' judgments in the future.[64] This custom finds no

[58] Schmidt-Assmann (n 7) 112.

[59] Article 5b § 2 point 3 Deutscher Richtergesetz (BGBl. from 19. April 1972 I S. 713 as am.). This training should last at least three months.

[60] U. Stelkens, 'Die Funktion des verwaltungswissenschaftlichen Ergänzungsstudiums für Rechtsreferendare an der Deutschen Universität für Verwaltungswissenschaften Speyer in der Juristenausbildung' (2017) (4) Die Öffentliche Verwaltung 152–157.

[61] J. Schmidt-Räntsch, *Deutsches Richtergesetz. Kommentar* (C.H. Beck 2009) 152.

[62] Article 10 § 1 DRiG.

[63] Segalla (n 38) 63–64.

[64] G. Beckstein, 'Die Ressortierung der Verwaltungsgerichtsbarkeit in Bayern beim Innenressort' in *Festschrift zum 125-jährigen Bestehen des Bayerischen Verwaltungsgerichtshofs* (2004, München) 45.

confirmation in a written law. Nevertheless, it is firmly anchored in the practice of the administrative courts in Bavaria and is recognised by the German law doctrine.[65] Another possibility for gaining more specialisation in courtrooms is based on the engagement of candidates for partial adjudication *(der Richter im Nebenamt)*[66], combined with their employment in other institutions, for example at universities. Such kind of presence of professors being experts in detailed areas of administrative law, additionally with different to ordinary judges' perspective, leads to strengthening their level of judicial specialisation.

Although the German philosophy for judges' appointments is not similar to their Austrian or Polish counterparts, which foresee special conditions for candidates to administrative judiciaries, judges' specialisation in Germany is visible both in the structure of the administrative judiciary as well as the judicial training, where education in administrative law is foreseen. In addition, adjudication in a reduced time offered for law processors is a tool for gaining special knowledge from administrative law inside judiciaries.

IV New Competencies for the Judges' Candidates

Although the criteria for the positions of administrative judges are demanding and embrace both legal education and practical experience, it is questionable if they are sufficient for the contemporary challenges associated with public administration, administrative law, and the judicial verification of administrative acts. Do judges need additional specialisation connected with modern challenges faced before the administrative judiciary? Currently, administrative law is coming under the constantly growing influence of EU law, which in many areas is applied directly by public authorities and courts. Administrative courts are described as European courts.[67] In addition, citizens' expectations with regard to courts are also growing. Nowadays it is not enough to guarantee the parties to the proceedings the right to active participation in them, which during the COVID-19 pandemic resulted in a growth of online contact forms[68] – this participation should also be understandable for them, and the final resolution ought to be convincing. In addition to the vested interests of the parties, selected proceedings are a subject of interest to a broader audience, thanks to media engagement. Unfortunately, media reports are sometimes not objective, because of

[65] H. Schmitz, 'Der Blick der Verwaltung auf die Verwaltungsgerichtsbarkeit' (2019) Deutsches Verwaltungsblatt 267.

[66] W. Piątek, 'Die Schranken der Nebenaktivitäten der Richter im Lichte ihrer Unabhängigkeit und Dienstaufsicht' (2020) (4) Verwaltungsgarchiv 474–481.

[67] See the jurisprudence of the Polish Supreme Administrative Courts: the judgment from 29.4.2021, II GSK 79/19, from 20.4.2021, II GSK 936/18, 15.4.2021, II GSK 906/18, published at <orzeczenia.nsa.gov.pl> accessed 27 December 2022.

[68] A. Wimmer, 'Audiovisuelle Verfahrensführung vor Verwaltungsbehörden und Verwaltungsgerichten' (2020) Zeitschrift der Verwaltungsgerichtsbarkeit 477–478; S. Rebehn, 'Mehr als 50.000 Verhandlungen in 2021' (2022) (4) Deutsche Richterzeitung 153; W. Piątek, 'Rozprawa w formie zdalnej przed sądem administracyjnym – nieunikniona przyszłość czy rozwiązanie tymczasowe na czas pandemii?' (2022) (2) ZNSA 17–19.

their sensationalism or lack of competence in merits-oriented reporting.[69] Those conditions, which are dynamic, lead to questions about new competencies that should be demonstrated by candidates for the position of judge in the administrative courts. To what extent should they be verifiable within the appointment procedure and within scholarships organised for judges?

Above all, in our opinion, knowledge and experience in the area of administrative law should be more detailed and evaluated. Besides formal requirements connected with the implementation of administrative law at various stages of candidates' professional careers, it is worth considering verifying this knowledge.[70] The appointment procedure gives a possibility to verify the candidate's formal and practical abilities when it comes to performing judicial obligations. Since many candidates usually apply for judges' positions in the administrative judiciary,[71] there is a need for a professional-oriented selection and choice of the most suitable candidates.

It is questionable whether other competencies that are not strictly associated with judicial education should be verified within the appointment procedure. To be sure, language skills can offer better chances to apply EU law, become acquainted with the jurisprudence of the ECtHR and CJEU, and compare legal interpretations across various jurisdictions.[72] Although judges adjudicate in their own national languages, some specific areas of administrative law, such as industrial property law or stocks and shares law, and those which involve international trade, tend to use English. Expectations from the private sector[73] may gradually increase the public administration and administrative courts' readiness to solve disputes in this language. On the one hand, there is no need to rush in expecting all candidates for judges` positions to have fluency in English. On the other hand, complete avoidance of this obligation may lead to enclosing the administrative judiciary in an exclusively national background of administrative law interpretation, without any deeper inputs from international (EU law and ECtHR, CJEU jurisprudence) perspective.

A current area of development is the courts' digitalisation. It is worth considering whether candidates for judges' positions should exercise competencies in this sphere in order

[69] It is noticeable that a rather small number of journalists studied law or even have some other professional experience.

[70] As an example of this, the Italian solution, based on an examination of the candidate's knowledge from the area of administrative law, should be considered. See Fraenkel-Haberle, D.u. Galetta (n 34) 303–304; M.L. Maddalena, *Evaluation criteria in the selection process of administrative judges in Italy* (printed version, 2019) 2–4.

[71] It is typical for Poland where judges' positions apply many candidates. All applications are published in the official bulletin Monitor Polski.

[72] Language skills – para 58 explanatory memorandum rec. (2010)12 – adoption of EU law, comparative reasoning, the rule that a judge is focused only on his language is insufficient

[73] P. Meier, 'Fremdsprachige Verhandlung vor deutschen Gerichten?' (2018) WM 1827–1828; F. Diekmann, 'Commercial courts – innovative Verfahrensführung trotz traditioneller Prozessordnung?' (2021) Neue Juristische Wochenschrift 605–606; P. Biesenbach, 'Spezialkammern: NRW sucht neue Wege in der Ziviljustiz' (2022) (3) Deutsche Richterzeitung 107.

not to be reliant exclusively on parties` statements or IT assistance services. Simultaneously, the role of automatisation or even the adoption of artificial intelligence inside courts will be constantly growing.[74] Judges should be aware not only of the functionalities of those systems but also potential and threats that are associated with their adoption.[75] In any case, the public administration procedure and private sectors are gradually becoming increasingly digitalized. Judges should at least understand these mechanisms in the process of supervising public administration in order to issue professional-oriented judgments.

V How to Guarantee Knowledge and Experience to Adjudicate Disputes in the Area of Administrative Law?

Although specialisation within administrative judiciaries plays a significant role in professional adjudication and, from this perspective, also in the exercise of a right to a fair trial, it should not be treated separately as a key solution for organising every judiciary system from all points of view, including reasonable disposition time, professional adjudication and the individual's protection. There are even legal systems without a special branch of administrative courts where, at first sight, the appointment process for judicial positions does not involve specialisation.[76] Even in those systems where great significance is placed on general legal knowledge, judicial specialisation is safeguarded in many other ways, such as through the partial composition of judicial panels from specialists even without a legal education,[77] or shifting the burden of specialisation to the parties in the proceedings.[78] However, it is not possible to adjudicate in contemporary factual and legal circumstances without any specialist knowledge, since this would lead courts to issue accidental, not merits-oriented judgments, which, in turn, could result in the public administration facing difficulties in their enforcement.

Focusing on mechanisms for verifying specialisation among candidates within the appointment procedure, it is evident that specialist knowledge in the area of administrative law is significant for both uniform (Germany) and separate systems (Austria, Poland) of judges' appointments. In the uniform system, they are parts of judicial training that embrace all branches of law. For this path, details connected with a programme of judicial training

[74] Z. Cao, 'Evolution of online courts in China: situation and challenges' (2021) 2 (11) International Journal of Procedural Law 305–309, L. Greco, 'Roboter – Richter? – Eine Kritik' in H.G. Dederer, Y.Ch. Shin (eds), *Künstliche Intelligenz und juristische Herausforderungen* (2021) 105–108.

[75] Greco (n 74) 108.

[76] A. Filflet, 'Judicial independence and the appointment of judges in Norway' in N.A. Engstadt, A.L. Froseth, B. Tonder (eds), *The independence of judges* (Eleven International Publishing 2014) 69.

[77] A.K. Sperr, *Verwaltungsrechtsschutz in Deutschland und Norwegien. Eine vergleichende Studie zur gerichtlichen Kontrolle von Verwaltungsentscheidungen* (Nomos 2009) 70.

[78] W. Piątek, 'O różnych sposobach dążenia do specjalizacji sędziów orzekających w sprawach administracyjnych' (2020) (2) RPEiS 70–71.

have crucial importance. In other words, it is important to take into consideration not only basic information from administrative law and practice but to assign the same priority to this branch of law as civil and criminal law.[79] An advantage of this model is that one way of educating judges may help to create common practice and the uniform jurisprudence of administrative courts. In addition, this system is more flexible for managing the structure of the judiciary and deciding in which panel a specific judge will adjudicate. In addition, a judge exam ensures the objective verification of knowledge and competencies necessary to apply the law in practice. If it is connected with an additional probationary period (e.g. *Richter auf Probe*[80]), the opportunity to eliminate persons who do not guarantee a high level of adjudication is even greater.

An advantage of the opposite system is connected with the deep practical knowledge of administrative law that the candidates can gain before becoming judges. They are lawyers with a wide range of experience that may provide an additional perspective when analysing detailed disputes, and they are aware of the practical consequences of the issued judgments. Professional and life experience are significant for adjudication, because they help judges to settle complicated disputes in a fair way. Even if the judgments in similar disputes are not entirely uniform and a judge who was previously a member of public administration is obliged to make up for knowledge from procedural law, she or he can still issue a merits-oriented judgment, which is the key purpose of a judge's appointment. In our opinion, it is less complicated to equip a judge with the knowledge of procedural law that is necessary to conduct a procedure and issue a judgment than it is to provide her or him with the knowledge and experience necessary to make the final resolution a professional one. It is possible to gain experience from many years of legal practice, not only through legal education. Knowledge focused on procedural law can be deepened within judicial training or by the assistance of other judges, or even members of court administration.

However, both of those models, as long as they are not disturbed by particular (political or private) interests, can offer a sufficient standard of judicial professionalism and protect individuals from the unlawful activity of the public administration. Their diversity as well as various pros and cons offer a broad perspective when creating the conditions for judges' positions in specialised jurisdictions. Nevertheless, the higher standard of specialisation is realised by those candidates who at the beginning of their judicial career can benefit from both their knowledge and professional experience. Being judges, they deepen this experience by profiting from the previous contact with the area of adjudication.

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[79] The proportionality in judicial training is disturbed within the Polish regulation in which administrative matters are considered only in a minimal amount of time. Undoubtedly, candidates to judicial positions do not receive during judicial training a thorough knowledge and experience about administrative law and public administration.

[80] G. Lippok, 'Der Richter auf Probe im Lichte der Europäischen Menschenrechtskonvention' (1991) NJW 2383–2385, L. Bode, 'Proberichter im Justizvollzug?' (2021) NJ 542–544.

Coming back to the modern challenges faced before judiciaries, the majority of them can be verified within the appointment proceedings because they are verifiable by certificates or tests confirming the candidate's language skills or digital knowledge. Conversely, social skills and communication competencies are not really verifiable and for that reason should be improved together with further development of specialised knowledge, language and digital competencies within the process of judicial education. Communication competencies are decisive, not only for comprehensible communication between judges and parties to the proceedings but for the evaluation of the whole judicial system and creating trust in the judicial power. Certainly, there is an urgent need to bring courts close to society through regular contact with the media,[81] preparation of justifications for issued judgments in plain language[82] and their publication in available resources,[83] and offering detailed information about the court's functioning electronically and physically in court buildings. In our opinion, the Austrian combination of judicial and academic cooperation seems to be a useful tool for offering judges professional knowledge and simultaneously providing academics with contact with practical realities. This cooperation is beneficial for the whole judicial system, too. It offers feedback on how to change the court's practice in a manner that is expected by citizens.

VI Conclusions

The judge's specialisation provides knowledge and experience that are indispensable for professional adjudication. This should be taken into consideration within the process of appointing judges through reference to detailed and professional-oriented criteria that can be objectively verified. Such conditions for appointing judges' positions would reduce the danger of subjective or arbitrary selections.

The specialisation of judges can be introduced in various ways. There is currently no one prevalent system of judicial appointments and there is no need for such, nor one way of equipping courts with specialist and detailed knowledge. However, for the administrative judiciary, it would be beneficial if judges had that knowledge at the beginning of their professional careers. They should be aware of the mechanisms that govern public administration and lead to issuing administrative acts in concrete instances of dispute resolution. This is more important than the experience connected with the implementation

[81] For example, in Norway some judges offer journalists assistance in following with analysis of court`s reasoning in order to present it publicity in an understandable (both for the publici and journalists) way. See more R. Aarli, Independent judges and their relations with media, in N.A. Engstadt, A.L. Froseth, B. Tonder (eds), 'The independence of judges' (Eleven International Publishing 2014, Hague) 334.

[82] U. Saxer, 'Vom Öffentlichkeitsprinzip zur Justizkommunikation – Rechtstaatliche Determinanten einer verstärkten Öffentlichkeitsarbeit der Gerichte' (2006) (1) Zeitschrift für Schweizerisches Recht 476–479.

[83] M. Heese, 'Die praktisch uneingeschränkte Pflicht des Staates zur Veröffentlichung der Entscheidungen seiner (obersten) Gerichte' (2021) (13) JZ 665–666.

of procedural law and technical issues combined with internal judicial actions, which can be gained in the process of judicial education.

Besides specialisation, other abilities connected with language and foremost digital competencies will gradually gain increasing importance in judicial education and profession. They can be verified already at the stage of judicial appointments. In contrast, communication abilities should be developed as part of judges' educational training. All of the competencies mentioned above are responsible for professional adjudication and the understandability and acceptance of its results.

Andrzej Paduch*

Fair Administrative Trial After COVID-19 Pandemic

Abstract

The article addresses the problem of the impact of the COVID-19 pandemic on the scope of the notion of fair administrative trial. Legal measures adopted in different countries in connection with the pandemic have modified the course of court proceedings, in particular those conducted before administrative courts. Will these modifications be permanent? The answer will be given using the dogmatic-legal and comparative method. On the basis of these, an analysis of acts of international law regulating the right to a fair trial is conducted. Selected works on the particular court proceedings' modifications in connection with the COVID-19 pandemic are also analysed.

First, the article analyses the concept of fair administrative trial, pointing out two of its aspects, which were particularly threatened by the measures adopted in the pandemic era: openness of the proceedings and reasonable time. The second part of article identifies the legal measures adopted in different countries, dividing them into two groups, measures of suspension and measures of transformation. The first group led to the temporary suspension of court procedures. The measures from the second group limited the openness of the procedure, transferring its course to closed, remote or hybrid hearings. The third part of the article indicates possible paths for modifying the fair administrative trial after a pandemic.

In conclusion, the author states that although the concept of fair trial itself has not changed, some of the measures adopted constitute its more complete protection and, as such, should remain in individual legal systems.

Keywords: COVID-19, fair trial, administrative judiciary

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I Introduction

The right to a fair trial is undoubtedly one of the most fundamental human rights.[1] This is because only when the trial meets the conditions of a fair one is it possible to determine the legal situation of an individual effectively, or to verify the obligations imposed on him or her, or to determine the rights to which they are entitled. The concept of the right to a fair trial has been known for decades and is already mentioned in the Universal Declaration of Human Rights.[2] In general, it consists of the right to a public hearing without undue delay by an independent tribunal established by law.

The above-mentioned aspects of the right to a fair trial should always be met. This means that lawmakers should shape procedural law in such a way that the indicated elements of the right to a fair trial are met, even in the event of special circumstances in which maintaining the guarantee of human rights protection is difficult.[3] Moreover, if any of the aspects could not be guaranteed – the court case should be suspended from being heard.

The article analyses the scope of the notion of the right to a fair trial in a specific set of circumstances – in the context of the post COVID-19 pandemic world. The massive incidence of this disease and the various precautionary measures introduced as a result[4] (including the prohibition of movement and business activity – lockdowns[5]) undoubtedly made it very difficult to maintain the guarantee of a fair trial as presented above. At the same time, it was not possible to suspend the examination of all court cases until the end of the pandemic: it is difficult to imagine a situation in which courts would not decide any cases for 2 or 3 years.[6] For this reason, the legislators of various countries have introduced many measures aimed at strengthening the guarantees of the right to a fair trial in these

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1 Christoph Grabenwarter, 'Fundamental Judicial and Procedural Rights' in Dirk Ehlers (ed), *European Fundamental Rights and Freedoms* (de Gruyter Recht 2007, Berlin) 152.

2 See Art. 10 of the Universal Declaration of Human Rights.

3 Andreas Zimmermann, 'The Right to a Fair Trial in Situations of Emergency and the Question of Emergency Courts' in David Weissbrodt, Rüdiger Wolfrum (eds), *The Right to a Fair Trial* (Springer 1998, Berlin) 747.

4 Angelo Jr Golia, Laura Hering, C. Moser, T. Sparks, 'Constitutions and Contagion. European Constitutional Systems and the COVID-19 Pandemic' MPIL Research Paper Series (2020 No 42) 1, 8; Edward P. Richards, 'A Historical Review of The State Police Powers and Their Relevance to the COVID-19 Pandemic of 2020' in Stephen Dycus, Eugene R. Fidell (eds), *COVID-19: The Legal Challenges* (Carolina Academic Press 2021, Durham) 93–118; Robert Knox, Ntina Tzouvala, 'International Law of State Responsibility and COVID-19 and Ideology Critique' (2021) Australian Yearbook Of Law 105–121; Upendra Baxi, 'International Law and Covid-19 Jurisprudence' in Werner Gephart (ed), *In the realm of Corona Normatives. A Momentary Snapshot of a Dynamic Discourse* (Kolestermann 2020, Frankfurt am Main) 179; Matthias C. Kettemann, Konrad Lachmayer, *Pandemocracy in Europe. Power, Parliaments and People in Times of COVID-19* (Bloomsbury Publishing Oxford 2022, London) 9–346.

5 See Matthias Lehmann, 'Legal Systems Reactions to Covid-19: Global Patterns and Cultural Varieties' in Werner Gephart (ed), *In the realm of Corona Normatives. A Momentary Snapshot of a Dynamic Discourse*, (Klostermann 2020, Frankfurt am Main) 183–193.

6 Klaus Rennert, 'Sądownictwo w czasie pandemii koronawirusa' (2021) (3) Ruch Prawniczy, Ekonomiczny i Socjologiczny 7, 9.

specific circumstances. This raises the question of whether the right to a fair trial currently has a different meaning or scope than before the outbreak of the pandemic. What normative shape should it be given after the end of the COVID-19 pandemic?

When looking for answers to the above questions, the dogmatic-legal method will be used, on the basis of which the normative acts regulating the right to a fair trial at the international level will be analysed. A comparative method will also be used, comparing the model of the right to court, resulting from different acts of international law. Other studies on the modification of the course of the trial in connection with the COVID-19 pandemic will also be analysed. The analysis will be carried out as follows: first, the concept of a fair administrative trial will be examined under international law; then the typical anti-COVID court measures will be presented. The last part of the article is devoted to the possible paths for modifying the scope of the fair administrative trial concept in the post-pandemic period.

II The General Concept of Fair Administrative Trial in International Law

The concept of the right to a fair trial has been formulated in many different acts of international law. From the European perspective, there are four basic normative acts which indicate the right to a fair trial as an element of the standard of trial in a democratic state. These acts were adopted by various international organisations, including cooperation of states at the regional and global level. As regards the first circle of cooperation, it is necessary to point to the acts adopted within the Council of Europe (European Convention on Human Rights[7] and Recommendation R (2004) 20 on judicial review[8]) and the European Union (Charter of Fundamental Rights of The European Union[9]). It has to be mentioned that the last document not only establishes the right to a fair trial in matters transferred to the EU as such, but also gives it the same meaning as that adopted on the basis of the ECHR.[10]

[7] See <https://www.echr.coe.int/documents/convention_eng.pdf> accessed 31 August 2022.

[8] See <https://rm.coe.int/09000016805db3f4> accessed 25 August 2022.

[9] OJ EU C 83, 30.03.2010, 389.

[10] For more see Christian Calliess, 'The Charter of Fundamental Rights of the European Union' in Dirk Ehlers (ed), *European Fundamental Rights and Freedoms* (de Gruyter Recht 2007, Berlin) 518–540; Tobias Lock, Denis Martin, 'Right to an effective remedy and to a fair trial' in Manuel Kellerbauer, Marcus Klamert, Jonathan Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights – A Commentary* (OUP 2019) 2222–2225; Tobias Lock, 'Scope and Interpretation of Rights and Principles' in Manuel Kellerbauer, Marcus Klamert, Jonathan Tomkin, *The EU Treaties and the Charter of Fundamental Rights – A Commentary* (OUP 2019) 2255; Stanisław Adam Paruch, 'Koegzysentacja systemów ochrony praw człowieka Rady Europy oraz Unii Europejskiej' in Jerzy Jaskiernia, Kamil Spryszak (eds), *Regionalne systemy ochrony praw człowieka 70 lat po proklamowaniu Powszechnej Deklaracji Praw Człowieka. Osiągnięcia – bariery – nowe wyzwania i rozwiązania* (Wydawnictwo Adam Marszałek 2019, Toruń) 14.

As part of the global scope of cooperation, the International Covenant on Civil and Political Rights[11] should be noted. This act was adopted under the auspices of the UN.[12]

When comparing the wording of the provisions on the right to a fair trial in the acts mentioned above, it should be assumed that they provide for the same concept. Although it is not verbally established in most of them, the concept of fair trial applies also to judicial review.[13] However, the ECtHR excluded tax, immigration, election law, military service and customs law from the scope of civil matters in art. 6 sec. 1 ECHR. These cases were recognised as the exclusive prerogatives of the state, not subject to the jurisdiction of the ECtHR[14]. However, there are, in principle, no similar exceptions in the case of the other acts mentioned. Therefore, it seems that a uniform standard of the right to a fair trial has been created at the international law level, as shown in the table below.

[11] See <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights> accessed 31 August 2022.

[12] Amal Clooney, Philippa Webb (eds), *The Right to a Fair Trial under Article 14 of the ICCP* (OUP 2021) 5; Michał Kowalski, *Prawo do sądu administracyjnego. Standard międzynarodowy i konstytucyjny oraz jego realizacja* (Wolters Kluwer 2019, Warszawa) 31–50.

[13] Piero Leanza, Ondrej Pridal, *The Right to a Fair Trial. Article 6 of the European Convention of Human Rights* (Kluwer Law International 2014, Alphen aan den Rijn) 36–42; Christoph Grabenwarter, *European Convention of Human Rights. Commentary* (Hart Publishing 2014) 102; Grabenwarter (n 1) 154; Andrzej Pagiela, 'Zasada "fair trial" w orzecznictwie Europejskiego Trybunału Praw Człowieka' (2003) (2) Ruch Prawniczy, Ekonomiczny i Socjologiczny 125, 127; *Guide to Article 6 of the European Convention of Human Rights: Right to a fair trial (civil limb)* (Council of Europe 2020, Strasbourg) 12; Michał Kowalski, *Prawo do sądu administracyjnego. Standard międzynarodowy i konstytucyjny oraz jego realizacja* (Wolters Kluwer 2019, Warszawa) 31–50; *Aldo and Jean-Baptiste Zanatta v. France*, App no 38042/97 (ECtHR, 28 March 2000), § 22–26; *Allan Jacobsson v. Sweden* (No 1); App no 10842/84 (ECtHR 25 October 1989), § 72–74, *Skärby v. Sweden*, App no 12258/86 (ECtHR, 28 June 1990), § 26–30; *Tre Traktörer Aktiebolag v. Sweden*, App no 10873/84 (ECtHR, 7 July 1989), § 43–44.

[14] *Ferazzini v. Italy*, App no 44759/98 (ECtHR, 12 July 2001), § 25; *Emesa Sugar N.V. v. Netherlands* (decision), App no 62023/00 (ECtHR, 13 January 2005); *Maaouia v. France*, App no 39652/98 (ECtHR, 5 October 2000); *Pierre-Bloch v. France*, App no 24194/94 (ECtHR, 21 October 1997), § 50 – for more see *Guide to Article 6 of the European Convention of Human Rights: Right to a fair trial (civil limb)* (Council of Europe, Strasbourg 2020) 18–20; Grabenwarter (n 13) 102.

Table 1. Summary of provisions regulating the right to a fair trial at the international level
Source: the author's own work

European Convention on Human Rights	Art. 6 sec. 1: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
Recommendation R (2004) 20 on judicial review	Art. 4 Sec. A: The time within which the tribunal takes its decision should be reasonable in the light of the complexity of each case and of the procedural steps or postponements attributable to the parties, while respecting the adversary principle. Sec. F: The proceedings should be public, other than in exceptional circumstances.
Charter of Fundamental Rights of The European Union	Art. 47 sentence 2: Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Art. 52 sec. 3: In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
International Covenant on Civil and Political Rights	Art. 14 sec. 1: All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

In the abovementioned context, two aspects of the right to a fair trial, which are important from the pandemic perspective, are the openness of the proceedings and the reasonable duration of the proceedings. According to the ECtHR, openness of the proceedings means such a structure of a court process in which social control of its course is guaranteed by its participants (parties), third persons or the media.[15] Openness of the proceedings means, on the one hand, a public trial and, on the other, a public announcement of the decision.[16] A special element of the above is the right of the party to be heard, which should be guaranteed in at least one instance.[17] On the other hand, reasonable time of the proceedings refers to the examination of a case in which the activities of the proceedings are performed continuously, i.e. there are only necessary and justified breaks between individual activities.[18] The task of this element is to protect parties against excessive delays in legal proceedings, and underline the importance of rendering justice without delays.[19]

III Anti-COVID Measures in the Field of Administrative Judiciary

The outbreak of the pandemic made it necessary for legislators to react quickly in many aspects of life. At first, many states adopted some strategies of combating COVID-19 in general.[20] The subject of those acts was primarily the legal and sanitary framework for combating COVID-19.[21] However, its provisions also indirectly related to the course of

[15] *Diennet v. France*, App no 18160/91 (ECtHR, 26 September 1995), § 33; *Martinie v. France*, App no 58675/00 (ECtHR, 12 April 2006), § 39; *Fazliyski v. Bulgaria*, App no 40908/05 (ECtHR, 16 April 2013), § 69, Andrzej Paduch, 'The Right to a Fair Trial Under Article 6 ECHR during the COVID-19 Pandemic: The Case of the Polish Administrative Judiciary System' (2021) 2 (19) Central European Public Administration Review 11.

[16] Grabenwarter (n 1) 15; Grabenwarter (n 13) 147; Leanza, Pridal (n 13) 109.

[17] *Fredin v. Sweden* (No. 2), App no 18928/91 (ECtHR, 23 February 1994), §§ 21–22; *Allan Jacobsson v. Sweden* (No. 2), App no 18928/91 (ECtHR, 19 February 1998), § 46; *Göc v. Turkey*, App no 36590/97 (ECtHR, 11 July 2002), § 47; Paduch (n 15) 11.

[18] *Beaumartin v France*, App no 15287/89 (ECtHR, 24 November 1994), § 33, Andrzej Paduch, 'Supervision over a court as a tool to protect the right to have a case heard within a reasonable time' in Wojciech Piątek (ed), *Supervision over courts and judges. Insights into Selected Legal Systems* (Peter Lang 2021, Berlin) 152; Paduch (n 15) 10; Grabenwarter (n 13) 141; Grabenwarter (n 1) 158, *Beaumartin v. France*, App no 15287/89 (ECtHR, 24 November 1994), § 33.

[19] Leanza, Pridal, (n 13) 141; Paduch (n 18) 153.

[20] Zhaohui Su, 'Rigorous Policy-Making Amid COVID-19 and Beyond: Literature Review and Critical Insights' (2021) 18 (23) International Journal of Environmental Research and Public Health 1–17; Guangyu Lu, Oliver Razum, Albrecht Jahn, Yuying Zhang, Brett Sutton, Devi Sridhar, Koya Ariyoshi, Lorenz von Seidlein, Olaf Müller, 'COVID-19 in Germany and China: mitigation versus elimination strategy' (2021) 14 Global Health Action 1–11; Henrik Wenander, 'Sweden: Non-binding Rules against the Pandemic – Formalism, Pragmatism and Some Legal Realism' (2021) (1) European Journal of Risk Regulation 127–142; Domenico Piers De Martino, Katharina Plavec, 'Has COVID-19 Unlocked Digital Justice? Answers from the World of International Arbitration' (2021) 6 (1) Cambridge Law Review 45–59.

[21] Shaden A. M. Khalifa, Briksam S. Mohamed, Mohamed H. Elashal, Ming Du, Zhiming Guo, Chao Zhao, Syed Ghulam Musharraf, Mohammad H. Boskabady, Haged H. R. El-Seedi, Thomas Efferth, and Hesham R. El-

court proceedings, including those before administrative courts. For instance, in Poland, this took place under the Act of 2 March 2020 on special solutions related to preventing, counteracting and combating COVID-19, other infectious diseases and emergencies caused by them.[22] These acts limited the possibility of people gathering, created a framework for remote work, and introduced benefits for employers potentially affected by the pandemic.[23]

Difficulties in organising court work and appearing in court – resulting from both legal restrictions (e.g. lockdown) and factual circumstances (increasing number of COVID cases, resulting changes in plane, bus or train timetables, etc) may have resulted in the fact that leaving court procedures unchanged could lead to an actual violation of either the principles of active participation of a party in court proceedings or the principle of reasonable time of the proceedings. For these reasons, it was necessary to adopt appropriate measures.

Therefore, some instruments focused on guaranteeing the openness of the proceedings. Since it was legally impossible or difficult to attend court hearings, for example, decisions were made to suspend court proceedings until the number of cases was reduced.[24] Those measures of suspension could be grouped as follows:

1) suspension of hearing cases,
2) suspension of initiating a court case,
3) suspension of time limits,
4) temporarily limited access to court buildings, court documents and court clerks.

The aim of the indicated group of measures was – apart from ensuring the safety of the population, including court clerks – to secure the right to file a court case and openness of the proceedings. At the very beginning of pandemic in particular, it was not known how long it would last; it was then assumed that the duration of the pandemic would not be long. Therefore, temporary difficulties in access to court or postponing hearings were considered as effective tools for of guaranteeing a fair trial, which would take place in future.

Seedi, 'Comprehensive Overview on Multiple Strategies Fighting COVID-19' (2020) (17) International Journal of Environmental Research and Public Health 1–13.

[22] Journal of Laws of 2020, item 374.

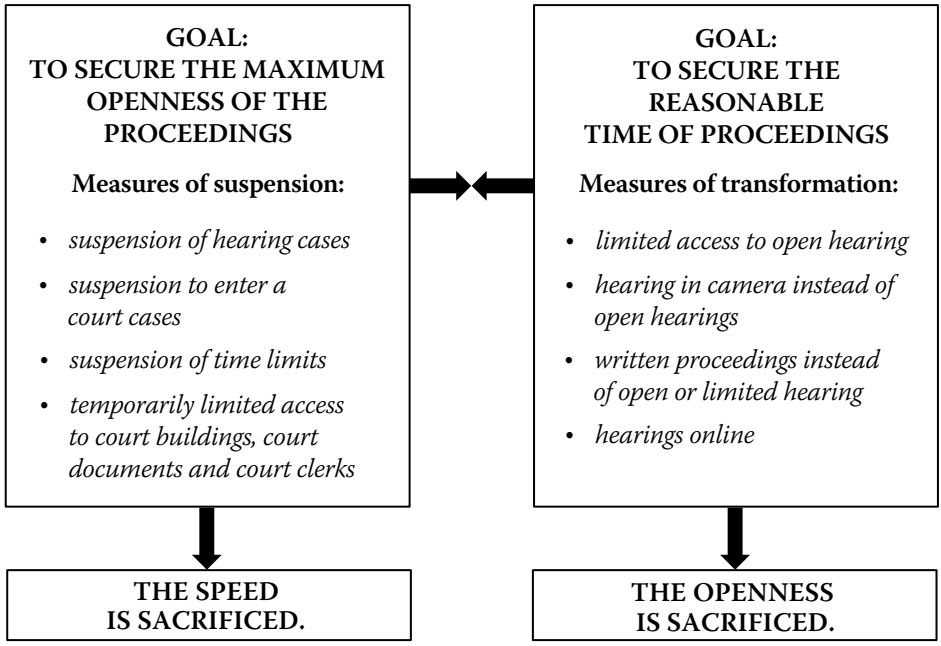
[23] For more see Paduch (n 15) 13–17.

[24] *The functioning of courts in the Covid-19 pandemic* (Organisation for Security and Co-operation in Europe 2020, <https://www.osce.org/files/f/documents/5/5/469170.pdf> accessed 22 October 2022) 9; Emmanuel Slautsky, Frédéric Bouhon, Camille Lanssens, Andy Jousten, Xavier Miny, Élise Dermine, Daniel Dumont, Mathilde Franssen, 'Belgium: Legal Response to Covid-10' in Jeff King, Octavio Ferraz (ed), *The Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press 2022) 10; Eirik Holmøyvik, Benedikte Moltumyr Høgberg, Christoffer Conrad Eriksen, 'Norway: Legal Response to Covid-19' in Jeff King, Octavio Ferraz (eds), *The Oxford Compendium of National Legal Responses to Covid-19* (Oxford University Press 2022) 8; Paduch (n 15) 14.

The lengthening period of the pandemic made it necessary to adopt a different strategy, including strengthening the aspect of speed of proceedings by increasing the number of cases heard remotely, online or in closed sessions.[25] Those measures would transform the traditional courtroom into a remote or virtual one, or transform oral procedures into procedures in writing. Those measures are:

1) limited access to open hearings,
2) hearing in camera instead of open hearings,
3) written hearings (or proceedings in writing) instead of open or limited hearings,
4) hearings online.

The second group of measures therefore refers to the enhancement of the speed of the procedure, by limiting its openness at the same time. Similarly, the previously analysed measures of suspension were to ensure the openness of procedures at the expense of their speed. This dependence is presented in the graph below:



Graph 1. The dependence between securing openness and reasonable time of court proceedings
Source: the author's own work

[25] The Functioning of Courts In The COVID-19 Pandemic (Organisation for Security and Co-operation in Europe 2020, <https://www.osce.org/files/f/documents/5/5/469170.pdf> accessed 22 October 2022, 9; Anne Sanders, 'Video Hearings in Europe Before During and After the COVID19 Pandemic" [(2020) 2 (12) International Journal For Court Administration, <https://www.iacajournal.org/articles/10.36745/ijca.379/> accessed 22 October 2022] 8; Holmøyvik, Høgberg, Eriksen (n 24) 9; Paduch (n 15) 15.

Therefore, the question arises whether the discussed solutions are in line with international law. There are no doubts that both pillars of fair trial are not unlimited. For certain reasons, both the openness and the speed of the proceedings may be limited or extended.[26] There is therefore a certain feedback between both foundations: withdrawing from a public hearing is possible when the court is able to adjudicate on the basis of the materials already presented by the parties or collected in writing. In this way, it guarantees that the case is resolved without undue delay, reducing its public examination to a minimum. On the other hand, hearing a case should be postponed if it is necessary to secure the attendance of parties or third persons (including the public) or the complexity of the problem analysed in the court case suggests the need for public hearing.[27] From this perspective, limiting the scope of public hearing of the case is to accelerate court proceedings; on the other hand – by referring to the need to ensure the public hearing of the case, it is possible to slow down the course of the proceedings.

However, it should be noted that the discussed re-balance of the right to a fair trial cannot be arbitrary. This should take place only when, without any response, there is a risk of violating the right to a fair trial and the proposed amendment reduces or eliminates the resulting threat. Moreover, it does not violate other aspects of the right to a fair trial, or at the same time compensates for the violations that have arisen.[28] Otherwise, the introduction of the solutions discussed must be considered contrary to international law.

It should therefore be considered whether the measures taken shift the centre of gravity of the right to a fair trial and counterbalance the limitations caused by the pandemic. As regards the measures of suspension, it should be stated that their aim is to create a situation in which - the examination of the case is suspended until the parties can exercise their conventional entitlement to participate in the proceedings. The measures of transformation – by limiting the openness of procedures – aim to settle matters without undue delay. At the same time, the party does not lose the right to be heard: they can still express their position in writing or participate in a remote session, which, in the assessment of the judicature and doctrine, meets the criteria of being heard.[29] In this approach, both groups of measures should be considered generally admissible under international law.

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[26] *Miller v. Sweden*, App no 55853/00 (ECtHR, 8 February 2005), § 30; *Allan Jacobsson v. Sweden* (No. 2), App no 18928/91 (ECtHR, 19 February 1998), § 48–49; *Valová et al. v. Slovakia*, App no 44925/98 (ECtHR, 1 June 2004), § 65-68, *Döry v. Sweden*, App no 28394/95 (ECtHR, 12 November 2002), § 37; *Saccoccia v. Austria*, App no 69917/01), 18 December 2008, § 73; Grabenwarter (n 13) 156; Leanza, Pridal (n 13) 110; Paduch (n 15) 11, *Hadobás v. Hungary*, App no 3686/20 (ECtHR, 10 December 2020), § 6; *Comingersoll S.A. v. Portugal*, App no 35382/97 (ECtHR, 6 April 2000), § 19; *Keaney v. Ireland*, App no 72060/17 (ECtHR, 30 April 2020), § 85, 89, 90; *König v. Germany*, App no 6232/73 (ECtHR, 28 June 1978), § 98; Leanza, Pridal (n 13) 145–150; Pagiela (n 13) 125, 135–136.

[27] Grabenwarter (n 13) 142–143.

[28] For more Paduch (n 15) 19–20.

[29] Leanza, Pridal (n 13) 196 and cited there *Pashayev vs. Azerbaijan*, App no 36084/06, 28.02.2012.

IV Fair Trial after COVID-19 Pandemic: Possible Paths

How will the pandemic affect the right to a fair trial? In this context, it should be noted that the law should be a living creation, reacting to changes in the socio-economic situation, the level of technological development and, consequently, the needs of individuals. Moreover, the specific shape of the regulations influences the legal environment of court proceedings, and shapes or modifies the practical rules of legal transactions and the awareness of individuals. The functioning of solutions modifying the existing process regulations for over two years may therefore have a permanent impact on the shape of procedural regulations. It therefore seems that three scenarios are possible in the post-pandemic era.

1 Extra Measures as 'New Order' Measures

First, it is possible to assume that the measures adopted in the pandemic constitute 'new order solutions'. After COVID-19 pandemic, states should consider whether some of measures introduced during it may ensure the openness and reasonable time of hearing a case with the balance of some additional solutions (e.g. digitalisation of court papers, online hearings, written procedures instead of oral hearings). In this approach, the extra measures adopted in the course of the pandemic will simply become part of the procedural law system, and their use by the courts will be mandatory. There will thus be a kind of reshaping of the right to a fair trial in the direction of increasing the guarantee of the speed of the trial, while at the same time ensuring the active participation of the party through the use of electronic communication technologies.

However, the indicated structure requires two conditions to be met. First, the compliance of the solutions adopted at the national level with international law cannot raise any legal doubts. Therefore, in the event of any doubts as to the legality of the regulations in question, they should not constitute a permanent element of the procedural law system. For instance, referring above to Poland, it should be stated that the issue of the legality of extra measures has already been the subject of several judgements, in which they were considered admissible in the light of the Polish Constitution.[30] However, this admissibility has always been related primarily to the constitutional aspect and the possibility of its application in the context of extraordinary circumstances. So far, however, there is no judicature that would not relate the regulations in question to just the circumstances of the pandemic, but to admissibility as such. In my opinion, such a ruling would be in favour of extra measures. There are no grounds for considering them as violations of the standard of the right to a fair trial.

[30] Judgements of Supreme Administrative Court: 24.11.2020, II OSK 1305/18, 30.11.2020, II OPS 6/19, 26.04.2021, I OSK 2870/20, 11.05.2021, II OSK 2179/18, 15.07.2021, III OSK 3743/21. For more see Andrzej Paduch, 'Skierowanie sprawy sądowoadministracyjnej na posiedzenie niejawne na podstawie przepisów ustawy antycovidowej a prawo do jawnego procesu. Glosa do wyroku NSA z dnia 26 kwietnia 2021 r., I OSK 2870/20' (2022) (1) Orzecznictwo Sądów Polskich 156–176.

Another important element from this perspective is the positive social assessment of the adopted regulations. This aspect seems to be as important as the issue of legality described above. It seems that, if the hitherto temporary regulations are deemed excessively restrictive of the right to a fair trial, damage may be caused to the foundations of a democratic state ruled by law. Hence, in my opinion, extending the scope of the discussed regulations to the time after the pandemic requires an analysis of society's assessments as to the functioning of extra measures.

2 Extra Measures as Emergency Measures

The second possible path includes the use of extra measures, but only as solutions functioning in the event of an emergency situation. The trial would therefore take place according to procedural rules similar to those from before the pandemic, considered to be the most fully for implementing the right to a fair trial. A kind of re-balance would only take place in the event of an emergency need that would make it impossible to ensure a fair trial in these emergency conditions. Therefore, anti-COVID solutions remain in force, but only in the event of special situations, in which ensuring the active participation of the party or effectiveness and speed according to traditional rules may be impossible or highly difficult.

Such a solution seems undoubtedly acceptable, but the question arises as to what extent the legal solutions provided for the duration of a pandemic can prove successful in the context of other catastrophes or natural disasters. The specificity of the COVID-19 pandemic included the need to limit direct contact between people, which forced the necessity to move to a larger scale of electronic communication than in the previous order. In the case of natural disasters other than an infectious virus epidemic (e.g. flood, hurricane, fire), these solutions may turn out to be ineffective or insufficient (e.g. due to the inability to establish an Internet connection because of damage to optical fibres or a lack of electricity). It therefore seems that basing the current extra measures structure as that in the event of any future special circumstances seems pointless and potentially ineffective.

3 Extra Measures as 'Nearby' Measures

The third path involves leaving extra measures in legal systems as ordinary instruments ensuring a fair trial next to temporary solutions, while establishing the discretionary power of the judge in choosing the instruments necessary to apply in a given case. Thus, in a case where, for example, a party does not request a direct hearing at a court session, it would be possible to organise a remote hearing, or possibly one in camera, in order to ensure quick settlement of the case. On the other hand, in a case where a party expressly requests a hearing, the court could be bound by such a request, unless it found that it would only be aimed at unduly delaying the proceedings.

Therefore, the discussed structure is based on the particular court trial, in which the course of the trial depends on the will of the parties and the court. Instruments introduced to legal systems during the COVID-19 pandemic therefore become an additional range of measures that can enable quick examination of the case while ensuring the possible active participation of the party. The discussed solutions, although derived from a special regulation, would in this approach become a part of a traditional process, which however does not mean, , of course, that they could not be used in emergency situations.

Leaving the discussed instruments in force would mean that their compliance with both constitutional acts and the provisions of international law regulating the right to a fair trial is beyond doubt, and there is at least partial social consent to their use. It seems that, in the current economic and social situation and in the absence of clear controversies of a legal nature, this solution seems to be the closest to be implemented. Perhaps in the longer term, extra measures would replace measures that guarantee the 'classic' course of a court trial.

V Conclusions

The concept of the right to a fair trial has been formulated in many different acts of international law. The following documents refer to it in the broadest scope: ECHR, The Recommendation R (2004) 20 on judicial review, The Charter of Fundamental Rights of The European Union and The International Covenant on Civil and Political Rights. On the basis of the above-mentioned regulations, the right to a fair trial is uniformly understood as the right to a public hearing of a case without undue delay by an independent tribunal established by law. These indications also apply to the administrative judiciary.

In connection with the outbreak of the COVID-19 pandemic, the first two aspects of the right to a fair trial are at risk of violation. The measures adopted to counteract this risk led to the suspension of court proceedings or limited their openness. For this reason, they can be divided into two groups: measures of suspension and measures of transformation. The legal assessment of the admissibility of such solutions is a complex issue and must always be related to a specific legal solution. Generally speaking, it could be said that the modification of the course of court proceedings in connection with the pandemic was necessary, and the measures adopted were acceptable if they served to strengthen certain aspects of the right to a fair trial.

The research question posed in the introduction concerned whether the right to a fair trial currently has a different meaning or scope than before the outbreak of the pandemic. In my opinion the conceptual scope of the right to a fair trial has not changed. It is still based on the openness of the proceedings and reasonable time of adjudicating the court case, although a balance between them can be maintained by specific or 'extra' legal instruments. According to the second research question – what normative shape should be given to right to a fair trial after the end of the COVID-19 pandemic – it has to be noted that those

'extra' measures shall be used to guarantee the reasonable time of adjudicating by courts and to maintain (or even widen) the openness of the proceedings. That applies to some of 'extra' measures of transformation (hearings in camera, written procedures and online hearings). Similarly, some of the detention measures may remain in the law as emergency measures. This applies in particular to the suspension of time limits and access to court buildings. Due to their restrictive nature, their retention in the legal system depends on their proportionality and their exceptional nature.

Thomas Mann*

Cutting Off the Heads of the Hydra: Current Reforms in German Administrative Litigation Law

Abstract

In Germany, a discussion of accelerating administrative court proceedings has been going on for years. The new federal government has joined the debate and in 2022 presented a bill to accelerate energy transition, which is primarily aimed at changes in substantive law, but also seeks to accelerate the overall duration through changes in the procedural law of the administrative courts. However, the article shows that attempts to shorten the duration of administrative court proceedings inevitably go hand in hand with losses in the effectiveness of legal protection, which is protected under constitutional law in Germany.

Keywords: administrative court process, concentration of jurisdiction, negligence of errors, provisional legal protection, suspensive effect

I Introduction

Reforms in German administrative procedural law are reminiscent of the mythological Heracles fighting the hydra: every time a malformed head of the snake is cut off, two new heads grow in the immediate vicinity. This can also currently be observed under the reign of the so-called 'traffic light coalition' of SPD, The Greens and FDP, which has been in power in Germany since December 2021. Their central political agenda is aimed at achieving the climate protection targets by accelerating the expansion of renewable energies. In this context, it has once again been criticised that this expansion is progressing only slowly in reality, contrary to the optimistic time expectations that had been set for it. This affects not only the politically desired erection of more wind turbines, but also the construction of

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power lines to transport the regeneratively generated electricity from the north of Germany to the south of the country, which has so far been supplied mainly by nuclear energy. With this criticism, the debate on acceleration that has been well-known in Germany for more than 20 years is once again entering the political arena, merely in a new guise.

In particular, in waves of increasingly shorter amplitudes, we repeatedly complain about the excessive duration of official and administrative court proceedings. In the past, it related to the construction and approval of industrial plants, today it is about the construction and approval of wind power plants. This discussion often ignores the fact that approval procedures, especially for infrastructure projects or other projects subject to environmental law, are already highly complex in themselves, which, in view of the right to full judicial review, often requires the judge to delve into scientific or technical issues. In addition, political actors often – consciously or unconsciously – send the wrong signals and nurture unrealistic hopes, such as when the public was given the impression that the transmission lines needed for the energy transition could be planned, built and put into operation within three to five years. Everyone who is halfway familiar with the process and the inherent laws of planning and zoning procedures knew from the beginning that it´s only wishful thinking that dominates; this is just a "blue-eyed promise'.

In the meantime, politicians have also apparently identified administrative jurisdiction as a disruptive factor in the realisation of major projects. In June 2019, following several acceleration laws in the field of specialised law, the Bundesrat presented a bill to amend the Administrative Court Code,[1] which had been prepared in advance using legal opinions from the legal profession.[2] However, this draft could not finally be debated in the Bundestag due to the expiry of the legislative period. In April 2022, the new Federal Government presented an energy policy amendment in the form of the so-called 'Easter Package',[3] the aim of which is to accelerate the expansion of renewable energies. This law, which was passed by the Bundestag on 7 July 2022,[4] provides for various measures that are predominantly based on energy law and its supporters thus hope to achieve an acceleration effect. But why have the possibilities for acceleration offered by German administrative procedural

[1] BT-Dr. 19/10992.

[2] Wolfgang Ewer, 'Möglichkeiten zur Beschleunigung verwaltungsgerichtlicher Verfahren über Vorhaben zur Errichtung von Infrastruktureinrichtungen und Industrieanlagen: Gutachten für den Normenkontrollrat' (April 2019) <https://www.normenkontrollrat.bund.de/resource/blob/300864/1600406/f0613bfaa6ea13b6a35d756672387d29/2019-04-17-nkr-gutachten-2018-data.pdf?download=1> accessed 16 November 2022; Olaf Reidt, Frank Fellenberg, 'Rechtliche Stellungnahme zur Beschleunigung von Planungs- und Genehmigungsverfahren für Gewerbeansiedlungen und Infrastrukturvorhaben' (December 2018) <https://www.ihk-kassel.de/wirtschaftsstandort/standortentwicklung/schwerpunktthema-gemeinsaminfrastrukturbeschleunigen-4352752> accessed 16 November 2022.

[3] See the following bill, BT-Dr. 20/1630.

[4] Gesetz zu Sofortmaßnahmen für einen beschleunigten Ausbau der erneuerbaren Energien und weiteren Maßnahmen im Stromsektor vom 20. Juli 2022 (BGBl. 2022 I S. 1237) [Law for immediate measures for an accelerated expansion of renewable energies and further measures in the electricity sector dated 20 July 2022)].

law been largely exhausted? The preliminary assumption of the following article is that all further shortening options under discussion inevitably lead to negative consequential effects that either counteract the hoped-for acceleration effects or even lead to unconstitutional impairment of rights.

II Extension of First Instance Jurisdiction of the OVG and BVerwG

The long duration of planning and approval procedures is first and foremost a problem of the administrative procedure before the authorities and, in this respect, not least a consequence of the cascade of public participation procedures provided for in sectoral law, which, for example, provides for sixfold public participation in the construction and modification of extra-high voltage grids.[5] If the duration of subsequent disputes before the administrative courts is also taken into consideration, one possibility for acceleration is often seen in extending the first instance jurisdiction of the higher administrative courts or the Federal Administrative Court. As such, the aforementioned draft of the Federal Council also provided for extending the catalogue of first-instance jurisdiction of the Higher Administrative Court (OVG) in section 48 (1) sentence 1 VwGO to include further matters.[6] Above all, however, in order to accelerate the expansion of wind power plants, the first instance jurisdiction for 'the construction, operation and modification of plants for the use of onshore wind energy with a total height of more than 50 metres' was transferred to the higher administrative courts at the end of 2020 (section 48 (1) sentence 1 no. 3a VwGO).[7] A draft bill[8] currently under discussion provides for further extensions of this catalogue of competences.

This amendment, passed towards the end of the term of office of the old federal government under Chancellor Merkel, realised a political goal envisaged in the coalition agreement of the time 'to limit administrative court proceedings to one instance for selected

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[5] See generally Thomas Mann, 'Repräsentative Demokratie in der Krise: Jahrestagung 2012' (2012) 72 Vereinigung der Deutschen Staatsrechtslehrer 546 (561 et seqq); Claudio Franzius supposes even seven participation stages by including the proposal conference within the *Bundesfachplanung*, see Claudio Franzius, 'Stuttgart 21: Eine Epochenwende?' (2012) Gewerbearchiv 225 (229).

[6] See Art. 1 Ziffer 5 of the bill from the Bundesrat, BT-Dr. 19/10992, S. 7. Regarding further plans to let the OVG decide all plan approval processes in the first instance, see NRW-Justizminister Biesenbach DRiZ 2018, 330 (332).

[7] See Art. 1 Nr. 1 des Gesetzes zur Beschleunigung von Investitionen vom 3. Dezember 2020 (BGBl. I 2022 p. 2694) [art. 1. nr.1 Law to accelerate investions dated 3 December 2020].

[8] Referentenentwurf eines Gesetzes zur Beschleunigung von verwaltungsgerichtlichen Verfahren im Infrastrukturbereich vom 18.8.2022 [Ministerial draft of a law to accelerate the lawsuits of public administration courts in the infrastructure sector] <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/Beschleunigung_verwaltungsgerichtliche_Verfahren.html> including all statements from the hearing of the associations, accessed 13 November 2022.

projects with overriding public interest [...]'.[9] From a legal point of view, this question raises the tension between substantive justice and legal certainty, both of which – on the one hand in the form of the subjective guarantee of legal protection and on the other hand as a guarantee of timely (effective) legal protection – are rooted in Article 19 (4) of the Basic Law.[10] This tension is why this fundamental right does not in principle guarantee a right to several administrative court instances.[11] The restriction of the judicial procedure to only one instance of factual jurisdiction brought about by the elevation to the OVG therefore certainly promises a reduction of the overall duration of planned projects.[12] This is due to the fact that the administrative authorities have already carried out a comprehensive investigation of the facts in the plan approvals predominantly affected, which – unlike in the case of 'simple' decisions by the administration – could compensate for a lack of instance of factual jurisdiction.[13]

On the other hand, there is a non-systemic change in the catalogue of competences. The original purpose of concentrating individual projects at the OVG or BVerwG was their supra-regional significance. In this respect, both § 48 VwGO and the catalogue of jurisdiction applicable to the BVerwG in § 50 VwGO have an 'exceptional character',[14] which is intended to take account of the special function of these higher courts. The argument of complexity, which is the sole reason for the recent changes in the catalogue of jurisdiction, would also apply to numerous other matters in dispute – basically to all project approvals that are subject to an obligation to conduct an environmental impact assessment (EIA obligation).[15] In this respect, a 'backlash effect' must be warned against, because an overly generous expansion of Section 48 VwGO could be to the detriment of the subjects of litigation already contained therein, which have already been identified as priority infrastructure and industrial projects.[16]

However, a decisive element, both for the hoped-for acceleration effect and for the associated effective legal protection of the plaintiffs, is the accompanying significant increase in the number of judges at the OVG. The example of North Rhine-Westphalia has

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[9] See the coalition agreement between CDU, CSU and SPD for the 19th legislative period 'Ein neuer Aufbruch für Europa, Eine neue Dynamik für Deutschland, Ein neuer Zusammenhalt für unser Land' (March 2018) 75 lines 3417 et seqq.

[10] BVerfG, Urt. 16.5.1995 – 1 BvR 1087/91, BVerfGE 93, 1 (13); BVerfG, Beschl. v. 24.9.2009 – 1 BvR 1304/09, Neue Zeitschrift für Sozialrecht (2010) 381 (382).

[11] BVerfG, Beschl. v. 24.6.2014 – 1 BvR 2926/13, BVerfGE 136, 382 (392) = Neue Zeitschrift für Verwaltungsrecht (2014) 2853 (2856).

[12] Reidt, Fellenberg (n 2) 49.

[13] Thus in the readings of the bill Peter Biesenbach, BR-PlProt. 977, p. 183 et seqq.

[14] Nicolai Panzer in Friedrich Schoch, Jens-Peter Schneider, Wolfgang Bier, *Verwaltungsgerichtsordnung* (C.H. Beck 2022, München) § 48 margin nr. 2.

[15] See the consistent suggestion to extend the jurisdiction of the OVG as first instance on all litigation regarding the *Umweltrechtsbehelfsgesetz* (Environmental legal remedy law) by Klaus Rennert, Verhandlungen des 71. Deutschen Juristen Tages in Essen, 2016, Bd. II/1 – Thesis 13.

[16] Ewer (n 2) 11.

shown that, without such an increase in personnel, the acceleration expectations placed in the expansion of the catalogue of section 48 VwGO cannot be fulfilled. Before the aforementioned amendment to the law at the end of 2020, seven administrative courts in North Rhine-Westphalia had jurisdiction at first instance for actions against the erection of wind turbines; thereafter only one senate with three judges at the Higher Administrative Court had jurisdiction for all such proceedings while also having jurisdiction for other subject matters. It is obvious that such a personnel constellation does not contribute to speeding up the proceedings, but to slowing them down, thus thwarting the plans of the federal legislator. It took more than a year before a new specialised senate, specifically responsible for wind turbines, could be established at the OVG in Münster. On the one hand, this has led to a specialisation of the judiciary, which creates an expectation of acceleration, but it has not eliminated the problem of the high volume of business. Seven administrative courts can bring several cases to a conclusion simultaneously, while one senate can only deal with its cases consecutively.[17]

III Disregard of Remediable Deficiencies in Preliminary Legal Protection

The draft bill,[18] which is currently in a formal association hearing, intends to supplement the concentration of jurisdiction in Sections 48 and 50 VwGO by taking precautions to avoid delays in proceedings for interim relief. To this end, it provides for the insertion of a section 80c VwGO, which – in relation to certain proceedings before the OVG, such as the approval of wind power plants pursuant to section 48 (1) sentence 1 no. 3a VwGO – wants to allow the courts to disregard a defect in the administrative act in proceedings for the order or restoration of the suspensive effect 'if it is obvious that it will be remedied in the foreseeable future'. Examples of defects affected by this are 'a violation of procedural and formal requirements or a defect in the weighing of interests in the context of the plan approval'. The applicants are only granted the right to apply for a stay of execution if a period of grace granted by the courts to remedy the deficiencies has expired without success.

This legal innovation calls into question the very essence of provisional legal protection under the VwGO. After all, this precisely concerns preventing the occurrence *of faits accomplis*. However, if the aforementioned deficiencies of the administrative act are now excluded as legal arguments from the proceedings for interim relief, this regulation leads to a conflict with the effective guarantee of legal protection under Article 19 (4) of the Basic Law. Furthermore, it would be worth considering whether this would not contradict Article 9 (4) sentence 1 and Article 9 (2) of the Aarhus Convention. In any case, it is doubtful

[17] On further criticism see Thomas Mann, 'Adhäsionsverfahren, konzentriertes Verfahren, OVG-Zuständigkeit' (2020) 53 (1) Zeitschrift für Rechtspolitik 20 (21).

[18] See (n 8).

from a practical point of view whether the hoped-for acceleration effect can be achieved. In particular, if the deficiencies of the administrative act are 'obvious', as envisaged in the draft bill, a decision could be taken quickly, which would help the applicants to obtain their rights. The rectification that would then be required would possibly lead to a new application for interim legal protection, but the gain in time that could be achieved by setting the envisaged court deadline is only marginal, especially since the court would always have to enter into an additional examination after the supposed 'rectification' as to whether the authority has also fully complied with its petition to rectify the deficiencies, because. it is only if this is the case that an application for a stay of execution could be excluded.

IV Abolition of Suspensive Effect

The aforementioned considerations also show the limits of another acceleration instrument already in use. The above-mentioned Investment Acceleration Act of December 2020[19] introduced a new section 63 into the Federal Immission Control Act. It provides that 'objections and actions for annulment by a third party against the approval of an onshore wind turbine with a total height of more than 50 metres [...] have no suspensive effect'. Actions against wind turbines located at the higher administrative courts of first instance are thus affected. Although such legal changes in specialised law, which deny the suspensive effect of legal remedies by third parties (private individuals or nature conservation associations) against the approval of such installations, have always been included in administrative procedural law via § 80 para 2 sentence 1 no. 3 VwGO, they do not generally lead to a shortening of the legal dispute. Instead, plaintiffs now additionally resort to the constitutionally guaranteed path of provisional legal protection, so that their actions are exceptionally granted a suspensive effect by the court due to overriding private interests. The acceleration effect achieved on the one hand is thus accompanied by an increase in proceedings on the other hand; a vicious circle is created by the legal protection guarantee of Article 19 (4) of the Basic Law.

This is where section 80c (4) VwGO of the current draft bill on the amendment of the VwGO[20] comes in. It has the effect of interweaving the VwGO with the stipulation in the Renewable Energy Sources Act (EEG) made by the current Federal Government through the 'Easter Package' that the use of renewable energies is in the overriding public interest and serves public safety [section 2 (1) sentence 1 EEG]. In this respect, the draft amendment to the VwGO provides that the court 'shall give special consideration to the importance of infrastructure measures within the framework of a balancing of enforcement consequences if a federal law determines that they are in the overriding public interest'.

[19] See (n 7).
[20] See (n 8).

If this regulation becomes applicable law, it will become more difficult for applicants for interim legal protection to assert their interests in the weighing of interests to be carried out pursuant to section 80 (4) VwGO. The number of cases in which applicants will be able to assert themselves successfully in preliminary legal protection proceedings will then probably decrease significantly.

While on the one hand this planned amendment has the potential to speed up proceedings, on the other there is already a conflict with the state objective of environmental protection laid down in Article 20a of the Basic Law, insofar as altruistic actions by environmental associations are concerned. Precisely because the BVerfG, in its climate protection decision of March 2021,[21] particularly emphasised the special value of environmental and climate protection concerns, it can be eagerly awaited how the administrative courts will make their balancing decisions on the tightrope stretched between constitutionally enriched environmental protection and legally forced procedural acceleration. If only because a priority standardised in simple law does not also prevail over private interests secured by fundamental rights and public interests of constitutional rank (e.g. animal protection in Article 20a of the Basic Law), which are asserted in practically every individual case, the acceleration effect hoped for in this respect is also likely to fizzle out in many cases.

V Concentrated Proceedings

A significant delaying factor in German administrative court proceedings involving the approval of large-scale industrial or infrastructural projects is the written submissions by the parties. In addition to the statement of grounds and the statement of defence, the parties often respond to the arguments of the opposing side with extensive pleadings, the page-length of which is in the upper two-digit range, or they submit arguments on factual details that are supposedly of central importance for the decision. This is because the applied court regularly does not pre-structure the subject matter of the case or limit it by setting court deadlines. This is where a second reform proposal comes in, which is intended to shorten complex administrative court proceedings. In the Bundesrat draft, the insertion of a new section 87c VwGO was planned, which would make so-called concentrated proceedings possible. The idea behind this is that the court will agree on the further course of action in a kind of 'procedural timetable' in an early meeting with the parties and that the chairman or rapporteur will then issue an 'order on the progress of the entire proceedings' [section 87c (2) VwGO-E] as early as possible. This innovation is expected to have a disciplinary effect, both on the part of the court (problem-focused conduct of proceedings) and on the parties

[21] BVerfG, Beschl. vom 24.3.2021 – 1 BvR 2656/18 u.a., BVerfG E 157, 30 ff. = NJW 2021, 1723 ff.

(more cooperative conduct of proceedings).[22] In order to achieve this, the administrative courts are to be allowed, with the consent of the parties, to set deadlines for submission and deadlines for decisions by which the parties must, for example, present their case on certain legal issues, state facts, designate evidence or even finally present their case. If these deadlines can be set with preclusive effect, the court should be able to reject late submissions and decide without further investigation.

One advantage of this solution for complex authorisation proceedings is obvious: If the court pre-structures the subject matter of the proceedings at an early stage and separates the issues that it considers unproblematic from those that are relevant to the decision, the parties' further submissions can thus concentrate on the issues that have been identified as essential. The necessity to replicate in detail all issues raised by the opposing side as a precautionary measure is eliminated, and the submissions could be channelled in a solution-oriented manner. On the other hand, even under the legal situation already in force, an administrative court is not prevented from making appropriate procedural orders. The adjudicating court can point out the legal questions which, in its opinion, are relevant to the decision and invite the parties to make specific submissions.[23] Above all, § 87b VwGO,[24] which was already introduced in 1991, opens up the possibility to call upon the plaintiff to make a submission substantiating the action (para. 1) and to order all parties to state facts, designate evidence or submit documents (para. 2), in each case setting a time limit. Statements and evidence submitted after the expiry of the time limit are to be rejected pursuant to section 87b (3) VwGO and the court can then decide without further investigation. The draft bill currently under discussion takes up this criticism and only provides for one early hearing for discussion of the written submissions in section 87c (2) VwGO draft. At the same time, section 87b VwGO is to be supplemented in a new paragraph 4 by a possibility to reject unexcused late submissions.[25]

The only truly new thing would be the request to the parties to 'finally present their case', which would be linked to a time limit. This would at least put an end to the bad practice of extensive written submissions being received by the court on the days immediately preceding a scheduled oral hearing. These writings often only repeat the arguments from the case material already known, but sometimes also surprisingly present a new submission on detailed questions, which then causes the opposing side to again submit a long sprint brief in the procedural home stretch.

From a constitutional point of view, however, one will have to ask whether such a procedural 'conclusion' is compatible with the principle of the right to be heard [Article 103 (1) GG, Section 108 (2) VwGO]. In my opinion, this is the case, since the request is intended

[22] See the reasons to section 7 of the bill from the Bundesrat, BT-Dr. 19/10992, S. 17.

[23] See Martin Beckmann, 'Gerichtliche Vollprüfung und zeitgerechter Rechtsschutz' (2019) Die Öffentliche Verwaltung, 773 (777).

[24] This rule applies also to the appeal proceeding pursuant to § 125 para 1 VwGO.

[25] See the ministerial draft (n 8) 4.

to give the parties the opportunity to comment on the facts and evidence relevant for the judge's need to form an opinion. However, it would have to be ensured that no preclusion occurs if the affected party is not responsible for their delay.[26] This also reduces the likelihood of an unconstitutional surprise judgement, in other words a decision in which the court expresses a legal or factual point of view that had not been discussed until then as the basis of its decision and thus gives the legal dispute a turn that the parties had no reason to expect after the previous course of the proceedings.[27]

However, it is questionable whether a legal standardisation in § 87c VwGO will lead to the judges using this instrument more frequently[28] than the possibilities for setting deadlines already given so far under § 87b VwGO. Above all, it is doubtful that the replacement of the unilateral regulation by the court pursuant to section 87b VwGO, the previous acceleration effect of which is seen negatively anyway,[29] by shortening the procedure agreed upon with the parties, has a chance of materialising in court practice. Just as in more extensive planning and approval procedures in nuclear law or in the construction of power lines (keyword: underground cabling[30]), the fronts between the parties involved in the construction of new wind turbines are often so hardened that an acceleration effect through a voluntary limitation of submissions is not to be expected.[31]

Accordingly, it is questionable whether there is a legal policy need at all for the introduction of a voluntarily entered preclusion. Because the parties involved cannot yet adequately assess the spectrum of issues that may become relevant at the beginning of the proceedings, the actual satisfying function of court proceedings will be missed and the intended acceleration effect will turn into its opposite.[32] This fear is mainly based on the fact that the preclusion of late submissions can lead to further 'sideshows', in which the existence of the prerequisites for rejection can be disputed,[33] as is already the case with regard to

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[26] Regarding the last aspect see also Peter Biesenbach, BR-PlProt. 977, S. 183 hin.

[27] BVerfG, Urt. v. 19.5.1992 – 1 BvR 986/91, BVerfGE 86, 133 (144 f.); BVerwG Beschl. v. 15.5.2008 – 2 B 77/07, Neue Zeitschrift für Verwaltungsrecht (2008) 1025 margin nr. 20; Beschl. v. 2.3.2010 – 6 B 72/09, Neue Zeitschrift für Verwaltungsrecht (2010) 845 margin nr. 14.

[28] Thus the reasons to section 7 of the bill from the Bundesrat, BT-Dr. 19/10992, S. 17. See also Biesenbach, BR-PlProt. 977, S. 183.

[29] Harald Geiger in Eyermann et al. (eds), *VwGO* (14th edn, C.H. Beck 2014, München), § 87b margin nr. 1; Peter Kothe in Redeker, v. Oertzen (eds), *VwGO* (17th edn, Kohlhammer 2022, Stuttgart), § 87b margin nr. 2; Beckmann (n 23) 773 (777); Karsten Ortloff, Kai Riese in Schoch, Schneider, Bier, *VwGO* (C.H. Beck 2022, München) § 87b margin nr. 47 (*keine praktische Bedeutung* ['no practical meaning']).

[30] On this subject Thomas Mann, *Rechtsfragen der Anordnung von Erdverkabelungsabschnitten bei 380 kV-Pilotvorhaben nach EnLAG* (Nomos 2017, Baden-Baden); Thomas Mann, Shaghayegh Kian, 'Erdkabel bei Abstandsunterschreitungen zu Dorf- und Mischgebieten?' (2016) Neue Zeitschrift für Verwaltungsrecht 1443 ff.

[31] In this sense with empirical findings see Ewer (n 2) 12; see also Beckmann (n 23) 773 (777).

[32] See the concerns in the reasons to the recommendation of the committee, BR-Dr. 113/1/19 (neu) 11.

[33] See also Ortloff, Riese (n 29) § 87b margin nr. 47 with reference to the, in this respect, extensive jurisprudence in the civil lawsuit.

section 87b (3) VwGO.[34] Such a development could hardly be avoided, even if the rapporteur acted particularly carefully, even if they first comprehensively ascertained the state of the facts and of the dispute in order to be able to make their order in accordance with them. This would also require more work, which would counteract the desired acceleration effect and would therefore not arouse much enthusiasm on the part of the administrative judges for such 'acceleration legislation' through the introduction of a concentrated procedure.

Above all, however, it would have to be examined, before realising such a reform project, whether or not the preclusion of late submissions within the proceedings would, lead to a conflict with the principle of investigation in administrative proceedings,[35] which is constitutionally secured by Article 19 (4) sentence 1 of the Basic Law, the principle of the rule of law in Article 20 (3) and fundamental rights.

VI Conclusion

The initiatives presented to accelerate and improve administrative court proceedings demonstrate the necessity and possibility of moderate reforms, but at the same time they face the challenge of having to strike a fair balance between the opposing maxims of a full administrative judicial review and timely legal protection. The possibilities for this are limited, and it will not be possible to find an ideal solution that is beyond criticism. However, many of the reform proposals fail to achieve the goal of further reducing the duration of administrative court proceedings for infrastructure projects that are important for the energy transition, without compromising the constitutionally guaranteed effectiveness of legal protection. Heracles must think of another tactic – otherwise Hydra will continue to keep her many heads high.

[34] With more sources from the jurisprudence see Christian Baudewin, Sabine Großkurth, 'Die Präklusion im Verwaltungsrecht: Bedeutung, Chancen, Risiken' (2018) (22) Neue Zeitschrift für Verwaltungsrecht 1674 et seqq.

[35] On this subject Wolf-Rüdiger Schenke, *Verwaltungsprozessrecht* (17th edn, C.F. Müller 2021, Heidelberg), margin nr. 23 et seqq; Friedhelm Hufen, *Verwaltungsprozessrecht* (12th edn, C.H. Beck 2021, München) § 35 margin nr. 21 et seqq; Thomas Mann, Volker Wahrendorf, *Verwaltungsprozessrecht* (4th edn, Vahlen 2015, München) margin nr. 48.

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Judicial Review in Hungary: The Turmoil of Organisational Changes through the Lenses of Procedural Law

Abstract

The last decade of Hungarian administrative justice and public administration has been marked by organisational changes. These changes affected the effectiveness of judicial review and of legal protection against administration in general. The article aims to trace these changes back and show how they are affecting procedural rules and diminishing legal protection against administration. First, a chronicle of the continuous changes of the organisation of administrative justice is given, together with the repartition of competences, to then turn to the interdependencies of administrative procedures and administrative litigation in the centralisation processes and their effects on the remedy system in administrative litigation. Finally, the rules on the composition of court as a third layer of organisational issues are analysed to conclude that the legislator somewhat set aside the policy goal of ensuring effective legal protection through the rules of judicial review.

Keywords: effective judicial protection, appeal, centralisation, administrative justice, composition of judicial panels

I A Rollercoaster of Five Organisational Models in Ten Years

Since 2011, Hungarian administrative justice has been the target of a constant desire for reform. This was not only a political wish, but initially emanated from scholars in view of the organisational reforms in other post-socialist countries during the preparation of the new Hungarian constitution. The aspirations within the judiciary for the rescue of autonomous labour justice, as well as the possibility of cost reduction twisting and distorting the original aim of establishing an autonomous administrative justice, finally led to the emergence of a

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hybrid solution, labelled by the legislator as a specialised court, but which cannot be classified as such. Act CLXI of 2011 on the Organisation and Administration of Courts established the so-called Administrative and Labour Courts (ALC) on the basis of the former labour courts, typically with a majority of labour-law judges and a labour-law judge as president, under the direction of the president of the General Court of the same territorial unit.[1] The next step was drafting the Code of Administrative Procedure, the preparation of which resulted in a proposal for a five-party consensus solution, aiming at replacing these 'pseudo-specialised courts' with eight administrative tribunals.[2] As consensus was not finally reached, the legislator used procedural tools to concentrate administrative cases into eight ALCs. It also designated the Metropolitan General Court as a 'Higher Administrative Court', as a special mixed forum for administrative cases. Although not creating a new court, the provisions of the Code of Administrative Procedure on the Higher Administrative Court, adopted by the National Assembly on 6 December 2016, were declared unconstitutional by the Constitutional Court in its Decision No 1/2017. (I. 17.) AB on the motion of the President of the Republic. The procedural tools remained, so a three-tier system of fora started its work on January 1, 2018, eight ALCs being designated as general first instance courts, the other twelve ALCs with competences in social adjudication only, the Metropolitan General Court as a mixed forum (first instance cases, mainly emanating from regulatory agencies and appeals against decisions of the ALCs), and the Curia as a forum for revisions and appeals from the Metropolitan General Court.

Subsequently, the Seventh Amendment to the Fundamental Law separated administrative justice from ordinary courts at constitutional level and created a two-headed justice system. Upon this new regulation, Parliament adopted Act CXXX of 2018 on Administrative Courts, the entry into force of which was later postponed by the National Assembly until mid-2019, when Parliament repealed the Act on the entry into force of Act CXXX of 2018.[3]

A series of surprises then started: upon the initiative of an opposition party,[4] the Eighth Amendment to the Fundamental Law was enacted with the support of the governing

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[1] Küpper defines this as a 'pseudo-mixed system', Herbert Küpper, 'Verwaltungsgerichtsbarkeit in Ungarn' in Armin von Bogdandy (ed), *Handbuch Ius Publicum Europaeum.* Band VIII. (Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren, C.F. Müller 2018) 717–826.

[2] At the same time transferring the remaining labour disputes, the number of which by that time had become quite small, to the general courts.

[3] Act CXXXI of 2018 on the entry into force of Act CXXX of 2018 and on certain transitional rules was repealed by Act LXI of 2019, § 1, as of 9 July 2019. Since a separate Act provided for its entry into force, the National Assembly cannot repeal the Kbtv. itself. See the translated acts at <https://njt.hu/translations/-:-:2018:-/1/10>. Cf. Krisztina F. Rozsnyai, 'Administrative Law 2018 Hungary: Droit administratif 2018 Hongrie' (2019) 30 (4) European Review Of Public Law 1431–1461; Renáta Uitz, 'An Advanced Course in Court Packing: Hungary's New Law on Administrative Courts' VerfBlog, 2019/1/02, <https://verfassungsblog.de/an-advanced-course-in-court-packing-hungarys-new-law-on-administrative-courts/>, accessed 30 August 2022, DOI: 10.17176/20190211-223946-0

[4] It was the 'Párbeszéd Magyarországért' party.

parties. This amendment reversed all amendments in relation to the twin peaks of the court system and reinstated its unity – as much moreover, it went further and even abolished the constitutional basis for establishing special courts. The government was surprisingly more than ready to follow this line of legislation. Soon it initiated the enactment of an omnibus bill[5] titled the 'Act amending certain acts in connection with the establishment of single-tier district office procedures' (hereinafter: STDAP). As a quite remote connection, this bill also amended the acts on the organisation of administrative courts and on administrative court procedure: it abolished administrative and labour courts with effect from March 31, 2020. This marks the end of an almost *decade-long* process, by which the Hungarian court system has sought to move closer to the dualist system of administrative adjudication. At the same time, the other existing features of the dualist system, separate procedural law and separate adjudicative forums, remain in place despite the full integration into the ordinary court system, and administrative justice's separation from the civil and the criminal branches will even be reinforced, so there is only an organisational rewind, which does not mean that the new solution will fall into the monist category.[6]

With this amendment by the STDAP, the administrative court forum system became a two-tier system. It is true that the historical system of administrative justice was originally conceived as a two-tier system, but it did not materialise in 1896, nor later. In 1896, only the (supreme) Hungarian Royal Administrative Court could be established and all subsequent attempts to set up lower courts failed, so there was only one forum for administrative disputes until its abolition in 1949.[7] 1990 found Hungary already with an (almost entirely) monist three-tier system, the general courts (as civil courts) exercising appellate jurisdiction between the district courts and the Supreme Court. The idea of a two-tier system appeared again in the Act on Administrative Justice and was finally realised within the ordinary justice system – but only for a short time, from April 2020 to February 2022.

In terms of the number of instances, since the restructuring of the Austrian system there are now two or three levels of administrative adjudication everywhere. Historically, the three-tier system (i.e. first instance, appeal and review) was first introduced by Germany, and we find other three-tier systems established or developed over time, for example in France, Spain, Portugal and Greece. Recent changes to the English system can also be seen as an approximation to the German model. Many European countries, such as Austria, Poland, the Czech Republic, Latvia, Lithuania, Croatia, Slovenia, Bulgaria, the Netherlands,

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[5] Act CXXVII of 2019 on the amending of certain acts in connection with the establishment of single-tier district administrative procedures.

[6] Krisztina F. Rozsnyai, 'The Procedural Autonomy of Hungarian Administrative Justice as a Precondition of Effective Judicial Protection' (2021) 30 (4) Studia Iuridica Lublinensia 491–503, DOI:10.17951/sil.2021.30.4.491-503.

[7] András Patyi, 'Rifts And Deficits – Lessons Of The Historical Model Of Hungary's Administrative Justice' (2021) 1 (1) Institutiones Administrationis – Journal of Administrative Sciences 60–72, DOI: 10.54201/iajas.v1i1.8

Finland and Austria, have only a two-tier court system.[8] Even in countries with a three-tier forum system, there is a trend towards two-tier jurisdiction, with an increasing number of countries opting for fewer forums to ensure the timeliness of judgments, such as in Greece and Spain, where there are significant exceptions, both by excluding appeals and by transferring first instance jurisdiction to higher courts. Consequently, even in the three-tier system, there are many cases where administrative court procedures are conducted on only two instances at most, and even exceptionally only on one single (first and last) instance. As another solution, appeals are, if not excluded, significantly limited in some three-tier models, or there is a possibility to not to allow appeal (e.g. Germany).

This tendency is fuelled not only by the requirements of the reasonable time requirement of the right to fair trial, but also by the experience that the *quality of judgments* does not necessarily improve with the number of judicial fora that one may access in a single case: contrary to the general opinion, it is mainly *influenced* by *the expertise of the judge(s)*.[9] As already noted, it an important tendency to observe that the accessibility of fewer levels does not generally lead to a reduction in the number of fora, but rather to a preference for differentiated distribution of competences. Moreover, in countries with only a two-tier forum system, there is a recurring demand for an intermediary level (e.g. in Bulgaria).

Neither is the number of instances necessarily related to the area and population of the countries. In countries similar in size and population to Hungary, a two-tier system is typical, but it is also found in much larger countries (e.g. Poland). Conversely, a three-tier system is mostly found in larger countries (e.g. France, Germany, Spain, Ukraine), but Portugal, for example, which is similar to Hungary with regard to number of inhabitants and size, has also established a three-tier system.[10]

This trend was also followed by the original system of Act I of 2017 on the Code of Administrative Court Procedure (hereinafter: the CACP). Adapting a mixture of the German and the Spanish models, certain cases were put into the first instance competence of a higher court – a solution widely used in civil and criminal cases. After less than two years of this new system, without experiencing problems in the case-law, the only argument of the legislator for the decrease of the number of instances was that the system, 'with two and a half instances', was too complicated and it would suffice to have two instances. The new president of the Curia soon began to complain about the workload of his court, and, as another surprise, a new intermediary level has been inserted into the forum system: the

[8] Karl-Peter Sommermann, Bert Schaffarzik (eds), *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer 2019, Berlin–Heidelberg); Karl-Peter Sommermann, 'Die Europäisierung der nationalen Verwaltungsgerichtsbarkeit in rechtsvergleichender Perspektive' in Ralf P. Schenke, Joachim Suerbaum (eds), *Verwaltungsgerichtsbarkeit in der Europäischen Union* (Nomos 2016, Baden-Baden) 189–211.

[9] Cf. Kovács András Gy., 'A bírói határozatok karakterisztikája komplex döntéseknél' (2006) (2) *Állam és* Jog 269–289, 277.

[10] Krisztina F. Rozsnyai, 'Current Tendencies of Judicial Review as Reflected in the New Hungarian Code of Administrative Court Procedure' (2019) (1) Central European Public Administration Review 7–23, DOI: 10.17573/cepar.2019.1.01

appellate court, namely the Metropolitan Appellate Court. All appeal procedures against first instance decisions (mainly procedural orders) were transferred to this court – more precisely given back to this court, as it had the same competences before 2012. With this last step, Hungarian administrative justice almost arrived back to the starting point of the reforms initiated through the new constitution. One big difference is that the intermediary level now exclusively handles appeals, whereas before – both before 2012 and in the original solution of the CACP from 2018 to 2020 – it also had first instance competences. It is thus worth having a look at the repartition of competences.

II The Repartition of Competences

The dynamics of the static organisational system lies in the arrangement of competences.[11] Of course, there is always the question of, which is first, which is the determinant factor: should the organisation be developed according to the requirements of competences and procedures, or should the procedures be determined by the organisation? Even if we do not cut the Gordian knot, there are at least *three pillars of the* competence regime that are worth exploring: (1) in addition to ensuring access to courts against administrative action; (2) the allocation of cases between administrative courts (material and territorial competence and the remedy system) plays a great part. and so do (3) the provisions on the composition of the court. It is therefore worth taking a closer look at these questions of administrative court procedural law, in parallel with the significant changes of organisation since the 1997 judicial reform.

As we have indicated above, there is an international trend of creating a differentiated repartition of competences, both in ordinary and administrative courts. This leads to the creation of courts with mixed competences: they proceed both on first and on second instance, which can enhance professionalism. Apparently, in a two-tier system, this is not possible except for a few cases because of the requirements of remedies, so the shift to the two-tier system necessarily led to the abolition of the differentiated repartition of competences, which although not a completely new phenomenon of the CACP, was however applied systematically for the first time. Even so, it proved to be as ephemeral as previous attempts to create such rules. Article 6 of Act XXVI of 1991 transferred to the first instance jurisdiction of the county courts (now the general courts, at that time the courts of second instance in administrative cases), the first instance competence in administrative cases 'in which the administrative body of first instance proceeded with a territorial competence over the whole country'. This innovative solution was only in force for about a year, until 31 December 1993. The second pioneering attempt took place in the field of communications:

[11] Erdei Árpád, 'Gyógyítható-e a perorvoslati rendszer?' in Varga István, Kiss Daisy (eds), *Magister Artis Boni et Aequi – Studia in Honorem Németh János* (ELTE Eötvös Kiadó 2003, Budapest) 161–186.

in 2011 the Metropolitan Court of Appeal was granted successively increasingly greater competences to examine certain acts of the media and communications authority as a first instance court. This solution was also abolished quickly, at the end of 2012 by an amendment linked to the start of the operation of the ALCs.[12] The *CACP* institutionalised the differentiated repartition of competences in administrative justice on a general scale. As a substitute for the organisational changes, it *has had two directions to increase professionalism*. On the one hand, the Metropolitan General Court,[13] was given the competences of a mixed court: it proceeded not just in appellate procedures against decisions of the ALCs, but also had the (exclusive) competence to proceed in some administrative disputes of priority, mainly disputes in connection with regulatory issues and professional bodies. On the other hand, it was necessary to concentrate administrative disputes in general on fewer fora than before, so there was also a repartition of competences between the 20 ALCs, as explained in the previous part: eight ALCs were mandated to proceed as general first instance courts with a regional territorial competence while the other 12 ALCs were only given the competence to proceed in administrative cases 'close-to-the-people': these were mostly groups of cases in certain areas of social administration. This meant that *four different allocations of* administrative disputes at first instance were *possible* under the CACP, since. in addition to the eight ALCs, all 20 ALCs or the Metropolitan General Court could proceed at first instance, as well as the Curia as first and last resort in election and referendum disputes and in disputes relating to the right of assembly. This differentiated repartition of competences disappeared with the conversion to a two-tier system. and the system really did become less complicated, as the regulation of disputes over material competences between administrative courts became redundant in the absence of several fora having competence for first instance procedures.

Thus, at least from this perspective, it is no wonder that the elements of a more sophisticated organisational solution[14] were put aside when (re)introducing the Metropolitan Appellate Court as a court proceeding in administrative cases. It would have contradicted the prior argumentation on the necessity to reduce the number of instances due to

[12] Cf. F. Rozsnyai Krisztina, 'A közigazgatási és munkaügyi bíróságok felállításával kapcsolatos törvénymódosítások margójára' (2013) 68 (3) Jogtudományi Közlöny 147–153, 150–152.

[13] The Metropolitan General Court would have been named the 'higher administrative court' in the CACP. The name was finally abandoned following the constitutionality veto of the President of the Republic, who objected to it and referred the CACP to the Constitutional Court. Decision 1/2017. (I. 17.) AB of the Constitutional Court declared this solution to be of organisational nature and thus in lack of the supermajority unconstitutional. However, the functions were retained by the Metropolitan General Court with the exclusive competences being declared [sections 7 (2) and 13 (11) of the CACP]. See in detail in Chronowski Nóra, 'A sarkalatosság árnyalatai' (2017) (2) Közjogi Szemle 62–63.

[14] See, for example, the various special administrative courts (mainly in tax, social, competition and migration matters) that already exist in several European countries, Rozsnyai Krisztina, *Hatékony jogvédelem a közigazgatási perben: A magyar közigazgatási perrendtartás európai fejlődési tendenciákhoz illeszkedő kodifikációjának egyes előkérdései* (ELTE Eötvös Kiadó 2018, Budapest) 85–87.

complexity. Besides the appellate procedures, the decisions over territorial competence disputes between general courts and for the designation of the proceeding administrative authority have been transferred to the Appellate Court. On the system of appeals, nothing changed; there are no appeals in priority cases and neither have they been transferred to the middle instance, according to the original design of the CACP. So, within four years there have been three different systems of the repartition of competences, the one most in line with European trends not being the present system.

III Administrative and Judicial Remedies as a Complex System

The remedies against administrative action, be that inner-administrative (often referred to as pre-trial) remedies or judicial remedies before an independent impartial court are in practice two (or more) parts of one procedure. The case law, both on the requirement of reasonable time of Art 6 ECHR (as well as other elements of fair trial) and on Art 13 ECHR is also grounded on this perception. It is not futile to shed light on the changes in a comprehensive manner.

1 The Elimination of Appeals of the Systems of Inner-administrative and Judicial Remedies

Another cardinal change, indicated in the title of the STDAP, was the transformation of administrative procedures into single-instance procedures and consequently in most administrative cases, appeals were abolished. In itself, abolition of the appeal procedure was not from evil intent: it depends on several factors whether the system of legal protection and the functioning of public administration can do without appeal. Among others, the guarantees of the first instance procedures as well as the professionalism of civil servants and public administration also play a great role, and, of course, there are also other means of control that play a part in safeguarding the legality of administration.[15] If we look at the different regulations in the German Länder, we can see that both models are applied and work well – there are Länder where there is a *Widerspruchverfahren* and others where there is none.[16]

This policy goal was already formulated A at the drafting of Act CL of 2016 on the General Administrative Procedure (hereinafter: GAPA), but was successfully opposed (to some extent at least) by the public administration back then. Compared to Act CXL of 2004

[15] Wolfgang Kahl, 'Begriff, Funktionen und Konzepte von Kontrolle' in Wolfgang Hoffmann-Riem, Eberhard Schmidt-Assmann and Andreas Voßkuhle, *Grundlagen des Verwaltungsrechts,* Band III[2] (C.H. Beck 2013, München) 459–591, Rn. 139 ff., 208 ff.

[16] See a broader European perspective: Buijze, Anoeska and Langbroek, Philip M. and Remac, Milan, *Designing Administrative Pre-Trial Proceedings* (Eleven 2013, Den Haag).

on the General Rules of Administrative Procedure and Services (Ket.), the real change in the system of legal remedies had only been in the logic of the regulation and has had little actual effect. While the Ket. had considered appeal as a general remedy and specified the cases in which it was excluded and thus access to court was immediately available, the GAPA applies the opposite logic: it designates court action as the general remedy and allows appeal as an exception only. It was also a factual necessity that led to this change, as in the Government's bureaucracy-reduction programme, a heavy centralisation process took place, which resulted in the merger of most government agencies into the ministries, which did not want to deal with day-to-day second instance and supervisory procedures.[17] As the government agencies are however set up on two instances, these agency competencies could be transferred to them and the first instance procedures again transferred from government offices to selected district offices, these second instance procedures could be retained in quite a lot of fields of administration. This readjustment of competences was reflected in the initial text of Article 116 (2)(a) GAPA, which, as an exception, allowed for appeals against the decisions of the district office. Thus, all this had resulted in a significant increase in the number of cases handled by the district offices,[18] so that appeals were possible in quite a large proportion of administrative cases, and there were quite a few procedures which actually became single instance ones. This was again a transitory phase, as the STDAP eliminated this rule without giving any explanation. Since the entry into force of this provision of the STDAP, appeals only prevail in a general manner in tax administration and in local government and police administration cases.[19]

The elimination of appeals from the system of judicial remedies in administrative cases began with the 1997 judicial reform. At that time, the possibility of appeal against judgments of the court of first instance was largely abolished in administrative litigation and revision was only available against judgments of first instance – but for a long time it functioned like an appeal as, due to the absence of appeals, the restrictions that applied in civil proceedings for revision could not be applied.[20] This change was based, on the one hand, on the fact that, in connection with an administrative act – together with the appeals,[21] there could typically be a procedure over five instances with four remedies, which was deemed to be too much. On the other hand, according to the Constitutional Court's established practice on the right to remedy,[22] the provision of a single remedy instance is

[17] István Hoffman, János Fazekas and Krisztina F. Rozsnyai, 'Concentrating or Centralising Public Services? The Changing Roles of the Hungarian Inter-municipal Associations in the last Decades' (2016) 14 (3) Lex Localis 451–471, DOI: https://doi.org/10.4335/14.3.451-471(2016)

[18] Approx. 30 million cases a year according to OSAP (the Hungarian PA Statistical Database).

[19] Tax authority procedures are exempted procedures and regulated by the General Tax Procedural Code.

[20] Section 340/A of the former Act III of 1952 on Civil Procedure Rules (CPR). The amending Act of CXVIII of 2012 contained restrictions on the review of the value of the subject-matter of the action as of 1 September 2012.

[21] At that time, the inner-administrative appeal still was the general remedy against administrative decisions.

[22] This is a human right guaranteed by Hungarian constitutional rules, which is quite unique in its scope as it offers not protection against the administration, but in general a remedy against the decisions of authorities and courts.

sufficient, since there is no constitutional provision on the number of levels, and the number of levels of remedy available against a decision is therefore a matter for the legislator.[23] Since the appeal and the court action were both regarded as remedies for the means of this right, but the requirement of judicial control over the administration has also to be respected, according to the Constitutional Court, the legislator thus fulfilled all criteria for the right to a remedy in administrative matters by providing for a single-instance court procedure, where an action may be brought by anyone whose right or legitimate interest is affected by an administrative decision.[24]

2 Is There an Interplay between the Appeal in the Administrative Procedure and the Appeal in the Administrative Court Procedure?

It is very interesting to observe the logics of the Hungarian legislator in view of the appeal procedures. Although they have the same name, they have a quite different function and shape in the administrative and the court procedures respectively. Whereas in the administrative procedure, the appeal is a procedure intended as a means of self-correction of the administration and as a means of evading judicial review, whereas the court procedure of second instance is centred around the legality of the first instance court procedure. Nevertheless, as both procedures can lead to the annulment (or even amendment) of the administrative act, their final goal is the same: that of ensuring subjective legal protection. However, this led to very differing legislative solutions.

When the second instance court procedure was abolished in general from 1999 on, there was an exceptional case where the appeal remained possible. It was reserved for cases where the court could amend the administrative act and only a single-instance proceedings has preceded the administrative action. This rule seems to have been intended to make it clear that, contrary to the view of the Constitutional Court, a single instance of judicial review is not sufficient where the court has the power to amend the decision and where there was no internal appeal.[25] It was later altered, and appeal was only granted in cases

[23] Decision 9/1992 (I. 30.) AB, ABH 1992, 68. On the evolving practice of the Constitutional Court: Hoffman István, 'A jogorvoslathoz való jog érvényesülése a közigazgatási hatósági eljárásban – különös tekintettel a közigazgatási határozatok bírósági felülvizsgálatára' [2003] Themis: Electronic Journal of the ELTE Doctoral School of Law and Political Sciences 27–38, 34.

[24] Varga István, 'A jogorvoslathoz való jog – Alkotmány 57. §' in Jakab András (ed), *Az Alkotmány kommentárja* (Századvég Kiadó 2009, Budapest) 2053–2174. On the constitutional bases of administrative justice evolving between the right to remedy and the principle of control over the administration: Patyi András, *A magyar közigazgatási bíráskodás elmélete és története* (Dialóg-Campus 2019, Budapest) 188–211.

[25] The former CPR Chapter XX Section 340 para (2). However, since in addition to those two conditions, the rule in question initially, until 2009 included the additional conjunctive condition that the decision must have been made by an administrative body with a countrywide territorial competence, a condition which called into question the relevance of that connection. So did the fact that the original concept would have provided for an appeal in general in the case of payment obligations exceeding HUF 2 million – a condition in accordance with the logic of civil law, but not really viable in administrative litigation. The latter condition was taken out of the judicial

where there actually was an amendment. Consequently, there were hardly any amending judgments – but that was only one of the reasons not to amend.

Institutionalising several types of actions besides the contestation action,[26] a differentiated approach was necessary in the codification process of the CACP. Because of the widening of access to court, there could be cases where the court procedure is not preceded by an administrative procedure, in view of which the first instance action would already be deemed to be a remedy. And while one of the starting points for codification in the case of contestation actions was thus according to the case law of the Constitutional Court that the scope of the remedies could be narrowed, for the other types of action this issue required complex examination. It has also become clear, however, that neither the power to amend nor the single instance nature of the preceding procedure makes it absolutely necessary to provide for additional remedies. However, these considerations have not led to a curtailment of the system of appeals, the main reason being the large-scale reduction of appeals in the parallel codification of administrative procedural law. To counterbalance the envisaged single-instance-model of administrative procedures, the first proposal of the CACP, submitted for public consultation by the Ministry of Justice on 3 April 2016, provided for an ordinary remedy against court judgments: judgments would have been subject to a referral to the second instance court.[27] The name itself shows that, at the same time, this ordinary remedy against judgments would have differed significantly from the appeal, namely on the issue of generality. The lodging of a referral would not in itself have created an obligation to adjudicate, there would have been a screening by means of an admissibility test, and the second instance court would have essentially only accepted appeals which met one of the criteria laid down by law. In principle, this model would have applied, but not in all cases, precisely because of the different construction of the preceding proceedings. Where there was no prior administrative procedure, there would have been no admissibility test to ensure at least a two-instance adjudication, nor would there have been any admissibility test for appeals against orders. Given the principle of effectiveness, the proposal was intended to concentrate the second instance procedures primarily on the examination of illegality and to discourage possible dilatory behaviour. Therefore, the invocation of a new ground or fact in second-instance proceedings would have been possible only as an exception. In the event of a referral being successful, the court would have exercised a mandatory amending power, except for the most serious vices which would have led to annulment.

In addition to appeals and complaints, the proposal would have provided for revision and retrial as extraordinary remedies. As regards revision, two important changes were envisaged: the proposal would have *radically reduced the scope of revision* to judgments except for those

reform package by Article 5 of Act LXXI of 1998, which amended Act LXXII of 1997 amending the former CPR three days before its entry into force.

[26] Like actions for failure to act, mandatory and declaratory actions or supervisory actions. See Chapters XXII–XXIV of the CACP at <https://njt.hu/jogszabaly/en/2017-1-00-00> accessed 30 December 2022.

[27] In Hungarian it would have been called 'fellebbvitel' instead of 'fellebbezés' (appeal).

brought on administrative action not preceded by formal administrative proceedings.[28] These are typically disputes with close links to other areas of law (administrative contracts – civil law, civil service disputes – labour law), which are also dealt with by different courts, so the need to ensure legal unity is even more existent. In the absence of a preliminary procedure, the extraordinary remedy would still 'only' be a third instance procedure in these disputes, which was an argument in favour of fewer restrictions on the revision. The narrowing of the scope of revision would have resulted in a new setting, in which the most important role of the development of the case-law would have been played by the higher administrative court, and not the Curia, the guardian of the uniformity of the whole system of case-law.[29] The design of this remedy system was undoubtedly also influenced by the expectation that the creation of an independent administrative court of second instance could be achieved and make way for professionalisation and autonomy of administrative justice within the unitary model of justice ensuring both subjective protection and the important objective functions of developing and preserving the unity of the administrative court's case-law and the possibility of reacting to interpretative difficulties arising from the introduction of a new system.

The document submitted to Parliament already contained a different system of remedies. The reasons for this were, on the one hand, the criticisms of the administrative bodies against the referral – mostly the admission procedure which was perceived as a hindrance to remedy – and, on the other hand, the objections of the Curia. Thus, instead of the referral, the admission procedure has been abandoned and the appeal has been 'reintroduced' into the system of judicial remedies, but severely limited to three constellations (judgments upon mandatory actions and failure to act actions,[30] and against first instance judgments in priority cases). The revision procedure has been broadened in parallel, with the introduction of an admission procedure. The admissibility grounds were not the grounds for the referral but became admissibility grounds similar to those in the Code of Civil Procedure, reflecting the primacy of the function of securing the unity of law: the need for a preliminary ruling, the importance of the case, the need to ensure the unity of the application of the law and the deviation from the published practice of the Curia. However, the dual role of the Curia in the appeal system was maintained, as the law allowed appeals to the Curia against the first-instance decisions (judgments in priority cases and some orders) of the Metropolitan General Court.[31] These features were left prima

[28] The introduction of the referral would have meant that in a typical case (i.e. in authoritative administrative proceedings) the ordinary remedy would have been accompanied by proceedings at least on three instances, or even at four instances, if an inner-administrative appeal was exceptionally granted.

[29] For a detailed analysis see András Gy. Kovács, 'The Curia's tasks in the Code of Administrative Court Procedure' (2018) Tomus LVII, Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominata Sectio Iuridica, 15–25, at www.ajk.elte.hu/annales.

[30] And other administrative acts, where there was no formal administrative procedure for the realisation of the administrative action, like policing measures.

[31] Kovács (n 29) 21.

facie untouched by the STDAP, but all together it was a great change, that judgments in priority cases could not be appealed any more, taken together with the change of the decision powers in revisions.[32] The fact that the inner-administrative appeal was at the same time almost completely abolished from the administrative procedure would have made it necessary to rethink the remedy system.[33] The legislator surprisingly established another causality link: the legislature did not think about how this reduction of legal protection could be counterbalanced, but eliminated the power of the court of first instance to amend administrative action except for those administrative acts that were carried out in a two-instance forum system. In this way, the system of decision powers in the CACP centred around the primacy of the *ius reformandi* has become somewhat obsolete: how are, for example, obligatory grounds for annulment to be interpreted; what is the situation with the amendment as a sanction for non-fulfilment of the judgment? These questions were not addressed, as there was no systematic revision. With the insertion of an additional conjunctive criterion for amending judgments, namely that the administrative act has to be performed in a multiple instance procedure, this power has experienced a serious cutback as, outside of tax administration, there are very few sectors where an appeal would be granted by the sectoral legislator.

IV Changes in the Composition of the Court

Although the constitutional rule was and is principally that 'courts shall adjudicate in panels',[34] this was and is rarely the case at first instance due to the first part of the sentence, 'Unless otherwise provided in an Act'. In administrative justice, the composition of the first instance court as a single judge was the general rule, cases have almost never been transferred to a chamber (in several courts, there has only been one or two judges, so no panel could have been formed at all), and even trainee judges could proceed alone. The CACP tried to return to the general rule of the constitutional principle but, being realistic, it allowed for single judges to proceed in some cases.[35] The proportion of the two models, originally already quite in favour of the single judge at the end of the codification process,

[32] Aligning the rules of revision in the CACP with the decision of the ECtHR in the *Pákozdi v. Hungary* case of 25/11/2014 (ECLI:CE:ECHR:2014:1125JUD005126907), amendment of the judgment is only possible if the Curia annuls the court judgment together with the administrative action and orders a new procedure. In all other cases, only cassation is possible, which means a much longer procedure than if the Curia would proceed as an appellate court, having the possibility to amend and bring the case to an end.

[33] The Curia was handling the admission procedure in a very restrictive manner in the beginning. As there were some corrections made by the legislator, the figures improved as well as.

[34] The Fundamental Law of Hungary, Art. 27 (1).

[35] There is a list of matters that can be dealt with by a single judge 'ex lege', and the chamber may also decide that one of the panel members proceeds alone if the case does not present any legal or factual difficulty. The courts in remedy procedures always proceeded in chambers.

was further pushed in that direction by putting even all administrative cases decided at the lowest territorial level (where there often is less administrative procedural expertise) into that category – another guarantee helping to balance out the lack of pre-trial appeals is weakened.[36]

The reorganisation into a two-tier system had a great impact on case numbers as well. The Curia, becoming competent for all remedy procedures, experienced a great rise of numbers; as all appeals reached this forum: in the first 20 months, there was a quadruplication in the numbers of appeals.[37] A rise was anticipated due to a surprising piece of law: appeals against orders should have been handled by single judges at the Curia. This had only one precedent in the admissibility decision of the revision – a solution that was declared unconstitutional at that time. Because of the criticism, this rule was first altered, and its scope was restricted. The single judge could also decide on transferring the case to a chamber. At the end of 2020, with effect from January 1, another surprise in the Act on the organisation and administration of courts followed, which was heavily criticised by the Venice Commission.[38] The new president (entitled to be nominated president according to the rules of the STDAP) received the power to designate groups of cases where chambers of five judges could proceed instead of the 3-judge-panels. This rule was not altered in view of the criticism, but the rules of the CACP were amended instead. Since the returning to the three-tier system, the general rule for the composition of panels of the Curia – only in administrative matters – is s panel of five judges. With full discretion, the president of the chamber (and not the chamber itself, as is the rule in the first instance procedure *per* CACP Section 8) may transfer the case to a panel of three judges. It is an exceptional possibility, yet without any reference to the grounds that could justify such an exception. The requirement of Art 6 ECHR regarding the court established by law is clearly not met in these cases.

The number of Curia judges remains constant, and the problem of having now – at least for some years until the retirement of quite a few judges – too many judges at the Curia has not been tackled. Transferring judges, as happened back in the early 2000s,[39]

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[36] The powers of the 'ex lege' single judge have been significantly extended as of 1 January 2020 by the STDAP. In addition, according to Section 8(3)(d) of the CACP., the category of cases in the competence of all ALCs, which has become obsolete, has been replaced by cases handled by district offices and local government bodies, which, as mentioned above, represent a very significant proportion of administrative cases. The increase of the threshold to HUF 10 million in Article 8(3)(b) for cases brought on the basis of an action contesting a payment obligation with a basic amount not exceeding HUF 5 million also results in an expansion of the use of the single judge. In addition, the inclusion of the orders rejection and termination of the procedure in § 8(3)(g), alongside the ancillary relief is of little consequence.

[37] See <https://birosag.hu/birosagokrol/statisztikai-adatok/statisztikai-evkonyvek> accessed 30 August 2022.

[38] Opinion CDL-AD(2021)036-e at <https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2021)036-e> accessed 30 August 2022.

[39] The judges consented to be transferred as they were offered the position of head of panel and the same salary as at the Supreme Court.

when the Court of Appeal was set up for the first time, and several judges opted for being transferred to the Court of Appeal, would probably not work in the present situation, after so many organisational changes. It might seem an infringement of the independence of judges. The new composition in practice, at least for 5-judge grand chambers – finally and retrospectively – provides a legal basis for the system of grand chambers developed a few years ago, contrary to both procedural law and organisational law.[40] but is still lacking transparency. At least, 'from 16 July 2022 no seconded judges will adjudicate cases at the Curia, and from that date on, the secondment of judges who have been working here until now will cease'.[41]

V Conclusions and Perspectives

The abolition of pseudo-autonomous[42] ALCs is not necessarily a step backwards in itself. Organisational autonomy is not indispensable, though undoubtedly a useful condition for high-quality administrative adjudication and thus the organisational solution followed by the majority. As the ALCs could not be said to be organisationally autonomous from the ordinary courts, their abolition does not in fact affect the autonomy of administrative justice. Professional autonomy is also improved to some extent by the re-institutionalisation of the Administrative College at the Curia and the prohibition of the fusion of administrative colleges with other colleges.[43] The restoration of the three-tier model after a short period with the two-tier system is a reasonable decision. However, the intermediary level should have been redesigned as a mixed forum, not only handling appeals, but also dealing with first instance cases. This would have been essential both for a deeper understanding of procedural issues, and for a more complete competence of the Curia to rule on both procedural and material law. Without the first-instance competences of the Metropolitan Appellate Court, quite a few really important procedural issues cannot reach the Curia, like e.g. problems of interim protection. This lack produces lacunes in the case law and the uniform interpretation of statutory law.

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[40] See in detail in Viktor Vadász; András Gy. Kovács, 'A game hacked by the dealer' VerfBlog, 2020/11/10, <https://verfassungsblog.de/a-game-hacked-by-the-dealer/> accessed 30 December 2022, DOI:10.17176/20201110-200050-0, as well as Kovács András Gy., 'Adalékok a Kúria első elnöke jogállamhoz való viszonyának megértéséhez' (2020) (4) Fundamentum 20–34.

[41] See the press release <https://kuria-birosag.hu/en/press/termination-activity-seconded-judges-curia> accessed 30 August 2022, reacting on one of the points of criticism from the Venice Commission and the EU. The problem in detail: Ágnes Kovács, 'Defective Judicial Appointments in Hungary: The Supreme Court is Once Again Embroiled in Scandal' VerfBlog, 2022/9/27, <https://verfassungsblog.de/defective-judicial-appointments-in-hungary/> accessed 30 August 2022, DOI:10.17176/20220927-230658-0

[42] Cf. Küpper (n 1) or F. Rozsnyai (n 12), 147.

[43] The college is formed by all judges assigned to the same section of the Curia. There are at present three such colleges, the Civil Law, Penal Law and Administrative Law College.

At the same time, further amendments to the rules of jurisdiction of the CACP, which are not at all related to the abolition of the ALCs and are not justified on the merits, such as narrowing the scope of judicial protection, the curtailment of the court's decision-making power and the reduction of proceedings in chambers, as well as the expansion of the Curia's chambers, all indicate that the legislator believes that administrative adjudication has become too efficient.[44] The almost complete abolishment of appeals in the general rules of administrative procedure raise a number of questions and fears for the future of effective legal protection against the public administration, which are only fuelled by the introduction of the uniformity complaint and the right of public bodies exercising public authority to lodge a constitutional complaint.[45]

The real goal of the changes to the administrative court procedure may be best revealed by the explanatory memorandum on the change of Section 4 and 5 of the CACP. Here, the legislator makes no secret of the fact that it considers this solution – less than three years after having adopted it – to be too progressive, and deems a return to the prior solution criticised for more than a century[46] to be necessary: 'The regulatory logic of the CACP returns to the pre-2018 rules as regards the scope of the CACP, and the possibility of contesting an authoritative measure and the contesting of general act is therefore removed from the general clause.'[47] However, it is not clear from either the general or the detailed explanatory memorandum why this return is necessary.[48] But all the changes listed here bring us back to the past, to a status quo of 2010. All this shows that, after a short transitional

[44] It was only one and a half years after the entry into force that the STAD was enacted. So, there was rather a fear of legislature of the future: These changes however hollow out the most important improvements brought by the CACP.

[45] The preclusion rules in evidentiary proceedings, for example are conceived for a model where a pre-trial appeal is typically possible and the case is properly clarified in the administrative procedure. Contrary to this perception, there are now even procedures *ex officio*, in which the party does not have to be notified of the procedure if is a decision shall be issued within 8 days. The same is true for the rules on shifting the burden of proof, the *ius reformandi* or the administrative loop (the healing of irregularities and flaws in the administrative action by the administration during the administrative court procedure). Cf. F. Rozsnyai (n 10) 16–19.

[46] See Patyi (n 24) 46–62 for an analysis of the historical model and a summary of the critiques already formulated at that time.

[47] Explanatory memorandum to Sections 202 and 203 of the Act adopted.

[48] The eighth amendment to the Fundamental Law of Hungary seems to confirm this. The restoration of Article 25 to the pre-Seventh Amendment wording, in addition to omitting the possibility of establishing specialised courts from paragraph 4, has removed from paragraph 2 the phrase 'in any other matter specified by law' [originally in Article 25(2)(a), and after the Seventh Amendment, coupled with the phrase 'in administrative disputes' in Article 25(3)]. The much-criticised concept of 'administrative decisions' under former Article 25(2)(b) has also been reinstated in this way [see e.g. Patyi (n 24) 211–226]. This is the second time that even the term 'administrative dispute' has been removed from the text of the Fundamental Law. First, the Fourth Amendment removed these words from the rule of 25 (4) on the possibility of the establishment of specialised courts – after the establishment of the ALCs. The 7th Amendment to the Fundamental Law of Hungary defined the field of administrative courts using the concept of administrative dispute in Article 25(3). The Eighth Amendment restored the text to the version after the Sixth Amendment, with the two substantive differences indicated and without the division of paragraph 2 into points a)-d).

phase,[49] the policy goal of rendering judicial review effective has been set aside, and looking at the present numbers of rejections and dismissals, there is not much prospect of the judiciary upholding that policy goal.[50] But hope abides.

[49] See on the achievements F. Rozsnyai (n 10).

[50] See for the statistics Balázs István and Hoffman István, 'A közigazgatási hatósági eljárás aktuális kérdései veszélyhelyzet idején' (2022) 2 (1) Közigazgatás-Tudomány 5–27, DOI:10.54200/kt.v2i1.35. Although the approx. 20% is a relatively fair number as to claims being upheld, there is a reduction of 6% for 2021, in spite of the abolition of the appeals, where the rate of success was previously around 25%.

Bernadette Somody*

Constitutional Complaints by State Organs? Changes in the Standing Requirements before the Hungarian Constitutional Court**

Abstract

Recently, the Hungarian Constitutional Court (HCC) upheld a constitutional complaint by the Government, arguing that the ordinary court had violated the Government's fundamental right. This decision, which fits in with the HCC's current practice, is clearly at odds with the concept of fundamental rights as a protection against the state's power. The paper explores the constitutional background to this controversial practice. It addresses the HCC's status and the introduction of the German type of constitutional complaint in Hungary. It points out that, due to its centralising effect, the constitutional complaint can only fulfil its purpose if the HCC's independence is guaranteed. Otherwise, it may undermine the ordinary courts' independence.

The paper examines the HCC's practice on the standing of public power-related bodies in constitutional complaint procedures. Since the constitutional complaint is an instrument of fundamental rights protection, the case-law shows a doctrinal tension between the fundamental rights concept and the constitutional complaint's actual purpose.

Finally, the paper links the findings on the constitutional complaint's function, the HCC's status and the interpretation of the standing requirements. It also considers that the HCC has extended the scope of the fundamental right to a fair trial to the incorrect interpretation of the law. The paper argues that administrative judicial review is centralised in the hands of the HCC, the independence of which has been compromised. The HCC's recent interpretation reverses the function of the constitutional complaint, which provides public bodies with an extra possibility for review instead of protecting citizens' fundamental rights.

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Keywords: constitutional court, constitutional complaint, fundamental rights protection, subject of fundamental rights, holders of fundamental rights

I Introduction

Recently, the Hungarian Constitutional Court upheld a constitutional complaint by the Government, which argued that the ordinary court had violated the Government's right, guaranteed as a fundamental right by the Fundamental Law of Hungary.[1] This decision, which fits in with the current practice of the Constitutional Court, is clearly at odds with the concept of fundamental rights as protection against the state's power; in other words, that state bodies are conferred with obligations, not entitlements, by fundamental rights.

The paper explores the constitutional background of this controversial practice by the Constitutional Court. (I) First, it briefly reviews how the regulation of the Constitutional Court's status has changed over the last decade and how this has affected its independence. (II) The second part deals with the impact of the introduction of the German type of constitutional complaint on the protection of fundamental rights. The link between the two factors is also important: a constitutional complaint can only fulfil its constitutional purpose if the independent status of the Constitutional Court is guaranteed. Otherwise, however, the constitutional complaint may undermine the independence of the ordinary courts. (III) The third part of the paper is based on the premise that the constitutional complaint is an instrument of fundamental rights protection; therefore, it can be used by those who are the holders of fundamental rights. This part examines the development of the Constitutional Court's practice about the standing of public power-related bodies in constitutional complaint procedures within this doctrinal framework. Another critical factor is how the Constitutional Court interprets the scope of the fundamental right to a fair trial in these cases. (IV) The analysis of the Constitutional Court's case-law reveals a doctrinal tension between the constitutional purpose of fundamental rights and the purpose of the constitutional complaint, which is discussed in the fourth part of the paper. (V) Finally, the paper links the findings on the constitutional complaint's function, the Constitutional Court's status and the interpretation of the standing requirements and the scope of the fundamental right to a fair trial. On this basis, it identifies the actual role of those constitutional complaint procedures that can be initiated by public bodies.

[1] Decision 3130/2022. (IV. 1.) AB.

II Judicial Independence in Hungary

The best-known aspect of the history of Hungary's public law over the past decade is probably the changes in the status and powers of the Constitutional Court and the ordinary courts.[2] Indeed, the state of judicial independence can be one of the main indicators of the state of constitutionalism and the rule of law.

Since, in Hungary's parliamentary form of government, the government depends on the parliament's political confidence, the executive and the majority in the legislature work in political unity. At the same time, as the Hungarian Constitutional Court pointed out in the first years of its operation, their political link and power needs to be balanced by neutral control institutions, granted independent status. While the legislature and the executive have a political nature, since they are driven by the political will of the majority, the judiciary and the Constitutional Court should be constant and neutral and, to this end, separated from the political influence of the majority.[3] In the absence of independence, courts cannot perform their constitutional function: the judiciary cannot control the government if the former is dependent on the latter.

In Hungary, however, more than a decade ago, the government gained a two-thirds majority in the National Assembly; apart from a short period, it has managed to keep it since the 2010 elections. Having a supermajority in the Hungarian parliament puts the government in an extraordinary position, where it can even shape the constitutional limitations of its own operation. The qualified majority lost its function as the protector of the minority interests against the governing majority's unilateral decisions. The latter is able to amend the constitution and even to pass a new one,[4] as happened in 2011.

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[2] Pál Sonnevend, András Jakab, Lóránt Csink, 'The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary' in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area: Theory, Law and Politics in Hungary and Romania* (Hart/Beck 2015, London, 33–109); Bernadette Somody, 'Theme with Variations: Lessons from the Recent History of Judicial Administration in Hungary' in Piotr Mikuli (ed), *Current Challenges in Court Administration* (Eleven International Publishing 2017, The Hague, 143–68); Zoltán Szente, Fruzsina Gárdos-Orosz, 'Judicial deference or political loyalty? The Hungarian Constitutional Court's role in tackling crisis situations' in Zoltán Szente, Fruzsina Gárdos-Orosz (eds), *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective* (Routledge, 2018, New York, 89–110); Fruzsina Gárdos-Orosz, Kinga Zakariás, 'Organisational, functional and procedural changes of the Hungarian Constitutional Court 1990–2020.' in Fruzsina Gárdos-Orosz, Kinga Zakariás (eds), *The main lines of the jurisprudence of the Hungarian Constitutional Court: 30 case studies from the 30 years of the Constitutional Court* (1990–2020) (Nomos 2022, Baden-Baden, 17–43); Bernadette Somody, 'Power Politics versus the Rule of Law in Hungary: A Case Study' in Sławomir Redo (ed), *The Rule of Law in Retreat: Challenges to Justice in the United Nations World* [Rowman and Littlefield, Lanham (MD) 2022, 147–159].

[3] The Hungarian Constitutional Court's interpretation of the principle of the division of powers. Decision of 38/1993. (VI. 11.) AB.

[4] Formally, the two-thirds majority in Parliament can act as a constituent and constitution-amending power, even if theoretically they are distinct from the legislative power. According to art S) para (2) of the Fundamental Law of Hungary, for the adoption of a Fundamental Law or for the amendment of the Fundamental Law, the votes of two-thirds of the Members of the National Assembly shall be required. There are no further criteria or restrictions.

The new Fundamental Law of Hungary entered into force in 2012 and, since its adoption, it has been amended eleven times. The two-thirds majority is sufficient to pass and amend so-called cardinal acts;[5] among others those on the judiciary and the Constitutional Court. Since 2010, the governing majority has been in the position to elect the members and the president of the Constitutional Court, the chief justice of the supreme court (the President of the Curia) and the head of the judicial administration (the President of the National Office for the Judiciary).[6] The regulation of the courts, even at the constitutional level, and the appointment of persons to leading judicial positions became up to the government.

As regards the Constitutional Court, by 2015, even according to moderate critics, it was alive but severely impaired.[7] The crucial factor was the composition of the Constitutional Court. Already in 2010, the two-thirds governing majority amended the Constitution and changed the composition of the parliamentary committee responsible for the nomination of the members of the Constitutional Court, who are elected by the aforementioned qualified majority. Until 2010, the candidates were nominated by a parliamentary committee, in which each faction had one representative; after that, the committee's composition reflected the proportions of the parliamentary groups. While the previous manner of nomination required a compromise between the ruling parties and the opposition, according to the new regulation, the governing majority could unilaterally nominate and elect its own people to the Constitutional Court. Some months later, the supermajority applied the technique of 'court packing', and increased the number of justices from 11 to 15, which enabled them to elect five new judges. By 2016, the nine new judges elected since 2010, a solid majority in the Constitutional Court, were chosen by the governing majority. As empirical research proved, there is an extremely strong correlation between the voting behaviour of the judges and the political standpoints of their nominating parties; the judges support the political parties that nominated them.[8]

III Introduction of the Full-fledged Constitutional Complaint and Its Centralising Effect

The constitutional changes affected not only the status of the Constitutional Court and the courts but also their powers. In the last decade, the most significant change in the Hungarian system of fundamental rights protection undoubtedly was the introduction

[5] According to art T) para (4) of the Fundamental Law of Hungary, Cardinal Acts are Acts, the adoption and amendment of which requires the votes of two-thirds of the Members of the National Assembly present.

[6] Zoltán Pozsár-Szentmiklósy, 'Supermajority in Parliamentary Systems – A Concept of Substantive Legislative Supermajority: Lessons from Hungary' (2017) (3) Hungarian Journal of Legal Studies 281–290, 286–289.

[7] Sonnevend, Jakab, Csink (n 2) in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (Hart Publishing 2015, Oxford, 33–111) 88.

[8] Zoltán Szente, 'The Political Orientation of the Members of the Hungarian Constitutional Court between 2010 and 2014' (2016) 1 (1) Constitutional Studies 123–149, 131.

of a fully-fledged constitutional complaint, modelled on the German legislation, which allows the Constitutional Court to exercise constitutional control over the judgments of the ordinary courts. Since 2012, the Fundamental Law of Hungary has provided that the Constitutional Court shall review the conformity of judicial decisions with the Fundamental Law on the basis of a constitutional complaint: any person or organisation is entitled to submit a constitutional complaint to the Constitutional Court if the ordinary court's judgment violates their rights laid down in the Fundamental Law and the possibilities for legal remedy have already been exhausted.[9] Prior to the entry into force of the Fundamental Law, citizens could lodge a constitutional complaint with the Constitutional Court if the law applied by the court violated their fundamental rights. As of 2012, they can also lodge a constitutional complaint if it is not the law applied but its interpretation that causes the violation of their fundamental rights. The extension of the constitutional complaint's scope has certainly been considered as strengthening the system of fundamental rights protection: citizens can now submit a constitutional complaint to the Constitutional Court as an extraordinary remedy if a final court decision has infringed their fundamental rights.

The extension of the constitutional complaint's scope also centralises the protection of fundamental rights. Since not only the law applied but also the interpretation of the law by the judiciary can be challenged by a constitutional complaint, the Constitutional Court has the final say on fundamental rights issues in all cases. If a judicial decision is contrary to the Fundamental Law, the Constitutional Court annuls it and, in court proceedings following the annulment of a judicial decision, as to the constitutional issue, the ordinary courts are obliged to follow the Constitutional Court's decision.[10]

The introduction of the fully-fledged constitutional complaint was also explicitly intended as a kind of 'centralisation'. Through constitutional complaint procedures, the Constitutional Court's practice can more effectively develop and unify the interpretation of fundamental rights by ordinary courts in individual cases. This 'centralisation' of the interpretation of fundamental rights is part of the essence and the constitutional purpose of the constitutional complaint. The constitutional complaint is not only the means of enforcing subjective fundamental rights and remedying individual fundamental rights violations but also has an objective function of protection and promotes the application of the law by ordinary courts in general in accordance with fundamental rights. On the one hand, the Constitutional Court remedies the violation of the complainant's rights by annulling the ordinary court's judgment and issuing guidelines to the court. On the other hand, the interpretation of fundamental rights on which the Constitutional Court's decision is based goes beyond the specific case and develops the ordinary courts' practice in general.

However, we must also see that, through constitutional complaints, the activity of the courts is subject to the control of the Constitutional Court. Although this control is only

[9] Fundamental Law of Hungary art 24 para (2) item *e)*; Act CLI of 2011 on the Constitutional Court s 26–27.

[10] Act CLI of 2011 on the Constitutional Court s 43.

partial and only covers the constitutional aspects of the cases, it is the Constitutional Court that ultimately determines what is to be considered a matter of constitutional importance in a civil, criminal or administrative case. Therefore, for a constitutional complaint to serve its constitutional function properly and to promote the enforcement of fundamental rights by ordinary courts, the independence of the Constitutional Court is a prerequisite. Failing this, if a constitutional complaint gives control over the judiciary to a body that is not sufficiently independent, the independence of the ordinary courts may be compromised.

IV State Organs as Complainants before the Constitutional Court[11]

The constitutional complaint is a means of protecting fundamental rights. If one feels that an ordinary court's judgment has violated their fundamental rights, they can appeal to the Constitutional Court after the final decision of the ordinary court. The purpose of the constitutional complaint necessarily implies that only those who are the holders of fundamental rights are entitled to lodge a constitutional complaint and claim the enforcement of their rights. However, the text of constitutions is rarely explicit on the question of the legal capacity to fundamental rights. As such, who can lodge a constitutional complaint is usually not clear from the text of the constitutions; it depends on the interpretation of the Constitutional Court. It also follows from the above that, when the Constitutional Court finds a constitutional complaint admissible, it also recognises the complainant as a holder of fundamental rights.

The Hungarian Fundamental Law, in addition to recognising the fundamental rights of human beings, contains an explicit provision on the fundamental rights status of non-human entities. It states that fundamental rights which, by their nature, do not only apply to human beings, shall also be guaranteed to legal entities established on the basis of an act.[12] This provision did not constitute a change, since the practice of the Constitutional Court prior to the entry into force of the Fundamental Law recognised organisations and legal persons as the holders of fundamental rights. Although the status of entities connected

[11] This part draws heavily on the results of the fundamental rights concept of legal capacity (FULCAP) research project, in particular the work of Lívia Bottlik-Granyák and Dominika Kincső Hollós. Lívia Bottlik-Granyák, 'Do Human Rights Belong Exclusively to Humans? The Concept of the Organisation from a Human Rights Perspective' (2019) (2) ELTE Law Journal 17–24; Bottlik-Granyák Lívia, 'A szervezetek mint alapjogi jogosultak a magyar Alkotmánybíróság gyakorlatában' (2021) (22) Jogi Tanulmányok 135–148; Hollós Dominika Kincső, 'Vannak az államnak alapjogai? Közhatalmat gyakorló szervek alkotmányjogi panaszhoz való joga az Alkotmánybíróság gyakorlata alapján' in Szikora Veronika (ed), *Díjnyertes gondolatok* (DE ÁJK 2021, Debrecen, 139–166).

[12] Fundamental Law of Hungary art I para (4): 'Legal entities established on the basis of an act of Parliament shall also have these fundamental rights, and they shall also be bound by those obligations which, by their nature, are not only applicable to human beings.'

to public power has never been a completely decided question, the related practice of the Constitutional Court has undergone a conceptual change.

1 Early Practice: Rejection Except for the Protection of Autonomy

As mentioned above, the constitutional complaint has been part of the Constitutional Court's catalogue of competences since the transition to democracy. However, between 1990 and 2011, it only existed in a restricted form that allowed for the possibility of challenging and reviewing the legislation on which the ordinary court's decision was based, but not the interpretation and the application of the norm by the ordinary court. During these two decades, this power was not a prominent competence in the practice of the Constitutional Court. This was due to the fact that, until the end of 2011, citizens were entitled to initiate an abstract constitutional review of norms on the basis of *actio popularis* – without any specific personal legal interest. However, the question already arose during this period of whether a constitutional complaint procedure can be initiated by bodies that exercise or are connected with public power.

In its previous practice, the Constitutional Court consistently rejected constitutional complaints by bodies exercising public power. This interpretation also prevailed in the years after the entry into force of the Fundamental Law, when the aforementioned provision of the Fundamental Law explicitly provided for the recognition of the fundamental rights of so-called legal entities established on the basis of an act:

> The petitioner […] is a public body (tax office), and therefore has no fundamental right to be infringed. A public body cannot be a holder of the 'right guaranteed by the Fundamental Law' [...], even if it is a legal person. Article I(4) of the Fundamental Law provides that '[a] legal entity established on the basis of an act shall also be guaranteed fundamental rights [...] which, by their nature, are not limited to the individual', but the Constitutional Court has consistently held that 'a public body vested with public powers does not have a constitutional right that constitutes a guarantee against the State and entitles it to lodge a constitutional complaint'.[13]

The Constitutional Court reasoned that, since public bodies do not have fundamental rights, they cannot lodge a constitutional complaint to enforce them. The Fundamental Law's provision explicitly guaranteeing the fundamental rights of legal persons does not change this interpretation, since it does not apply to public bodies.

During this period, the Constitutional Court ruled that a body connected to public powers could only lodge a constitutional complaint in exceptional cases. This is only possible if this body is closely linked to the exercise of fundamental rights, in particular if it is established for the express purpose of enabling individuals to exercise their fundamental

[13] Decision 3307/2012. (XI. 12.) AB [7].

rights, if its rights and autonomy are the institutional guarantees of individuals' fundamental rights.[14] This applies to constitutional complaints brought by public universities in defence of their autonomy, since the autonomy of universities is a guarantee of freedom of learning, education and science.[15] In addition, the Constitutional Court has accepted constitutional complaints from local self-governments to prevent the state from taking steps that make the powers that guarantee local government autonomy meaningless.[16]

2 Differentiation between Exercising Public Power and Acting as Private Entities

As mentioned above, the entry into force of the Fundamental Law in 2012 brought significant developments: it introduced a fully-fledged constitutional complaint and made an explicit provision on the fundamental rights of legal entities established on the basis of an act. However, the change in the public bodies' right to lodge a constitutional complaint was not brought about by the entry into force of the Fundamental Law but a couple of years later, in 2016. At this time, as described above, the independence of the Constitutional Court was seriously compromised. This was when the premise that public bodies are obliged by fundamental rights but cannot be right-holders at the same time began to be relativised.

In its landmark decision, the Constitutional Court argued that neither the Fundamental Law nor the Act on the Constitutional Court excluded public bodies from turning to the Constitutional Court to claim the protection of their fundamental rights. On the basis of the Fundamental Law's provision on the fundamental rights of legal entities established on the basis of an act, public bodies, even if only to a very limited extent, can also enjoy fundamental rights. This applies to where the public bodies act as private entities and do not exercise public power in the legal relationship. In particular, they may enforce their rights to property. The Constitutional Court stated that it has to be examined on a case-by-case basis whether the public body acted as a public authority or as a private entity (e.g. as the owner) in the underlying legal relationship, and the admissibility of the complaint must be decided accordingly.[17]

3 Current Practice: From Exception to Rule

In 2018, the Constitutional Court found the Hungarian Central Bank's constitutional complaint admissible in a case where the ordinary court annulled the Central Bank's decision concluding a supervisory procedure regarding an investment company's operation.[18] A

[14] Decision 198/D/2008. AB.
[15] Decision 62/2009. (VI. 16.) AB.
[16] Decision 3381/2012. (XII. 30.) AB.
[17] Decision 3091/2016. (V. 12.) AB.
[18] Decision 23/2018. (XII. 28.) AB.

significant departure from the previous approach is that, in this case, the complainant, the Central Bank, did not act as a private legal entity but as a supervisory authority. Despite the fact that the complainant exercised public power, the Constitutional Court acknowledged its standing and found that its right to a fair trial had been violated.

In the history of the constitutional complaints of state organs, a landmark event was the amendment to the Act on the Constitutional Court in 2019. Under the new provisions, a person or organisation that has been a party to the court proceedings is considered a person or organisation affected by the decision and this way is entitled to lodge a constitutional complaint against it, regardless of its legal status. The amendment also added that, in the case of a petitioner exercising public authority, it must be examined whether the right guaranteed by the Fundamental Law, as stated in the complaint, is granted to them.[19]

On the basis of the statutory provision, the Constitutional Court confirmed its position that the exercise of public power does not exclude the possibility of lodging a constitutional complaint:

> Section 27 para (3) of the amended Act on the Constitutional Court provides, as an additional statutory condition for petitioners exercising public power, that it shall be examined whether the right guaranteed by the Fundamental Law, as indicated in their complaint, is granted to them. According to the practice of the Constitutional Court, some fundamental rights are by their very nature only applicable to human beings, while other fundamental rights are also granted to legal persons, including bodies exercising public power. […] the right to a fair trial invoked by the petitioner [Article XXVIII para (1) of the Fundamental Law] is a right guaranteed by the Fundamental Law which, by its nature, does not apply only to human beings. In view of this, the petition meets the statutory condition laid down in Section 27 para (3) of the ACC…[20]

The fundamental right found to be infringed in the above decisions is also a crucial element of the Constitutional Court's practice. In the cases cited, the Constitutional Court based the annulment of the ordinary courts' judgements on the violation of the right to a fair trial:

> On the basis of such a complaint, the Constitutional Court examines the conformity of the interpretation of the law contained in the judicial decision with the Fundamental Law; whether, in addition to the enforcement of the constitutional content of the rights guaranteed by the Fundamental Law, the court, in applying the law, has taken into account the purpose of the law

[19] Act CLI of 2011 on the Constitutional Court s 27 para (3)–(4). According to S. 27 para (1) item a), a constitutional complaint can also be filed if the ordinary court's decision curtails the petitioner's powers under the Fundamental Law. However, the Constitutional Court does not typically base its decisions on this part of the provision but on the violation of public organs' fundamental rights. Although constitutional complaints based on the curtailment of powers would not raise the problem of the public organs' entitlement to fundamental rights, it would also stretch the concept of the constitutional complaint as a means of protecting fundamental rights (see the next part of the paper).

[20] Decision 3130/2022. (IV. 1.) AB [18].

> to the extent constitutionally required […]. The application of the principles of interpretation of the law laid down in the Fundamental Law is undoubtedly part of the minimum constitutional requirements for the interpretation of the law in a fair judicial procedure […] 'arbitrary judicial interpretation of the law may infringe the right to a fair trial enshrined in Article XXVIII para (1) of the Fundamental Law. […] An error of interpretation of the law becomes arbitrary *contra constitutionem* when the court expressly disregards the rules of interpretation of the law contained in Article 28 of the Fundamental Law'.[21]

The principle behind the Constitutional Court's decision is that an interpretation of the law that excludes an examination of the purpose of the law or otherwise disregards the rule of interpretation of the law contained in the Fundamental Law may violate the right to a fair trial. This principle may lead the Constitutional Court down a slippery slope, in that any interpretation of the law that is considered incorrect; ultimately the fact that the Constitutional Court disagrees with the decision of the ordinary court, may constitute a violation of a fundamental right and justify the annulment of the judgment of the ordinary court.[22] This phenomenon, namely acting as a supreme re-examination court *(Superrevisionsgericht)* is not limited to administrative judicial review, but it is a common concern regarding the constitutional courts' practice in Hungary and in other countries as well.[23] However, it is a specific case when it is linked to state organs' legal standing before the Constitutional Court.

V State Organs' Standing: A New (Dys)Function of the Constitutional Complaint?

The practice of the Constitutional Court before 2016 was basically coherent in that, as a general rule, public bodies' legal capacity to fundamental rights was considered to be excluded, while the public bodies' claim for fundamental rights protection required specific justification – such as the protection of autonomy in the early practice of the Constitutional Court, and the private party status of the public body in the later case-law. The doctrinal

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[21] Decision 3130/2022. (IV. 1.) AB [27]–[28].
Fundamental Law Article 28: 'In the course of the application of law, the courts shall in principle interpret the laws in accordance with their objective and with the Fundamental Law. The objectives of a law shall in principle be determined relying on its preamble, and/or on the explanatory memorandums of the relevant legislative or amendment proposal. When interpreting the Fundamental Law or any other law, it shall be presumed that they are reasonable and of benefit to the public, serving virtuous and economical ends.'

[22] Nóra Chronowski, Attila Vincze, '23/2018. (XII. 28.) AB határozat – közhatalmi szervek alkotmányjogi panasza' in Gárdos-Orosz Fruzsina, Zakariás Kinga (eds), *Az alkotmánybírósági gyakorlat. Az Alkotmánybíróság 100 elvi jelentőségű határozata 1990–2020.* Második kötet (HVG-ORAC – TK JTI 2021, Budapest, 881–900) 882, 896.

[23] Decision 3325/2012. (XI. 12.) AB, Decision 20/2017. (VII. 18.) AB, Decision 23/2018. (XII. 28.) AB.

background of this practice is the purpose of fundamental rights, which is to guarantee citizens' freedom by limiting the powers of public authorities. This implies that entities exercising public power cannot be the holders of fundamental rights. Since the constitutional complaint is a means of enforcing fundamental rights before courts, only those who are the holders of fundamental rights are entitled to lodge one with the Constitutional Court. State organs' constitutional complaints, as a general rule, cannot be admissible.

The current case-law of the Constitutional Court seems to reverse the relationship between the general rule and the exception. The established practice of the Constitutional Court and, since 2012, the Fundamental Law itself, state that fundamental rights that, by their nature, are not exclusively applicable to human beings, can also be claimed by legal persons and, as the Fundamental Law puts it, by entities established on the basis of an act. Recently, the Constitutional Court has included legal persons exercising public power in this category without further explanation. In this interpretation, the exception – where a public body is not entitled to claim a fundamental right – is where the fundamental right in question applies only to human beings.

However, the current interpretation of public bodies' standing in constitutional complaint procedures creates tension in the practice's doctrinal background. In this interpretation, the constitutional purpose of fundamental rights (limiting public power), in other words, the reason that public bodies are not entitled to fundamental rights, and the purpose of the constitutional complaint (enforcing fundamental rights) cannot be true simultaneously. If public bodies cannot be the holders of fundamental rights, their constitutional complaints cannot be considered a means of enforcing their fundamental rights. If the constitutional complaint serves the enforcement of the petitioner's fundamental rights, we can no longer sustain the premise that public bodies cannot claim the protection of fundamental rights.

Obviously, and logically, this contradiction can be resolved by accepting that, at least within a limited scope, public bodies are also entitled to fundamental rights, and therefore are allowed to claim the enforcement of these rights, as is suggested by the amendment of 2019 to the Act on the Constitutional Court. However, there are strong arguments against this interpretation. As mentioned, the Amendment of 2019, on which the Constitutional Court bases its reasoning, provides that when assessing admissibility, the Constitutional Court must examine whether the petitioner exercising public authority is entitled to the fundamental right claimed in the complaint. However, this is a procedural rule provided in an act which should not override the purpose of fundamental rights deriving from the Fundamental Law itself.[24]

In contrast to the above option, not reinterpreting the constitutional purpose of fundamental rights but the actual purpose of the constitutional complaint in the current Hungarian public law seems more acceptable. In other words, we have to accept that, in

[24] Bottlik-Granyák (n 11) 138–139.

the practice of the Hungarian Constitutional Court, the constitutional complaint not only serves to protect the citizens' fundamental rights against public power but also plays another role. What is this new additional role of the constitutional complaint? As we have seen, under the Constitutional Court's current practice, if the judicial review of administrative decisions is unfavourable to the public body concerned, the public body may appeal to the Constitutional Court. If the Constitutional Court finds that the ordinary court has not interpreted the law correctly, this may constitute a violation of the right to a fair trial, and the Constitutional Court may annul the ordinary court's judgment on this basis. All in all, the Constitutional Court will have the final say in the judicial review of administrative decisions.

VI Conclusion

In recent years, the Constitutional Court has found the public bodies' constitutional complaints admissible in an increasingly wide range of cases, most recently without a specific justification. In recent case-law, if the fundamental right in question can be applicable to legal persons (legal entities established on the basis of an act), it can also be claimed by a public body. The extension of the circle of the initiators of the constitutional complaint procedure has been combined with the extension of the scope of fundamental rights violation. The interpretation of the right to a fair trial has paved the way for an interpretation of the law, according to which a much wider range of misinterpretations of the law by the ordinary courts can constitute a fundamental rights violation.

As a result of these two factors, the Constitutional Court can function as an administrative supreme court, another judicial level above the actual Supreme Court (the Curia). In this way, administrative judicial review is centralised in the hands of a Constitutional Court whose independence has been compromised.

Public bodies can challenge before the Constitutional Court administrative court decisions that are unfavourable to them but ensure protection for citizens' rights. The Constitutional Court's recent interpretation reverses the function of the constitutional complaint, which in this way provides public bodies with an extra possibility of review instead of protecting citizens' fundamental rights.

Dominika Kincső Hollós*

The 'Autonomy Concept': The Constitutional Protection of Public Organs**

Abstract

It is a widely accepted constitutional legal axiom that public organs and state entities do not have fundamental rights. The state is the obligor in a fundamental right relationship; the function of fundamental rights is to set boundaries to potential state interference. But what happens in the case of the autonomous public organs within the public administration system? How could their freedom of research and education be exercised, if the state universities cannot be protected from the central state administration? How do we protect local governments' fundamental right to property from the central government itself? These questions raise intense political debates, although the constitutional legal practice might already have a solution for them, which I aim to present briefly in this article. I will summarise the role of the so-called *autonomy concept* in the practice of the constitutional protection of state entities.

Keywords: constitutional legal personality, constitutional petition, public organ, municipality, autonomy

I Introduction – Doubting an Axiom?

It is a widely accepted constitutional legal axiom that public organs and state entities do not have fundamental rights. The state is the obligor in a fundamental right relationship; the function of fundamental rights is to set boundaries to state interference. Despite this axiom, several potential answers exist to the question of whether it is possible for a state entity or public organ to enjoy constitutional protection. The first optional approach is to prohibit the right of state bodies to fundamental rights protection categorically, i.e. not to accept,

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in any case, that an entity linked to the state should be constitutionally protected. There is no exception according to this approach: if at the beginning of a procedure it is established that the petitioner is linked to the state (part of the state administration, or an independent entity but owned or controlled by the state), the procedure for the protection of fundamental rights cannot be pursued. This is the approach taken, *inter alia*, by the European Court of Human Rights (hereinafter: 'ECtHR'). According to the Strasbourg body, the Convention does not protect public bodies, not only to avoid having the same plaintiff as the defendant *(state 'X' vs state 'X')*, but also because the aim is to protect the individual against the state, and thus public bodies are excluded from protection *per definitionem*.

Another possible approach, which is the extreme opposite of the above explained interpretation of the ECtHR, is to go beyond the generally accepted view of the function of fundamental rights as a means of ensuring protection against state interference, by giving primary importance not to whether the body seeking protection of a fundamental right is a private or a public entity, but to other factors. For example, we might distinguish by whether the body in question acted as a private law subject (e.g. as a contracting party) or exercised public authority in the case before the court. In the most extreme interpretation, it is also possible that we do not attach any importance to the *public* character at all, and that we assess the defence of public bodies against each other as a *fundamental rights violation* rather than as a mere jurisdictional dispute. According to this interpretation, even the government itself may successfully bring a constitutional complaint alleging a violation of its own fundamental rights.[1]

Both conflicting responses may be open to criticism. While the former certainly has the advantage of being consistent and clear, it is easy to imagine cases where its application may prove inappropriate. For example, freedom of research and education requires the maintenance of an independent, autonomous system of institutes of higher education, of which university autonomy is one of the pillars. When university autonomy is violated – by the central administration –, the fundamental rights of natural persons are violated. It is therefore necessary to recognise the specific nature of such cases and to treat them as exceptions where appropriate. While the rights of self-governments and their constitutionally declared autonomy is also wildly recognised, their protection might however face challenges, since the ECtHR consistently refuses to accept the applications of local governments/municipalities on the basis that they are included in the definition of 'governmental organisations', and therefore are not able to apply for protection.[2]

As compared to this, there are a number of objections to the latter, extreme approach. The distinction between private and public institutions cannot be denied, just as the

[1] This is the current approach of the Hungarian Constitutional Court, where, *inter alia*, the government has successfully applied to the HCC.

[2] See the relevant case law e.g. European Court of Human Rights (52559/99) – Court (First Section) – Decision – *Danderyds Kommun v. Sweden, Gouvernement de la Communauté Autonome du Pays Basque c. Espagne* (dec.), no 29134/03, du 3 février 2004, European Court of Human Rights (55346/00) – Court (Fourth Section) – Decision – *Ayuntamiento de Mula V. Spain*.

relationship between the exercise of public power and fundamental rights must be taken into account, not to mention the need for a thorough and thoughtful system of arguments to dispense with the idea of a unitary state and to interpret the *state 'X' vs. state 'X'* fundamental rights cases and not merely view them as a jurisdictional dispute.

For presenting the above approaches to the question in focus, and to propose a possible compromise between the two opposing approaches, the practice of the Hungarian Constitutional Court (hereinafter 'HCC') is a good example. The HCC, in its short history, has applied many different approaches, therefore it is valuable to illustrate the advantages and disadvantages of its different views. Light was shed recently upon the respective practice of the HCC, due to an amendment of the legislation, namely the Act on the Constitutional Court. The applicable text of the Act from 20 December 2019 says 'In the case of a public organ petitioner exercising public authority, it is required to examine whether they are entitled to the quoted fundamental right ensured by the Constitution'[3].

As a result of the amendment, a public and professional discussion began, on those cases in which the HCC may admit a constitutional complaint filed by a state organ to. The practice of the HCC in this regard was neither clear nor unified even before this amendment, so the need for the clarification of the position of the HCC arose. When are public organs entitled to file a constitutional complaint? Which fundamental rights ensured by the Constitution are those that public organs are entitled to?

These questions arose since the amendment itself might imply that – even if only in a restricted way – public organs exercising public authority are entitled to fundamental rights.[4] Therefore, the HCC and the legal practitioners had to face the dilemma presented in this paper, and choose an approach for looking at the fundamental rights protection of state entities and specifically public organs exercising public authority. As stated before, it is an axiom that fundamental rights exist to set boundaries to state interference, and the role of public organs can only be interpreted as the obligor in a fundamental rights relationship. As such, it seemed hardly justifiable that those public organs that exercise public authority should be able to turn to the HCC with a constitutional complaint. It would mean that the state asks for protection from itself. According to this axiom, the fundamental right of a public organ is excluded by definition.

The constitutional complaint is a type of mechanism for fundamental rights protection. Its current form in the Hungarian legislation was introduced by the Fundamental Law of Hungary, 2012 and its introduction has shifted the HCC's function of fundamental

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[3] Az Alkotmánybíróságról szóló 2011. évi CLI. törvény (Act CLI of 2011 – on the Constitutional Court) s 27, para (3), the official translation states: 'In the case of a petitioner exercising public authority, it shall be examined whether the right guaranteed by the Fundamental Law, indicated in the complaint, applies.'

[4] On the impact of the modification of the legislation and for the arguments included in this chapter, see also: Dominika Kincső Hollós, 'Vannak az államnak alapjogai? Közhatalmat gyakorló szervek alkotmányjogi panaszhoz való joga az Alkotmánybíróság gyakorlata alapján' in Veronika Szikora, Judit Balogh (eds), *Díjnyertes gondolatok: Tanulmányok a 35. OTDK* Állam- és *Jogtudományi szekciójának első helyezett szerzőitől* (DE ÁJK 2021, Debrecen) 139–166.

rights protection from objective (abstract) towards subjective (concrete) legal protection.[5] The essence of fundamental rights protection is – in addition to declaring fundamental rights – that the state must establish and operate institutions and mechanisms of legal protection that guarantee the operation of state entities in accordance with the protection of fundamental rights and that the exercise of public authority remains within the limits set by fundamental rights.[6]

According to this approach, the state is the obligor of the fundamental rights relationship, and the essence of the fundamental rights protection mechanisms, such as the constitutional complaint, is to ensure that this obligation of the state is enforced. This interpretation is also reflected in the decisions of the HCC. In Decision 65/1992 (17.12.1992), the HCC had laid down the much-cited principle that fundamental rights are intended to 'create constitutional guarantees against state authority for the protection of the rights of the citizen, the individual or a community, and for the safeguarding of its autonomy of action'. This sentence has been cited by the HCC in many of its decisions and has long been used to argue that state entities do not have fundamental rights. This principle was reaffirmed after the introduction of the Fundamental Law of Hungary.[7]

A great example of the adherence to this thesis, although it was not part of the majority decision, is the dissenting opinion to Decision 3128/2019. (VI. 5.) AB of the HCC, that 'Fundamental rights guarantee the freedom of individuals from the state, the holder of public power, and their purpose is to limit public authority. Fundamental rights cannot, therefore, in principle, be enjoyed by state entities nor legal persons owned by the state. Fundamental rights protect the individual against the state'[8]. This is to argue against the entitlement to the right of a non-profit organisation (company) owned by a local municipality to file a constitutional complaint, which would mean that, in the absence of procedural rights, the HCC must reject the complaint without further examination.

If we accept that the essence of fundamental rights is the restriction of public authority and the state is an obligor in these relationships, the question necessarily arises as to how we should interpret the clause introduced by the amendment, according to which, *in the case of a public organ petitioner exercising public authority, it is required to examine whether they are entitled to the quoted fundamental right ensured by the Constitution.* The regulation has made it clear that the mere fact that the petitioner exercises public authority should not automatically lead to the rejection of a constitutional complaint in the absence of the right to file a petition.

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[5] László Sólyom, 'The Constitutional Court of Hungary' in Armin von Bogdandy, Peter Huber, and Christoph Grabenwarter (eds), *The Max Planck Handbooks in European Public Law: Volume III: Constitutional Adjudication: Institutions* (online edn, 20 Aug. 2020, Oxford Academic) DOI: 10.1093/oso/9780198726418.003.0008

[6] András Sajó, Renáta Uitz, *The Constitution of Freedom: An Introduction to Legal Constitutionalism,* (online edn, 21 Dec. 2017, Oxford Academic) 373.

[7] E.g. Decision 3291/2014. (XI. 11.) AB of the HCC, Statement of Reasons [11].

[8] Decision 3128/2019. (VI. 5.) AB of the HCC, Statement of Reasons [70].

Whether a legal entity is entitled to a certain fundamental right can rarely be deduced from the national constitution or other legislation alone, therefore, when analysing the potential fundamental rights of state entities, it is necessary to examine the case law of the bodies protecting fundamental rights. It is because, in most cases, it is left to the legal practitioner to determine whether or not a legal entity can initiate a fundamental rights protection procedure, and therefore case law analysis is required to understand the issue – the fundamental legal personality of public organs – more deeply. The first step in a fundamental rights protection procedure (e.g. the constitutional complaint procedure for the HCC) is to examine the formal and substantive conditions of the admissibility of the complaint, including whether the petitioner has the right to file it. The right to constitutional protection of state organs exercising public authority can therefore be assessed on the basis of the arguments put forward in the admissibility procedure

The aim of the current paper is to present the autonomy concept, a possible in-between solution for the dilemmas detailed above. The main focus will be on explaining the concept using Hungarian examples, since the approach of the Hungarian courts is quite unique, and enables us to highlight the main aspects of the problem and illustrate its difficulties; however, for supporting the relevance of each approach presented, we need to have a look at the European common ground, namely the practice of the ECtHR and the Court of Justice of the European Union (hereinafter: 'CJEU' or 'ECJ'). Moreover, since the Hungarian legislation, the Fundamental Law of Hungary and the constitutional legal practice was highly influenced by the German *Grundgesetz*, it is necessary to analyse the German approach in this regard. Thus, this research is mainly based on the jurisprudential analysis of the practice of the HCC and partly applies a comparative approach

II What is the Autonomy Concept?

There are two very opposing answers to the question of whether public bodies should be entitled to constitutional protection and to fundamental rights, both of which indicate difficulties. In theory, both could result in arguable decisions on cases, either by denying constitutional protection where it could be well established or whether accepting applications for protection where it there are no strong grounds. Thus, we need to have an approach that would give us guidance on how to decide the admissibility of cases where a public organ requests the protection of their *fundamental rights*.

The core of the problem is the fact that, from a fundamental rights perspective, there is a significant difference between an organ established by the state and an organisation established by human beings.[9] As discussed earlier, it is a widely common approach of

[9] Lívia Granyák, 'Do Human Rights Belong Exclusively to Humans?: The Concept of the Organisation from a Human Rights Perspective' (2019) (2) ELTE Law Journal 17–24, 8.

fundamental rights law that the state is the obliged party and the individual or the organisation established by a natural person is the entitled party. This is a cornerstone of the fundamental rights dogmatic which was highlighted in the practice of the HCC in 2009 and was quoted many times later. In this decision, the HCC stated that 'Public organs granted with public authority do not have such fundamental rights that could be protected against the state and would entitle them to submit a constitutional complaint'.[10]

According to this principle, the HCC consequently dismissed petitions filed by public organs, among others, the department of National Tax and Customs Administration, the notaries of several local municipalities and the chair of local election offices.[11] However, even between public organs, there can be relevant differences from a fundamental rights approach. There are certain types of public organs where some fundamental rights can be interpreted as applicable.

1 Distinguishing between Public Organs

Providing an answer to whether state entities are entitled to certain fundamental rights is not easy, since the public organs and entities connected to the state are not a homogenous group. We can distinguish between organs on whether they were established and are owned by natural persons or the state. Some legislations emphasise whether the entity in question is subject to private or public law. Others separate state entities from fundamental right protection perspective according to whether they were acting as a private party (e.g. taking a loan from a bank) or exercising public authority. A possible approach – and this paper is to advocate for this one – is to distinguish according to the connection of the state entity to a certain fundamental right of the people, which results in a constitutionally protected autonomy of that state entity. This *autonomy concept* would mean that the state entity is entitled to constitutional protection when strongly connected to a fundamental right, especially if it was established to enable a certain fundamental right of the people to be exercised.

This difference between state entities from a fundamental rights perspective, however, is not recognised universally. In order to understand the European standards, the *minimum requirement*, a closer look at the practice of the ECtHR and the CJEU is necessary. According to their practice, the legal personality and the right of the plaintiff to petition are closely linked, so we can understand the courts' concept of a fundamental rights legal personality (whether they are entitled to any fundamental rights) by examining the decisions taken in the admissibility procedures.

In the case-law of the ECtHR, the concept of standing of public authorities is clear; Article 34 of the European Convention on Human Rights (hereinafter: 'ECHR' or the

[10] Decision 23/2009. (III. 6.) AB of the HCC, quoted later in e.g. Decision 3077/2015. (IV. 23.) AB of the HCC.

[11] E.g. Decision 198/D/2008. of the HCC, Decision 3307/2012. (XI. 12.) AB of the HCC, Decision 3291/2014. (XI. 11.) AB of the HCC, Decision 3077/2015. (IV. 23.) AB of the HCC.

'Convention') itself states that the ECtHR may receive applications from natural persons, non-governmental organisations or groups of persons, thus excluding governmental or public bodies. Thus, the ECHR maintains a strict and very consistent view, as presented above. However, this does not mean, of course, that in practice there have not been questionable situations where the ECtHR has had to deal with the status (and thus fundamental rights legal personality) of (public) entities referred to it.

Such was the case, for example, when the Slovenian state bank turned to the ECtHR, claiming that Croatia had violated its right to property.[12] The ECtHR unanimously decided that accepting the state-owned bank as petitioner would be incompatible with the Convention, emphasising that state entities and state-controlled companies cannot turn to the ECtHR.[13] Since the ECtHR found that the bank is dependent on and controlled by the government, despite the fact that it was a separate legal entity, the bank's petition of the was dismissed. The argument that the Convention's restriction on the right of state entities to petition was merely intended to prevent both the plaintiff and the defendant from being (part of) the same state (i.e. to avoid *state 'X' vs. state 'X'* cases), was not well-founded.

However, the ECtHR has only taken such a strong position regarding the right to petition, so the question whether a person can have a fundamental right without the right to petition (and ask for protection for that fundamental right) may arise as a theoretical question with practical importance. The practice of the ECtHR does not cover whether, in the absence of the right to petition, state organs exercising public authority have a fundamental right guaranteed by the Convention. This was the basis of Slovenia's position when, following the bank's unsuccessful application, it brought the case before the ECtHR to defend the bank's rights in an interstate dispute.[14] It argued that, although the bank, as a public body, could not bring proceedings before the ECtHR, it had Convention rights (right to a fair hearing, right of appeal, right to property) which Slovenia could enforce. The question arose whether it was possible for Croatia to infringe the rights of a body which could not bring an action before the ECtHR, i.e. the relationship between the fundamental right of legal personality and the right to complain, the right to petition. In the critical literature, it was pointed out that it would lead to contradictions if it were accepted that there are persons who have certain rights but cannot bring proceedings to defend them. Fundamental rights and the right to bring proceedings are therefore closely linked.[15]

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[12] *Ljubljanska banka v Croatia.*

[13] Janja Hojnik, 'Slovenia v. Croatia: The First EU Inter-State Case before the ECtHR' EJIL:Talk! Blog of the European Journal of International Law, <https://www.ejiltalk.org/slovenia-v-croatia-the-first-eu-inter-state-case-before-the-ecthr/> accessed 30 December 2022.

[14] *Slovenia v. Croatia* [54155/16, ECHR 215 (2019)].

[15] Igor Popović, 'For Whom the Bell of the European Convention on Human Rights Tolls? The Curious Case of Slovenia v. Croatia' EJIL:Talk! Blog of the European Journal of International Law, 2019, <https://www.ejiltalk.org/for-whom-the-bell-of-the-european-convention-on-human-rights-tolls-the-curious-case-of-slovenia-v-croatia/> accessed 30 December 2022.

Contrary to the above, the Court of Justice of the European Union has – to a limited extent – recognised the fundamental rights of public bodies. In one case,[16] for example, the Bank Saderat Iran, owned by the Iranian state, successfully invoked its fundamental right to effective judicial protection. The Court rejected the Council's and the Commission's argument that the state-owned bank was not entitled to the protections and guarantees attached to fundamental rights. In its appeal, the Council argued that the interpretation of the law according to which an institution belonging to the Iranian state can claim fundamental rights protection is false. The Council based its reasoning on the ECHR provision quoted above: the Convention excludes the possibility for government bodies to turn to the Court of Justice, since states cannot be beneficiaries of fundamental rights, and this principle applies before the Court of Justice of the European Union as well. The CJEU has held that it is irrelevant whether the bank is in fact a governmental body or a public law entity, because the right to a fair trial, the right to effective judicial protection and the requirements of essential procedural requirements are also available to all legal persons. In its reasoning, the Court also refers to the effectiveness of judicial review as guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. It appears that, in its practice, the CJEU also recognises certain fundamental rights (rights of t defence, the right to an effective remedy, the right to judicial review) for public bodies, which are linked to the right to a fair trial.

Hungarian fundamental rights thinking relies heavily on German practice, so it is necessary to address the German legislation in the research in order to understand the Hungarian practice better. In Germany, the classical idea that the state cannot be subject to fundamental rights due to the nature of its function prevails.[17] The Federal Constitutional Court itself defines its task as 'monitoring the enforcement of the Basic Law *(Grundgesetz)*, which is the duty of all state bodies'.[18] According to the German interpretation of the law, state bodies cannot invoke fundamental rights, since the cases they invoke as a violation of fundamental rights can in fact only be considered as a dispute of jurisdiction between the organs of the unitary state.[19]

First, the German legislation accepts the theory that the state performs its actions within the frameworks of the unitary state and therefore applies the principle that state organs cannot be entitled to fundamental rights. Second, German constitutional thinking makes a difference between legal bodies according to whether they are subject to public or private legislation. This also means, for example, that a state-owned business (company)

[16] Case C-200/13 P *Council of the European Union v. Bank Saderat Iran*, ECLI:EU:C: 2016:284.

[17] Lóránt Csink, Johanna Fröhlich, 'Mire lehet alkotmányjogi panaszt alapítani? – A jogvédelem alapjául szolgáló alaptörvény-ellenesség és az Alaptörvényben biztosított jog fogalma' MTA Law Working Papers 2017/25.

[18] Official website of the Federal Constitutional Court *(Bundesverfassungsgericht)* of Germany: <https://www.bundesverfassungsgericht.de/DE/Das-Gericht/Aufgaben/aufgaben_node.html> accessed 19 October 2022.

[19] Lecture of Professor Dr. Klaus Ferdinand Gärditz at Rechts- und Staatswissenschaftliche Fakultät of Universität Bonn, 2019, <https://www.jura.uni-bonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Gaerditz/Vorlesung/AuslR/Grundrechte-AP3.pdf> accessed 19 October 2022.

is only a special manifestation in which the public administration body itself is exercised; it is no different from the public administration body itself regarding the question of the fundamental rights. According to the German practice, the state has no private affairs; its legal transactions under private law are the fulfilment of state tasks, and therefore only within limits can there be any talk of a 'contractual freedom' of the state (even though private law may be applicable), therefore even legal persons under private law should not be entitled to fundamental rights if they perform public tasks in the form of private law. Moreover, a significant difference between a state entity and a private legal entity is that there are no natural persons, whose fundamental rights should be protected, behind a state entity, just the state.

However, some institutions that are closely related to the fundamental rights of natural persons have special status in the German constitutional system. For example, public broadcasting institutions and universities are atypical in this sense. Universities are dependent on the freedom of research, and their self-government to which they are constitutionally entitled, and they have an autonomy from the central state bodies, the public administration itself. The same applies to the broadcasting public bodies: although they are subject to public legislation; it is obvious that they are not actually part of the public administration, but have a special, atypical status. Churches also enjoy a wider protection of fundamental rights since, regardless of the fact that they are subject to public law, their essential tasks and powers are not derived from the state. According to German legal theory, the above detailed interpretation of the fundamental rights (i.e. public bodies are not entitled) cannot be a reason for the limitation of the effective protection of the fundamental rights (of the people) themselves.[20] Moreover, the German constitutional regulation has special rules on the defence of autonomous bodies, such as the local municipalities.

As a conclusion, in Germany, as per the general rule, state organs can only turn to the Constitutional Court for protection in the event of a conflict of powers. In their view, public organs do not have fundamental rights and their dispute can only mean a conflict of power between the parts of the unitary state. In Germany, it is evident that the state is the obligor in relation to fundamental rights and state organs have the duty to keep and respect fundamental rights. However, there are some exemptions from this general rule.

At the first phase of its practice, the HCC followed the German approach and distinguished between state organisations according to whether they have a strong connection with a fundamental right of the people, especially if it was established to enable people to exercise their fundamental right.[21] Universities, the Hungarian Academy of Sciences and museums can be examples of this. They therefore have the right to turn to the Hungarian Constitutional Court for protection of their fundamental rights. This approach is what I call the *autonomy concept*.

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[20] Herbert Bethge, 'Grundrechtsträgerschaft juristischer Personen: Zur Rechtsprechung des Bundesverfassungsgerichts' (1979) 104 (1) Archiv des öffentlichen Rechts, published by Mohr Siebeck GmbH & Co. KG, 54–111.

[21] Decision 198/D/2008. AB of the HCC.

There are two types of public organs with regard to which the practice of the HCC is quite developed and their right to file a constitutional complaint is supported, due to their autonomy from the central state administration: the universities and local municipalities.

2 Public (State) Universities

The first type of state entity that was granted the right to file a constitutional complaint were state universities. The tradition of academic self-governance is an essential part of the life of the universities, regardless of whether it is a state university or a private institute. Moreover, states nowadays usually intend to ensure the freedom of research and education by maintaining the system of higher education institutions.[22] Institutional autonomy and the preservation of academic freedom are strongly linked.[23]

From the very beginning, universities have been closely linked to an aspiration for autonomy and privileges, the protection of which is still a sensitive issue and a cardinal question for higher education. From the constitutional point of view, this autonomy is a guarantee of academic freedom and freedom of education, which the state also seeks to fulfil primarily through the maintenance of institutions. The institutionalised exercise of fundamental rights requires universities to have self-government, protected at constitutional level.[24]

This special status of state universities is reflected in the considering whether they should be entitled to fundamental right protection. Even from the strict view of the German approach, state universities are one of the few exceptions, as an example of where the state body itself is established for the *purpose* of ensuring the exercise of a fundamental right. The constitutional protection of the self-government *(institutional autonomy)* of universities exists, since this autonomy was established to protect the freedom of expression, arts and sciences granted in the *Grundgesetz*,[25] and it is recognised and defended by the Federal Constitutional Court. According to constitutional case law, universities were established to ensure academic freedom and can therefore claim constitutional protection on the basis of the constitutional right to academic freedom.[26] The universities are view as having been

[22] Kocsis Miklós, *A felsőoktatási autonómia elmélete és gyakorlata Magyarországon* (PhD thesis, Pécsi Tudományegyetem Állam és Jogtudomány Kar Doktori Iskolája).

[23] On the relationship between academic freedom, institutional autonomy and democracy is fundamental, see also: Sjur Bergan, Tony Gallagher and Ira Harkavy (eds), *Academic Freedom, Institutional Autonomy and the Future of Democracy*, Council of Europe Higher Education Series No. 24, Council of Europe, April 2020.

[24] Kocsis (n 22).

[25] Paragraph (1)–(3) of Article 5 of the *Grundgesetz* states that: 'Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship. These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour. Arts and sciences, research and teaching shall be free. The freedom of teaching shall not release any person from allegiance to the constitution.'

[26] For example, in the decision about the compliant of the Justus-Liebig-Universität, Giessen, BVerfGE 15, 256.

founded to maintain and protect the freedom of education, therefore the Constitutional Court acknowledges the constitutional protection of the self-governance of the universities, and they can file a complaint in cases where academic freedom may have been breached.

In Hungary as well, the possibility for institutes of higher education to appeal to the HCC; it was even declared in the legislation itself.[27] It declares that

> the State shall perform the functions of higher education in compliance with the rights, obligations and powers of higher education institutions as regulated by the Constitution and this Act and the institutional regulations established pursuant to this Act. Legislation and individual decisions infringing the self-government of higher education institutions may be challenged before the HCC.

According to the above, between 1995 and 2005, in cases where the petitioner was an institute of higher education, it was not for the HCC to consider whether universities had the right to seek the protection of fundamental rights, but the legislator itself declared that the self-governance of universities (regardless of whether private or public institutions) was an *autonomy* to be constitutionally protected. Moreover, the HCC also explained that the freedom of scientific research and artistic creation, the freedom of learning and teaching, guaranteed by the Constitution, is manifested in university autonomy and therefore must be protected at constitutional level.[28]

In the first case[29] in which an institute of higher education applied to the body on the basis of the above-quoted legislation, the HCC rejected the petition, but not because it 'generally lacked jurisdiction to hear a case of harm to the self-government of a higher education institution, but because it lacked jurisdiction to hear a case of academic performance'. The HCC also stated that, in addition to university autonomy, the decision on academic disputes is the exclusive right of the academic community, and therefore neither the Court nor the legislator may interfere in it.

In another decision,[30] the Constitutional Court found that the Minister of Culture and Public Education had violated the right of self-government of a catholic university by refusing to publish in full the information on the university admission conditions for several faculties of the university. The HCC held that the Minister should have published the information provided by the university – which was in the public interest – in full, since universities were entitled to impose additional requirements in the admission procedure and, by failing to do so, the Minister had infringed the autonomy of universities.

The HCC appeared to believe that the provision explicitly contained in the Higher Education Act, i.e. that universities could seek constitutional protection from the HCC in

[27] Act LXXX of 1993 on Higher Education.
[28] Decision 40/1995. (VI. 15.) AB of the HCC.
[29] Decision 1079/H/1995. AB of the HCC.
[30] Decision 1430/H/1997. AB of the HCC.

order to defend their autonomy, could be derived from the Constitution itself. Later, the Act on Higher Education was replaced and the new legislation no longer contained a provision on the procedure of the HCC.[31]

The new legislation was referred to the HCC, following a constitutional veto by the Hungarian President, who explained that the autonomy of higher education means that it is autonomous and independent of the government and the state administration, and that this does not only extend to academic, teaching and research activities in the narrow sense. In order to ensure academic autonomy, institutes of higher education should also have autonomy in their organisation, operation and management, and the legislator should ensure the meaningful participation of the subjects of autonomy in the definition of the content of the relevant legislation. Several petitioners challenged different sections of the new law before the HCC, claiming that they infringed the autonomy of universities.

In its decision, the HCC set out the purposes of university autonomy, which are two different things: on the one hand, to provide an institutional framework for the right to education and, on the other hand, to guarantee the neutrality of the State in academic matters. It derived this from the Constitution[32] (right to education, freedom of academic life). In this decision,[33] the HCC reviewed its practice on the autonomy of institutes of higher education and their right to constitutional protection. The HCC pointed out that, in its initial decisions concerning university autonomy, it had established that autonomy is to be exercised 'within the limits of the law', and thus annulled government decrees for conflict with the autonomy provision of the Higher Education Act, and not directly for conflicting with the Constitution. Nevertheless, the Court already recognised in these early decisions the link between the autonomy established in the law and Articles of the Constitution.

However, in its later decisions, the HCC derived the autonomy of institutes of higher education directly from the Constitution and explained its content and scope.[34] The autonomy of universities has been interpreted in practice as the autonomy and independence of institutes of higher education from the government and the state administration, which, according to the HCC, should be interpreted in line with the fact that the purpose of autonomy is to ensure the right to education and the neutrality of the state in academic matters, and thus to ensure the independence of such institutions from the executive. Since it follows from this that autonomy does not derive from a law but directly from the Constitution, the HCC held that it is also possible to examine the constitutionality of legal provisions if they do not sufficiently guarantee the independence of institutes of higher education from the Government and the state administration.[35]

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[31] Act LXXX of 1993 on Higher Education was in force until the introduction of Act CXXXIX of 2005 on Higher Education on 1 March 2006.

[32] Articles 70/F and 70/G of the Hungarian Constitution.

[33] 62/2009. (VI. 16.) AB of the HCC.

[34] E.g. 51/2004. (XII. 8.) AB of the HCC 41/2005. (X. 27.) AB of the HCC.

[35] Decision 62/2009. (VI. 16.) AB of the HCC, Statement of reasons III. 1.

The HCC concluded that not only institutional protection, but also specific fundamental rights derive from the Constitution,[36] and then analysed in detail the limits of university autonomy with regard to the aspects raised in the petitions, namely the cases of infringement of rights that can be referred to the HCC for protection. The HCC, referring to its previous practice, held that autonomy may be exercised by the elected representative bodies and self-governments of universities, of which university teachers, lecturers, researchers and students are part. It is not possible to create an autonomous representative body from which one group is excluded.

With its many decisions, the Court stated that institutes of higher education institutions are (and shall be) independent from the government and the central state administration, and the purpose of their autonomy is the protection of the right to culture and the neutrality of the state in scientific matters, as well as this should not only be an institutional protection, but also specific fundamental rights protection derives from it.

To summarise the above, the *autonomy concept*, which also arises in the context of the right of local municipalities to petition, is most evident in practice regarding the state-maintained, public institutes of higher education. The Act on higher education explicitly allowed universities to file a constitutional complaint to the HCC in Hungary when their autonomy has been violated. The HCC, in addition to explicit statutory provisions, has explicitly derived the possibility of constitutional protection of self-government from the Constitution itself, and has therefore accepted and examined the petitions of universities, even after the amendment of the statutory provision, and has even analysed the provisions of the Higher Education Act itself and examined whether they infringe the autonomy of universities. The HCC deduced in its argument that this right of the universities directly originates from the Constitution, from academic freedom itself. It was therefore irrelevant whether it is stated in the legislation as well; universities have a constitutional right to file a petition to the HCC. This resulted in successful filing of constitutional complaints by universities, even state universities. The practice of the HCC provides a detailed outline of the framework of university self-government and the cases in which an autonomous public body operating as an institute of higher education is entitled to constitutional protection. This approach of the HCC originates from the German approach, where the state universities are one of the few exceptions from the strict prohibition of state entities to apply for fundamental rights protection, thus where the *autonomy concept* enters.

3 Local Municipalities

The other group of petitioners, where we should discuss the *autonomy concept*, even if we can speak of a much limited right of petition, are local municipalities.

[36] Decision 62/2009. (VI. 16.) AB of the HCC, Statement of reasons III. 2.1.1.

In Germany, local municipalities can file a complaint with the Federal Constitutional Court, a right enshrined in the *Grundgesetz* itself. However, this right is rather a matter of competence and not an entitlement to fundamental rights, so local municipalities are not to be viewed as having the same type of exemption as state universities. As a historical approach, it is possible to talk about the fundamental legal idea of self-government, but it does not exist anymore. The 'fundamental right' of self-government is rather an institutional guarantee of self-government.[37] Article 93 of the *Grundgesetz* provides for the jurisdiction of the Federal Constitutional Court. Paragraph 4b of this article states that

> The Federal Constitutional Court shall rule on *constitutional complaints filed by municipalities or associations of municipalities* on the ground that their *right to self-government* under Article 28 has been infringed by a law; in the case of infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land…

In the Grundgesetz, local authorities have the right of self-government 'in accordance with the laws, within the limits prescribed by the laws and within the limits of their functions designated by a law'[38]. The German Federal Constitutional Court 'has ruled that legislation by the member states or the federal government cannot infringe on the core areas *(Kernbereiche)* of self-government; in other words, legislation cannot have the effect of emptying the principle of self-government'[39]. The constitutional complaint that can be filed by local municipalities is very different from those filed by individuals, since it has less connection to fundamental rights and more to the conflict of competence. The local municipalities are also able to file a constitutional complaint *(Kommunalverfassungsbeschwerde)*, although it is a sui generis complaint, that needs to be distinguished from the constitutional complaint filed by natural persons.

The German practice and legislation are reflected in the Hungarian versions in this regard too. The HCC, in its examination of the so-called fundamental rights of local governments, has also concluded that the act of the legislator cannot lead to emptying them, and that local governments can therefore also enjoy protection. However, the practice of the HCC regarding the right of local municipalities to petition is not so clear.

In a much cited decision,[40] the HCC rejected the petition of a local municipality, but the court did not challenge that a state body cannot be subject to a fundamental right guaranteed by the Fundamental Law. Instead, it recognised that local governments are *autonomous* bodies within the system of public power of the state, regulated by the Fundamental Law, and that the so-called fundamental rights of local governments are 'groups of powers

[37] Bethge (n 20).

[38] Article 28 of the *Grundgesetz*.

[39] The meaning of the core areas *(Kernbereiche)* of the right to self-governance was stated by the landmark decision of the Federal Constitutional Court no. BVerfGE 79, 127.

[40] Decision 3381/2012. (XII. 30.) AB of the HCC.

which constitute constitutional guarantees of the autonomy granted to local governments in the field of local self-government'. However, the Courts stated that this autonomy is not absolute and unlimited, but limits the legislator to the extent that his acts cannot lead to the emptying of a fundamental right of local government. The Court was of the opinion that, since the petitioner municipality is a public body, it can only file a constitutional complaint based on a violation of the fundamental rights of the municipality as guaranteed by the Fundamental Law, and therefore petitioner is not entitled to the fundamental rights to which it had referred to (such as non-discrimination and children's rights). Thus, in this decision, the HCC examined the petitioner's eligibility on the basis of the autonomy of the municipality.

Later, in another well-known case, the HCC further nuanced its standpoint on the right of local municipalities to petition.[41] The decision of the HCC reveals that it considers local governments to be special state bodies which, although they are part of the system of public administration, have certain functions and powers protected by constitutional law. The HCC found that the Fundamental Law does not provide local government with fundamental rights, only for categories of powers and functions, and that the Court did not even address the question of autonomy. The decision ended with a rejection, with the reasoning that the petitioner had not invoked in its petition a right guaranteed to local municipalities by the Fundamental Law. Although the HCC's decision implies that there are fundamental rights granted to local municipalities by the Fundamental Law, the decision led many to believe that the HCC had definitively excluded local municipalities from the scope of petitioners of constitutional complaints, since 'although it is formally possible to file a constitutional complaint, the specific status of local municipalities as public bodies means that the substantive requirements for the substantive admissibility of a constitutional complaint cannot be met'[42].

In conclusion, the Court agreed that local municipalities/governments have special autonomy from the central state organs. Municipal liberties, or municipal constitutional rights, are widely recognised. however it is very different from any fundamental right. They are rather groups of competences, powers that constitute constitutional guarantees of the autonomy granted to local municipalities.[43] However this autonomy is neither unconditional nor limitless. However. the interference of the state and its restrictions must not lead to the emptying of a municipal liberty. The autonomy concept has been used in practice very rarely and rather strictly, and the academic discussions lead to a path that said it is only

[41] Decision 3105/2014. (IV. 17.) AB of the HCC.

[42] István Hoffman, 'Local Self-Government in Hungary' in Bostjan Brezovnik, István Hoffman, Jarosław Kostrubiec, Borut Holcman, Gorazd Trpin (eds), *Local Self-Government in Europe* (Lex Localis 2021, Maribor) 207–243, 215.

[43] This interpretation of the HCC roots in its early decisions. Eg. in the decision 64/1993. (XII. 22.) AB of the HCC it is stated that the fundamental rights of the municipalities included in the Constitution are in fact a set of powers for the autonomy of local authorities.

a theoretical opportunity for local municipalities and in practice they are excluded from constitutional protection.

IV Conclusion

The axiom remains: the function of fundamental rights is to protect the individual from state interference. While the fundamental legal personality of private legal entities is rather easily supported, without the natural persons behind an organisation, state entities lack the entitlement to fundamental rights and their protection. However, the different fundamental rights protection forums apply different approaches in this regard and their practice also develops with time.

One of the possible responses is to completely shut the way to fundamental protection in for the state entities, even if they are subject to private law or if they have a strong connection with a fundamental right. The other, rather unique approach is what we see in the current Hungarian legislation and legal practice, where even the government can file a constitutional complaint to protect its *fundamental rights*, without considering the obvious contradiction between the function of fundamental rights and the role of the state in a fundamental right relationship.

In between those two viewpoints, a possible compromise exists. The *autonomy concept,* while respecting the axiom by recognising the special consideration when talking about the possibility of granting fundamental rights protection to state entities also reflects on the heterogenous characteristics of public organs and state entities. Organisations, like state entities, public broadcast or local municipalities have a special – atypical – status within the public administration system, which should be reflected in the fundamental rights protection processes. With a well-argumented and consistent legal practice, the fundamental legal protection bodies could benefit from the autonomy concept when facing difficult cases regarding the fundamental legal status of certain entities connected to the state.

Denisa Skládalová*

Preventing Harm: Interim Protection as an Aspect of Effective Judicial Protection**

Abstract

Interim protection, together with other fair trial guarantees, helps to achieve the effective protection of rights in administrative justice proceedings. Under the Czech Code of Administrative Justice, interim protection is represented by two instruments, namely interim measures and suspensive effect. They have in common that they both protect the applicant from the risk of harm of considerable intensity. The decision on interim protection is a solution to the conflict between the applicant's interest in prompt and effective protection against the contested act, on the one hand, and, on the other, the requirement to protect legal certainty, the stability of legal relations and the acquired rights and good faith of the other parties. The paper aims to cover the purpose and role of the institutes of interim protection in administrative justice, focusing on the substantive condition of imminent harm. In order to achieve this, it analyses a sample of decisions by the Supreme Administrative Court granting interim protection between 2019 and 2021. Analysis of the case law shows that five main categories can be distinguished in which the Supreme Administrative Court usually finds the imminent harm to be sufficiently serious. These relate to cases concerning foreign nationals (usually third-country nationals seeking residence or asylum), disproportionally high fines or tax obligations, withdrawal of driving licence, removal of constructions and disclosure of information requested through the Act on Free Access to Information.

Keywords: interim protection, interim relief, preliminary protection, suspensive effect, interim measure, administrative justice

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I The Role and Importance of Interim Protection

The purpose of administrative courts is to provide protection to public subjective rights. However, there might be situations in which merely filing an administrative action is not sufficient for the effective protection of the applicant's rights. The effects of the contested act (typically an administrative decision) may pose such a serious threat to the applicant that even a possible future success on the merits would be more or less irrelevant. Moreover, since most Czech administrative courts are chronically overburdened, success on the merits is more likely to come later rather than in time. The average length of proceedings before regional administrative courts was 511 days in 2021; proceedings before the Supreme Administrative Court (SAC) in 2021 lasted on average 277 days.[1]

For cases where the applicant cannot afford to wait that long for the final resolution of the dispute, the legislation provides (the possibility of) interim protection. The rule is that, at least in the majority of cases, neither administrative action nor cassation complaint has *ex lege* suspensive effect. Act No. 150/2002 Coll., the Code of Administrative Justice (CAJ), offers two instruments for obtaining interim protection, the preliminary measure and suspensive effect. Both can be granted on the applicant's proposal; in the case of preliminary measures solely on the basis of a proposal.

This paper focuses on the issue of interim protection in Czech administrative justice and its case law. However, the main aspects of interim protection are similar through different jurisdictions and different branches of law, thus allowing for comparison.

Why is interim protection of rights in administrative justice a topic worthy of attention? Although many authors emphasise the importance of interim protection, especially in the context of EU law[2] or concerning protection of human rights,[3] this topic does not receive much attention in Czech administrative justice or theory. This contrasts with its importance for the addressees of public administration, since interim protection can be considered as one of the aspects of the right to effective and timely court protection.[4] The issue of

[1] Czech Judiciary 2021: (2022) Annual Statistical Report 128–135, <https://justice.cz/documents/12681/719244/Ceske_soudnictvi_2021.pdf/37d8da17-4fee-4001-a473-fdb840f78936> accessed 30 August 2022. For SAC data, see response to the request for information of 28. 3. 2022 (2022) <https://www.nssoud.cz/informace-pro-verejnost/poskytovani-informaci/poskytnute-informace/detail/informace-poskytnuta-28-3-2022> accessed 30 August 2022.

[2] See, i.a., Dimitrios Sinaniotis, *The Interim Protection of Individuals before the European and National Courts* (Kluwer Law International 2006).

[3] See, i.a., Eva Rieter, Karin Zwaan (eds), *Urgency and Human Rights. The Protective Potential and Legitimacy of Interim Measures* (Springer 2021).

[4] Susana de la Sierra, 'Provisional Court Protection in Administrative Disputes in Europe: The Constitutional Status of Interim Measures Deriving from the Right to Effective Court Protection. A Comparative Approach' (2004) 10 (1) European Law Journal 42–60.

suspensive effect can be seen as 'perhaps the greatest debt that the administrative justice system owes to the truly real and effective protection of the subjective rights of individuals'[5].

Courts make decisions on interim protection under time pressure (within a 30-day time limit) and often with rather insufficient information. Concerning the timeliness of delivering interim protection decisions, there are no data available. The CAJ does not attach any consequences to the expiry of the 30-day time limit. However, from the author's personal experience as a law clerk at the SAC, the court meets the deadline in the vast majority of cases.

Decisions on interim protection are excluded from judicial review on the grounds of their temporary nature or are subject to a very limited review in proceedings before the Constitutional Court. The absence of judicial review means there is no mechanism for unifying case law on interim protection. This can lead to potential inconsistency and contradictions in the decision-making practice of regional administrative courts and the SAC.

Attention is focused primarily on decision on the merits. However, as mentioned, the practical importance of interim protection for the applicant can be even higher than the decision on the merits itself. Examples can be found across the entire agenda dealt with by administrative courts: whether cases in the field of law on foreign nationals or environmental law, construction law or tax law. If the applicant is exposed to a threat of harm that is difficult to remedy or compensate, a decision granting interim protection may indeed be preferable to granting the action itself. This applies especially in situations where the annulled decision has already been implemented and the interference with the rights or interests defended by the applicant is irreparable. This is all the truer in view of the average length of proceedings before administrative courts.

Requirements for effective judicial (and thus interim) protection arise not only from national legislation, but also from Council of Europe recommendations and EU law. Of particular note is *Recommendation No. R (89) 8 of the Committee of Ministers to Member States on Provisional court Protection in Administrative Matters*.[6] According to the Recommendation No. R (89) 8, protection can be sought not only after an action has been brought, but also prior to challenging the administrative act, if there is a case of urgency or where an action has been brought against an administrative act which does not have in itself any suspensive effect and has not yet been decided (Article 1 Paragraph 1). This requirement

[5] Lukáš Hlouch, 'Význam a smysl správního soudnictví v vztahu k veřejné správě' in Soňa Skulová, Lukáš Potěšil et al., *Prostředky ochrany subjektivních práv ve veřejné správě – jejich systém a efektivnost* (C. H. Beck 2017, 391–400) 393.

[6] Recommendation No. R (89) 8 of the Committee of Ministers to Member States on Provisional court Protection in Administrative Matters <https://rm.coe.int/16804f288f> accessed 30 October 2022.

is not met by the CAJ, since the law makes granting interim protection conditional on filing an action on the merits.[7]

Recommendation No. R (89) 8 is followed by *Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts*. This sets out five default categories of principles for judicial review. It conceives interim protection as one aspect of *effective* judicial protection. The court should have the power to order grant interim protection pending the outcome of the proceedings (Principle 5.d), which is intended to ensure that the court can suspend the implementation of the contested act if its implementation would place the applicant in an irreversible situation. The interim measures may include total or partial suspension of enforcing the contested administrative act. This will enable the court to restore the factual and legal situation which would prevail in the absence of the administrative act or to impose appropriate obligations on the administrative authority.[8] As mentioned, interim protection granted in proceedings before national administrative courts can have an EU dimension as well. The principle of effective judicial protection (enshrined in Article 47 Charter of Fundamental Rights of the European Union) entails the *right to an effective remedy*. In cases involving EU law, national courts must provide the possibility of immediate and provisional judicial protection when this is necessary in order to make legal protection effective.[9] Interim protection therefore plays an important role in ensuring the full effectiveness of a judgment to be given on the existence of the rights claimed under EU law.[10]

If the administrative court decides on interim protection in cases involving an element of EU law, it must consider the requirements arising from it. The decision must respect the principles of equivalence, efficiency and effective judicial protection, as well as the right to an effective remedy and to a fair trial. The obligation to have regard for the requirements of EU law is particularly relevant in the context of decisions concerning the protection of the environment (where EU law is manifested through the requirements of international law, namely the Aarhus Convention), in asylum cases or in cases concerning residence permits.

The particular form of interim relief is a matter for national legislations. However, as Prechal and Pahladsingh note, the principles of equivalence and effectiveness must be respected, as well as requirements stemming from effective judicial protection and Article 47 of the Charter of Fundamental Rights. The European Court of Justice (ECJ) case law also

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[7] See Article 38(1) CAJ, according to which, 'where an application for the initiation of proceedings has been made (…)'. In the case of suspensive effect, the condition for initiating proceedings is not expressly laid down by CAJ. Courts and the literature, however, derive it from the wording of Article 73 CAJ. See Jan Jirásek, '§ 73 [Odkladný účinek žaloby]' in Tomáš Blažek et al., *Soudní řád správní. Online komentář* (C. H. Beck 2016).

[8] Recommendation Rec(2004)20 of the Committee of Ministers to member states on judicial review of administrative acts <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805dba26> accessed 30 October 2022.

[9] Case C-213/89 R *(Factortame Ltd) v Secretary of State for Transport*, EU:C:1990:257; Case C-416/*10 Jozef Križan and Others v Slovenská inšpekcia životného prostredia*, EU:C:2013:8.

[10] Case C-416/10 *Jozef Križan and Others v Slovenská inšpekcia životného prostredia*, EU:C:2013:8.

provides some indications as to the conditions to be fulfilled in interim relief actions, such as a sense of urgency or a *threat of serious and irreparable damage* to the applicant seeking relief. This means that 'the application of a decision pending the preliminary proceedings may have irreversible consequences'.[11] According to the ECJ case law,

> the argument that harm is, by definition, irreparable because it falls within the scope of fundamental freedoms cannot be accepted since it is not sufficient to allege infringement of fundamental rights in the abstract for the purpose of establishing that the harm which could result would necessarily be irreparable.[12]

Infringement of certain fundamental rights (such as prohibition of torture, inhumane or degrading treatment or punishment) is liable to give rise by itself to serious and irreparable harm. Nevertheless, it is still for the party seeking an interim measure to set forth and establish the likelihood of such harm occurring in its particular case.[13]

II Interim Measure and Suspensive Effect in the Czech Code of Administrative Justice

1 Interim Measure (Article 38 CAJ)

The aim and purpose of a preliminary measure is to adjust the circumstances of the parties in exceptional cases, where the continuation of the existing state of affairs *(status quo)* or, on the other hand, their change threatens serious harm, on a provisional basis. Compared to suspensive effect, the use of interim measures in Czech administrative justice is much less frequent. As of 31. 12. 2021, the total number of decisions on interim measures (i.e. both granting and rejecting them) amounted to just over 5 % of the total number of decisions on suspensive effect. The explanation for this might be that suspensive effect is largely used in proceedings concerning an action against an administrative decision and in cassation complaint proceedings. These are by far the most frequent types of proceedings.

If the court grants the interim measure, it orders the other party to do something *(facere)*, refrain from doing something *(omittere)*, or endure something *(pati)*. Recently, the most frequently imposed obligation (in the context of cassation proceedings) is the obligation of the administrative authority to tolerate the applicant's (who is a foreigner

[11] Sacha Prechal, Aniel Pahladsingh, 'Urgency and Human Rights in EU Law: Procedures Before the Court of Justice of the EU' in Eva Rieter, Karin Zwaan (eds), *Urgency and Human Rights. The Protective Potential and Legitimacy of Interim Measures* (Springer 2021, 37–63) 46.

[12] Order of the President of the Court, Case C 43/98 P(R), *Camar Srl v Commission*, EU:C:1998:166.

[13] Order of the Vice-President of the Court, Case C-390/13 P(R), *European Medicines Agency (EMA) v InterMune UK Ltd and Others*, EU:C:2013:795.

seeking residence or asylum) stay in a detention centre and to provide them with basic material security until the final outcome of the cassation proceedings.[14] The second most frequent category of imposed obligations consists of an order that the other party shall refrain from certain conduct. A wide range of possibilities can be anticipated here. These include an obligation to refrain from proceeding with a tax enforcement, auctioning the applicant's property, intervening over advertising facilities or loading material on a specified piece of land.[15]

The conditions for issuing an interim measure (which must be satisfied cumulatively) are as follows:

1. an application initiating proceedings before the court (an administrative action or a cassation complaint);

2. an application for an interim measure;

3. a need to adjust the parties' circumstances provisionally because of the threat of *serious harm*;

4. a statement by the other parties to the proceedings on the application for an interim measure; however, only if the court finds it necessary.

Serious harm is an interference with the public subjective rights of a party which constitutes such a fundamental disturbance that the party cannot be fairly required to bear it, even temporarily. At the same time, serious harm can be understood as such interference with legal sphere of third parties (other persons) or interference with a public interest.[16] However, in the case of interim measures, the CAJ does not expressly require that the imminent harm be weighed against the harm that could be caused to other persons by granting the requested measure, nor does it consider any possible conflict with the public interest. In its decisions on interim measures, the SAC therefore does not assess these aspects.

2 Suspensive Effect (Article 73 CAJ)

Suspensive effect – generally speaking and in simplified terms – serves the same purpose as interim measures. However, its functioning is substantially different. It is clear from the nature of the institute that it suspends (any) effects of the contested administrative or judicial decision (or both simultaneously), or parts thereof (i.e. its individual statements).

The procedural conditions for granting suspensive effect are as follows:

1. pending court proceedings on an action or a cassation complaint;

2. an application by the person entitled (in cassation proceedings, the administrative authority can apply for suspensive effect as well);

3. a statement by the other parties to the proceedings or third persons who may be affected by the decision.

[14] E.g. SAC Resolution No. 3 Azs 28/2020-73.

[15] E.g. SAC Resolution No. 4 Afs 146/2020-60 or SAC Resolution No. 6 As 6/2017-75.

[16] SAC Resolution No. Na 112/2006-37.

There are two more substantive conditions that must be met. These are:

1. a threat of harm *disproportionately greater* than that which may be caused to other persons by granting suspensive effect;

2. an absence of conflict with an important public interest.

These conditions constitute a certain scheme by which the court assesses the application for suspensive effect. If the applicant does not establish a threat of qualifying harm, the court no longer considers the question of conflict with the public interest. To be successful, the applicant must satisfy three sub-steps of the substantive part of the scheme outlined above. It must allege with sufficient specificity and, where appropriate, substantiate the imminent harm (1), which the court must find to be sufficiently serious (2) and at the same time not contrary to an important public interest (3).

The applicant is expected to make a sufficiently specific and individualised allegation that they will suffer harm within the meaning of Article 38(1) or Article 73(2) CAJ as a result of the contested decision. In order for suspensive effect to be granted, the claim must include an explanation of what that harm consists of and an indication of its extent and intensity. Administrative courts are not called upon to establish or prove the grounds for granting interim protection on the applicant's behalf. To be successful, the applicant not only needs to state the threatened harm but also, where possible, provide evidence of it (e.g., contracts, accounting records or bank statements). However, full clarification of the applicant's circumstances is not a prerequisite for an application for interim protection to be well founded.

III Harm

In the context of decisions on interim protection, harm can be considered in two ways. First, there is harm *to* the applicant, for which they seek interim protection. On the other hand, there is harm that may arise as a result of ranting interim protection to others (third persons). As a result of interim protection being granted, such third persons might suffer damage and face additional costs. This risk of harm caused *by* interim protection must also be considered, having regard to the general principle of proportionality. However, this paper focuses on the first category of harm, since this is the focal point of decision-making and is thus relevant case law on interim protection.

The applicant's claims in the application for granting interim protection must show that the adverse consequence which they fear in connection with the enforcement of the contested decision would pose substantial harm to them. According to the SAC case law, the impeding harm must be *serious* and *real*, not *hypothetical* or *trivial*.[17] Only harm of a certain intensity can justify an exception to the rule that neither an administrative action nor a cassation complaint have suspensive effect by virtue of law. It is also described by the SAC

[17] SAC Resolution No. 2 Afs 193/2015-62.

case law as an 'intensive interference with the applicant's intimate sphere, their property rights or other (especially constitutionally guaranteed) subjective rights'.[18] Significant harm will be caused if it is no longer possible to reverse the effects caused by enforcement of the contested decision, even though the applicant succeeded on the merits. Injury will also be significant if the consequences of the contested decision (although reversible or remediable) are of such a nature as to cause the applicant serious difficulties or significant disruption to their life, functioning or activities.[19]

Its interpretation of what constitutes *serious harm* was put forward by the SAC in many cases. It is seen as interference with the applicant's legal sphere which (either in itself or as part of a more complex unlawful procedure) constitutes 'such a fundamental interference with that sphere that the party cannot fairly be required to endure it, even temporarily'.[20] Serious harm may also be a set of acts by the administrative authorities, which could not individually be regarded as such harm but if in their totality and having regard to their temporal continuity, targeting and cumulative negative effects, they amount to an intense interference against the applicant.

Any decision on the application for interim protection is closely linked to the specific facts of the case and allegations made by the applicant. Individual decisions therefore to some extent defy generalisation. A number of sub-factors may contribute to the conclusion on intensity of the harm. Because of this, the conclusions of the case law on interim measures and suspensive effect cannot be adopted mechanically. The idea of creating lists of cases in which suspensive effect is to be granted (and when it is not) was rejected by the administrative courts themselves.[21] The CAJ gives the court a wide margin of discretion, which must take into account all the particularities of the case in question. However, considering the volume of the relevant case law, it is nevertheless possible to trace some rather typical situations when the harm is seen as significant enough.

This paper evaluates the decisions of the SAC granting interim protection between years 2019 and 2021. The sample consists of all SAC decisions in given time period in which the court granted suspensive effect to the cassation complaint. All SAC decisions are freely available online.[22] In 2019, the SAC granted suspensive effect in 93 cases; in 2020, suspensive effect was granted in 107 cases; in 2021, suspensive effect was granted in 93 cases. Consequently, the five categories below can be distinguished in the selected sample. These are the most frequently occurring cases, meaning there were also a number of different 'unclassified' cases in the sample. The focus is on decisions in which the SAC

[18] SAC Resolution No. Na 112/2006-37.

[19] SAC Resolution No. 6 Afs 73/2014-56.

[20] SAC Resolution No. Na 112/2006-37.

[21] SAC Resolution No. 10 Ads 99/2014-58.

[22] See https://vyhledavac.nssoud.cz/, category 'details of the document and procedure', statement 'suspensive effect: granted'.

granted suspensive effect or imposed an interim measure as to determine which type of harm *is* sufficiently serious.

It needs to be noted that the representativeness of the chosen sample of decisions is limited by the time period chosen and also by the fact that the reviewed sample consists only of SAC decisions (and not also the decisions of the regional courts).[23] The CAJ does not make any distinction in the sense of different requirements for the intensity of the alleged harm in proceedings before regional administrative courts and the SAC (for example, such as that in cassation proceedings, the harm must be alleged to be even more serious, since it is an extraordinary remedy). For this reason, the conclusions of the SAC case law should be applicable to proceedings before regional administrative courts. In practice, however, potential inconsistencies in the assessment of intensity of imminent harm in the case law of regional courts and the SAC might arise.

The conclusions drawn below represent a set of decisions from the period in question, with specific decisions (resolutions) chosen as examples, as these conclusions are mostly repeated in dozens of resolutions each year. Upon categorization, the following five categories represent typical situations when serious harm is usually found.

1 Obligation of Foreigners to Leave the Territory of the State

The harm that applicants in the field of law on foreign nationals face arises from the obligation to leave the territory of the Czech Republic against their will. Within this category, the harm can be categorised into several main subgroups. The harm may consist of interference with their family life (long-term separation from close persons and relatives), or with their private life (severing the ties of a fully integrated foreigner who has been living in the country for a long time, while lacking any background in the country of origin). Harm may be caused by fundamental health factors (serious health problems which prevent departure or a disease that is incurable in the country of origin and threatens to worsen). Harm may also be caused by exceptional economic factors (existential difficulties in the country of origin or significant lack of resources for returning to the territory of the Czech Republic in the event of the applicant's success).[24] In these cases, there is regularly an accumulation of several sub-aspects of harm. The obligation to leave the territory of the state often constitutes a fundamental and multifaceted interference in the life of the foreigner in all its spheres.[25]

[23] The procedural decisions of regional administrative courts are not publicly available, although they can be obtained on request.

[24] SAC Resolution No. 6 Azs 325/2021-36.

[25] Such as the aforementioned interference with applicant's family and personal life (SAC Resolution No. 7 Azs 346/2018-28), disruption of their studies (SAC Resolution No. 5 Azs 84/2021-98) or working relationships and business activities (SAC Resolution No. 4 Azs 191/2020-23).

2 Disproportional Amount of Fine or Tax Obligation Imposed

Another group of frequently occurring cases is the harm that the applicant faces because of an administrative penalty (typically a fine) imposed on them or as a result of a tax obligation. In such situations, the applicant is obliged to pay a certain monetary amount, which will result in a serious interference with their financial situation. To grant interim protection, the amount must be disproportionate for the applicant or their activity, i.e., potentially causing an irreversible or even existential threat.[26] However, the SAC does not always require that this interference be a truly an existential threat – a 'mere' sufficiently strong interference may suffice.[27] The impact of a sanction or tax obligation may also affect other persons besides the applicant themself, such as persons to whom they provide services or care, or those dependent on their activities. These can be their family members, employees, students, or residents of a municipality.[28]

3 Withdrawal of Driving Licence

Applicants often seek interim protection because of an impending prohibition on practicing their profession. In most cases, this threat is linked to an administrative penalty of a driving ban. For the court to grant interim protection, there must be a risk of no longer working in a profession for which a driving licence is essential. The dependence on driving should be existential.[29] A mere reduction in comfort will not suffice.[30] The intensity of the harm is usually compounded by the allegation that the applicant will otherwise lose their job, which will jeopardise their livelihood or will have an impact on the fulfilment of their obligations to other persons.[31] Alternatively, the applicant may be using the vehicle to care for their dependents, such as elderly or ill family members. In doing so, the court will also consider the nature and seriousness of the offence committed by the appellant that led to the driving ban.[32]

4 Removal of Construction

The imminent removal of a construction is another case that appears relatively frequently in the SAC case law and usually constitutes significant harm. Such harm consists of the loss of investments in the construction and the additional financial and time expenses required to

[26] SAC Resolution No. 3 Ads 336/2017-34.
[27] SAC Resolution No. 2 Afs 131/2018-50.
[28] SAC Resolution No. 8 Ads 312/2021-33.
[29] SAC Resolution No. 6 As 29/2013-80.
[30] SAC Resolution No. 1 As 473/2020-32.
[31] The applicant is likely to be in the profession of a driver, a sales representative or an entrepreneur (SAC Resolution No. 3 As 286/2017-39 or SAC Resolution No. 7 As 321/2017-19).
[32] SAC Resolution No. 6 As 29/2013-80 or SAC Resolution No. 2 As 319/2018-24.

remove the construction. Removal will also result in the loss of the purpose and use of the construction. The situation will be more substantiated if the construction is intended for habitation and its removal would lead to complications in the applicant's housing situation or even to the loss of their shelter.[33]

However, a number of other risks can be encountered in construction cases. In addition to the imposition of an obligation to remove the building, cases can be mentioned where the harm consists of the interruption of construction work, but also in its commencement or continuation. The interruption of construction work may give rise to additional costs for preserving the building and protecting it from damage, compensation costs for contractors or subsequent costs for repairing or replacing materials damaged by the deterioration of the unfinished building or for engaging new contractors.[34] Conversely, commencement or continuation of construction work will cause harm, particularly if there is a risk of irreversible damage to the landscape, the environment in general or a population of specially protected animal or plant species.[35]

5 Disclosure of Information Requested through the Act on Free Access to Information

The last category of recurring cases consists of those concerning freedom of access to information. Here, the administrative authority will typically seek suspensive effect on the grounds that, if the SAC does not grant it, they would have to provide the requested information. Publishing the information would take the case to a purely academic level, since already disclosed information cannot be withdrawn or otherwise restored.[36] In effect, the subject matter of the dispute would no longer exist. In such situations, there is a risk of harm to the persons about whose private circumstances the other party is requesting information.[37] A risk of violating business secrets or leaking otherwise classified information can also occur.[38]

IV Closing Remarks

This paper presented the background of interim protection decision-making in the context of Czech administrative justice, with a focus on the aspect of imminent harm. Although the substantive conditions for granting interim measures and suspensive effect differ, the

[33] SAC Resolution No. 10 As 343/2021-36.
[34] SAC Resolution No. 2 As 272/2020-49.
[35] SAC Resolution No. 7 As 400/2018-96.
[36] SAC Resolution No. 5 As 170/2019-18.
[37] SAC Resolution No. 6 As 188/2021-38.
[38] SAC Resolution No. 9 As 163/2020-26 or SAC Resolution No. 10 As 241/2021-21.

threat of harm of significant intensity is the common denominator of both kinds of interim protection.

In the examined sample of the SAC decisions in which the court has granted suspensive effect to a cassation complaint, several similarly occurring types of situations can be observed. It cannot be understood that all such applications are guaranteed to be successful. They are intended to serve instead as an approximation of the content of a vague legal concept of *imminent harm*, or more precisely, *disproportionately greater harm*.

First, these include cases concerning law on foreign nationals, which involve harm consisting of interference with the foreigner's private and family life as a result of the obligation to leave the territory of the Czech Republic. Another category relates to the allegedly disproportionate amount of a fine or tax liability, the payment of which would endanger the applicant's livelihood or business activities. There are also frequent cases of a loss of their driving licence, where the applicant fears loss of employment due to their existential dependence on driving. Cases in the field of construction law are characterised by the fact that the court must balance the harm imminent to the applicant against that threatened to other persons. Neither the removal of a building nor the termination or suspension of construction work constitutes an automatic ground for granting suspensive effect. On the contrary, the construction activity itself may be regarded as a detriment, for example, from the point of view of neighbours or as a detriment to the environment. The last group of cases is represented by disputes relating to freedom of access to information. Here, the SAC regularly grants suspensive effect to the cassation complaint by the administrative authority, as disclosure of the information would largely render judicial review meaningless.

Administrative courts have consistently emphasised the exceptional nature of interim protection, which should be treated rather cautiously. However, it must be noted that both the legislation and the case law is evolving towards a broader interpretation of the conditions for granting interim protection.[39]

In addition to the aspect of harm, the topic of interim protection invites a number of other intriguing questions. Does the success rate of proposals for interim protection correlate with the success rate on the merits of the cases? What about additional judicial protection against decisions on interim protection? What role does liability for injury caused by granting interim protection play? How do the relevant stakeholders assess the relevant legislation? To answer these questions, we must first properly acknowledge the role and importance of interim protection. After all, it is still true that *justice delayed is justice denied.*[40]

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[39] An analysis by the non-profit organisation Ecological Legal Service (*Ekologický právní servis,* now *Frank Bold*) from 2009 provides an overview of the case law at that time. Since then, substantial progress has been made towards allowing access to interim protection for applicants, mostly in construction and environmental protection cases.

[40] The quote is commonly attributed to William E. Gladstone, a British Prime Minister in the late 1800's.

Igor Gontarz*

Judicial Review of Automated Administrative Decision-making: The Role of Administrative Courts in the Evaluation of Unlawful Regimes**

Abstract

Automated administrative decision-making in Europe draws attention to legal issues related to its scrutiny. The algorithm may not be an exact translation of the legal norms that it is supposed to enforce; moreover, the logic behind opaque systems is inaccessible to individuals affected by its operation. In the age of mass decisions on access to benefits and public services, how can it be ensured that the legal interest of individuals will be protected? The discussion on general assumptions of administrative justice towards the digital state has already begun in the UK, with some interesting developments on administrative courts' jurisdiction and evidentiary proceedings. At the same time in the EU, there are discussions on the Proposal for Artificial Intelligence Act resulting in Model Rules on Algorithmic Impact Assessment, with the significant role of the Supervisory Body and the Expert Board. In this paper, I would like to compare two approaches and reflect on them from the viewpoint of Polish administrative justice. To do that, I analyse the English legal framework of judicial review and its recent case law. I conclude that Polish administrative justice doesn't have the legal competence to evaluate the policymaking process and the role of the court should be limited to examining the decisions of the Supervisory Body.

Keywords: algorithms in public administration, algorithmic decision-making, structural review, jurisdiction over administrative regimes, review of policymaking, administrative justice, judicial review

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I Introduction

The reviewability of automated decision-making is one of the central topics raised in the discussion concerning the operations of the digital state.[1] As a rule, individuals may defend themselves against the illegal activity of a government in an administrative court, performing the right to a fair trial (art. 6 sec. 1 European Convention on Human Rights[2]). Nevertheless, fixing public law errors in a concrete administrative case doesn't fix a problem that might be systemic. With their intrinsic discriminatory potential and rigidity, digital tools massively breach individual interests, having an adverse impact on whole social groups.[3] The public body might not be responsible for shortcomings in a faulty system developed by the government. Should the administrative courts then have jurisdiction to assess whole administrative regimes? If yes, do they possess sufficient expertise to assess the legality of automated decision-making systems? In this article, I would like to focus on the role of administrative courts in the examination of administrative regimes of automated decision-making. To do that, I will compare two approaches with a different role for judicial review; the one discussed in the English literature and the one based on algorithmic impact assessment proposed by European law Institute. Having presented the state of the art in the debate on systemic review in the UK and Poland, I will consider existing proposals from a comparative perspective and assess how reliable they could be for domestic lawmakers.

II Definition and Overview of Automated Administrative Decision-making

A legal analysis of the operations of the digital state requires an explanation of certain basic concepts to which I refer further. This article concerns automated decision-making systems (or algorithmic decision-making systems; hereinafter 'ADM systems'), which I understand as 'decision-making systems that operate entirely without or with reduced human input, reaching decisions instead through the use of mathematical instruction sequences called

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1 Jennifer Cobbe, Michelle Seng Ah Lee, and Jatinder Singh, 'Reviewable Automated Decision-Making: A Framework for Accountable Algorithmic Systems' in *Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency* (FAccT '21, Association for Computing Machinery 2021, New York, NY, USA, 598–609) DOI: https://doi.org/10.1145/3442188.3445921

2 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, as amended by Protocols Nos. 11, 14 and 15 supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16, CETS No. 213 (entered into force 1 August 2021).

3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC ('GDPR'), art. 22 sec. 1.

algorithms"[4]. Recently, ADM systems have become used in numerous public services, from calculating benefits to tax fraud detection and profiling the unemployed. Governments are eager to automate their operations, though the logic behind it is not entirely transparent to society. In Germany, there are over 150 automated systems that affect access to important goods, services and enjoyment of civil liberties.[5] In the US, the number of discovered algorithms used by the Federal Government reached 829.[6] Also, in other countries, such as the UK,[7] Poland[8] and Norway,[9] there is a clear tendency to use data analytics (and algorithms) in the provision of public services. For a few decades, when the technology employed by public officials was rather simple and the degree of human engagement in decision-making was significant, the automation of public administration did not attract as much attention from legal scholars as it does today. Unsurprisingly, there were no challenges on the grounds of human rights infringement when a driver received an automatically generated speed ticket. Similarly, there was no reason to commence legal debate on automated income tax calculations, as the exact mechanism was transparent, and a taxpayer could question the amount to be paid. However, since algorithms have become more complex and governments have become more confident in automating public administration, discussion has boomed.[10] With the new types of algorithms, enabling classification, matching patterns and more complex applications of laws, new ideas of use have appeared in spheres susceptible to human rights infringements. Among typical examples, one could mention fraud detection,

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[4] I repeat this definition after Abe Chauhan, 'Towards the Systemic Review of Automated Decision-Making Systems' (2020) 25 (4) Judicial Review 285–295, 286; DOI: 10.1080/10854681.2020.1871714. By comparison, J. Cobbe et al. use the term 'automated decision-making' for decisions or interests of natural or legal persons made by other natural or legal persons using automated processes, Cobbe et al. (n 1) 599.

[5] *Atlas of Automation – Automated decision-making and participation in Germany* (1st edn, April 2019), <https://atlas.algorithmwatch.org/en/> accessed 29 September 2022.

[6] Algorithm Tips offers a curated set of algorithms being used across the US government at the federal, state, and local levels at: <https://db.algorithmtips.org/db> accessed 29 September 2022.

[7] Lina Dencik, Arne Hintz, Joanna Redden and Harry Warne, *Data Scores as Governance: Investigating uses of citizen scoring in public services* (Project Report Data Justice Lab, Cardiff University December 2018, UK).

[8] Natalia Mileszyk, Bartosz Paszcza, Alek Tarkowski, *AlgoPolska* (Raport 07/2019, Fundacja Centrum Cyfrowe Klub Jagielloński Kraków 2019, Warszawa), <https://centrumcyfrowe.pl/algopolska-raport/> accessed 29 September 2022.

[9] In Norway most tax decisions concerning individual taxpayers, more than 70 percent of applications to the Norwegian State Educational Loan Fund and the large majority of applications for housing benefits are totally automated, see Dag Wiese Schartum, 'From Legal Sources to Programming Code: Automatic Individual Decisions in Public Administration and Computers under the Rule of Law' in Woodrow Barfield (ed), *The Cambridge Handbook of the Law of Algorithms* (Cambridge University Press 2020) 307.

[10] See e.g. Lord Sales, 'Algorithms, Artificial Intelligence and the Law' (2020) 25 (1) Judicial Review 46–66, Joanna Mazur, *Algorytm jako informacja publiczna w prawie europejskim* (Wydawnictwo Uniwersytetu Warszawskiego 2021, Warszawa); Mateo Pressi, 'The Use of Algorithms within Administrative Procedures: National Experiences compared through the Lens of European Law Review of European Administrative Law' (2021) 14 (2) Review of European Administrative Law 69–84, DOI: 10.7590/187479821X16254887670900. Rashida Richardson, Jason M. Schultz and Vincent M. Southerland, *Litigating algorithms 2019 US report: New Challenges to Government Use of Algorithmic Decision Systems* (AI Now Institute September 2019).

welfare debt recovery systems and national security contexts, such as immigration (e.g. the UK settlement scheme).[11] Depending on the purpose, automated administrative decision-making may employ a simple algorithm, a rule-based expert system or a machine learning model. From the technical point of view, the most dangerous for an individual is the latter, as an algorithm can self-develop in an unpredictable, sometimes also inexplicable way. However, as it follows from the Proposal for an Artificial Intelligence Act[12] what matters more than the employed technology itself is the purpose of its use. All automation methods might constitute a high risk if they are employed in a context of access and enjoyment of essential public services and benefits or migration and border control management.[13] Therefore, for this paper, I do not wish to focus on any particular technology. For the reasons I have mentioned above, the conclusions that I draw might be universally applied to both: machine learning algorithms and simple ones, based on statistical, logic and knowledge-based approaches.[14]

III Review of an Act or the ADM System?

Considering the risks to human rights, such as a right to privacy, equal treatment and social protection, the use of ADM systems in public administration must be under control. As a rule, it is not a problem in the case of individual decisions, as at least a person to whom a decision is addressed may challenge it in court.[15] The review performed ex-post implementation of the ADM system might, however, be ineffective.

First, algorithmic tools are employed in circumstances that allow mass decision-making. The source code of ADM systems is 'rigid' (inflexible), making them incapable of considering open terms such as 'public interest' or 'justified exemption'. It is not possible

[11] Monika Zalnieriute, Lisa Burton, Janina Boughey, Lyria Moses Bennett, and Sarah Logan, 'From Rule of Law to Statute Drafting: Legal Issues for Algorithms in Government Decision-Making' in Woodrow Barfield (ed), *The Cambridge Handbook of the Law of Algorithms* (Cambridge University Press 2020) 254. Some of the authors perceive as administrative decision-making also law enforcement and predictive policing. I omit these activities as in some countries they don't relate to operations of public administration but rather are domain of criminal law.

[12] Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts (COM/2021/206 final).

[13] See annex nb III to the Proposal for an Artificial Intelligence Act.

[14] The technology is less relevant than simply a fact of delegating the issuance of the decision to a data-driven algorithmically controlled system. Though machine learning has proved to be most dangerous to human rights and completely untransparent, the scholarship has discovered that simple algorithms may also be difficult to review. Abe Chauhan mentions, for instance the GSCE and A-Level 2020 results fiasco, which was the consequence of implementing fairly simple algorithms, Abe Chauhan, footnote nb. 5.

[15] *Model Rules on Impact Assessment of Algorithmic Decision-Making Systems Used by Public Administration: Report of the European Law Institute* (European Law Institute 2022) 51.

(for now) to create a system of mass decisions on permits to build a house or to run a new petrol station. On the other hand, decisions on social benefits or asylum, which usually affect the poor and socially excluded, are issued daily. The adverse impact that is caused by irrational automation of some parts of public services might however be structural rather than individual.

Furthermore, the risks from which society needs to be protected, are systemic. The exemplary side-effect of automation is discrimination against some societal groups.[16] A good illustration might be the Polish system of profiling the unemployed, introduced in 2014. Based on answers provided by an unemployed person in the special 'Profiling questionnaire', the interviewee was ascribed to one of three predetermined profiles. The decision of which profile to attribute to an individual was taken automatically, and it determined the kind of support that the unemployed person could receive from the state.[17] While a person assigned to profile II could be offered a wide range of various active labour market programmes (apprenticeships, training, postgraduate studies), another one assigned to profile III was not offered any attractive form of assistance.[18] Such segregation into better and worse is highly controversial and, if proven, could be deemed discriminatory.[19]

Society usually does not have access to information that would allow us to assess whether the tool is discriminatory or not. Governmental use of ADM is not transparent to society, neither when it comes to numbers, nor the technology employed.[20] In the above example, legal regulations failed to provide for how a specific active labour market programme should be determined. Both the algorithm and the questionnaire were kept secret, fearing that the unemployed would learn the answers and manipulate the system.[21] Nevertheless, exercising its right to public information, a non-governmental organisation *(Panoptykon) finally received the list of questions put to the unemployed and published it on its website. Later, in 2018, the regulation on data collection was declared unconstitutional by the Polish Constitutional Tribunal.*[22]

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[16] Joanna Mazur, 'Can public access to documents support the transparency of automated decision-making? The European Union law perspective' (2021) 29 (1) International Journal of Law and Information Technology 29, 1–23, 4, DOI: 10.1093/ijlit/eaaa019

[17] The profiling program involved processing of data of about circa 1.5 million people. See more: Jędrzej Niklas, Karolina Sztandar-Sztanderska, Katarzyna Szymielewicz, *Profiling The Unemployed in Poland: Social And Political Implications Of Algorithmic Decision Making* (Fundacja Panoptykon 2014, Warsaw) 5.

[18] Niklas and others (n 17) 13.

[19] As the authors of the report indicate, 'in some cases, the very fact of having a disability or being a single mother turned out to be sufficient to assign a person concerned to Profile III'. See Niklas and others (n 17) 37.

[20] Jack Maxwell, Joe Tomlinson, 'Public Law and Technology: Mapping and Analysing Legal Responses in UK Civil Society' (2020) 25 (1) Judicial Review 28–38, 29 ff, DOI: 10.1080/10854681.2020.1732741

[21] Similarly, the transparency of the ADM system detecting tax fraud is limited in order to protect its safety. See Ustawa z dnia 29 sierpnia 1997 r. – Ordynacja podatkowa, t.j. Dz.U. 2021 poz. 1540 (the Tax Ordinance in Poland), art. 119zo.

[22] Wyrok Trybunału Konstytucyjnego z dnia 6 czerwca 2018 r., K 53/16, OTK ZU A/2018, poz. 38 (Judgment of the Constitutional Tribunal).

Non-transparency as a general ADM problem is also visible in other issues. In similar cases, the societal control of digital government faces the industrial secrets of private IT systems vendors.[23] Even after gaining access to essential information on the logic involved in the ADM system, a meaningful evaluation of it requires technological literacy.[24] The potential group of evaluators is therefore limited to expert bodies with the legal power to intrude into the complex sphere of digital tools and their documentation.

The role of evaluating the fairness, rationality and legality of automation should therefore be held by competent public bodies with access to whole documentation, describing the characteristics of the ADM system rather than an individual decision with reasoning limited to a single case. That body ought to have the competence to establish ex-ante whether data was processed in such a way that leads to discriminatory treatment, or the weight ascribed to selected variables in the algorithm was not objectively determined.[25] Bearing in mind the input of NGOs to the system of ADM control, one should be aware that oversight of the performance of public administration is the job of the administrative judiciary.[26] Nevertheless, whether the decision to automate something is in fact 'the performance of public administration' depends on the legal form of this rule-making activity.

IV Jurisdiction over Automated Administrative Decision-making

That leads to whether it is permissible to complain about the ADM system to the administrative court. The response would vary in every country considered, so my goal is not to consider each legal system separately; however, some general remarks might be made here from the viewpoint of Polish administrative justice.

Above all, it is necessary to establish in what legal form the decision to automate some administrative activity is made. As mentioned in section II, the core element of the ADM system is an algorithm. From the ontological viewpoint, it is the regime of making decisions, written in a form of source code executed by a machine. The algorithm encompasses rules, which would normally be stipulated in statutes or secondary acts. In some cases, they would exist in an unwritten form of policy applied by the government or a public body. By introducing an algorithm to public services, one must translate existing legal norms into lines of code, which would ideally reflect the law. On the other hand, the government may

[23] See e.g., Judgement no. 8472/2019 of the Council of State in Italy and resolutions no. 123-124/2016 of The Comissió de Garantia del Dret d'Accés a la Información Publica (GAIP) of the Generalitat de Catalunya.

[24] At last, even developers and programmers sometimes don't follow the reasoning of the machine if it is able to learn and change the way it solves problems (machine learning).

[25] Mazur (n 16) 5.

[26] Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U. 1997 nr 78 poz. 483 (Constitution of the Republic of Poland) art. 184.

write down its policy in machine code, hence, creating the law that originally didn't exist (code as law[27]).

It follows that the decision to automate some activity could be made in a policymaking process. It follows numerous important decisions made by various bodies, not only ministers. As J. Cobbe and others observed, individual automated decisions are 'heavily influenced by choices around the system (i.e. selection of training data, design and training of models, and testing of systems)', which are usually made by software developers, and other non-government actors. In the end, however, legal responsibility is borne by the government, which decided to introduce an algorithm to its operations. Given that an effective review of the ADM system requires jurisdiction over policymaking activity, it is necessary to establish whether administrative courts may assess it.

A typical example of courts competent to review whole administrative regimes is found in the United Kingdom. In English scholarship, the concept of investigating the rules that govern administrative decision-making is known as a 'systemic review'[28]. Adjudicating a complaint against some system, the role of the court is to evaluate the merits of the regime's rules rather than the actions or intent of people tasked with enacting them. It focuses on 'the upstream decision' of a public body made to create, develop or manage the system. When it comes to the legal form, it might be the decision of the executive (represented by the Lord Chancellor) endorsed by Parliament.[29] That constitutes a challenge for administrative justice, as courts are not generally configured to be part of a policymaking process but to adjudicate disputes.[30] On the other hand, it is commonly held that 'the opportunity to be heard by an impartial adjudicator is central to legitimate democratic authority'[31] and judicial review is 'a key guardrail of legality'[32]. These arguments prompt me to consider the role of courts in policymaking, even though it doesn't fit entirely with their nature.

Systemic review in the UK has been recognised as promising for ADM systems, and there are several arguments for it.[33] Given public law infringements or unfairness are built into the algorithm, deciding on individual cases distances courts from the root of the systemic error – decisions made by the relevant department or authority as to the design

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[27] Lawrence Lessig, *Code and Other Laws of Cyberspace* (Basic Books 1999).

[28] This form of the review was commenced by the seminal authority R (Refugee Legal Centre) v Secretary of State for the Home Department [2004] EWCA Civ 1481, [2005] 1 WLR 2219 and originally was recognised as 'Structural Procedural Review', see: Carol Harlow and Rick Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) 669.

[29] See for instance *R(Howard League for Penal Reform) v Lord Chancellor* [2015] EWCA Civ 819, which concerned the amount of legal aid funding available for disputes between prisoners and authorities.

[30] Joe Tomlison, Katy Sheridan, Adam Harkens, 'Judicial Review Evidence in the Era of the Digital State' (May 31, 2020) 4. Available at SSRN: https://ssrn.com/abstract=3615312 or http://dx.doi.org/10.2139/ssrn.3615312.

[31] Ari Ezra Waldman, 'Algorithmic Legitimacy' in Woodrow Barfield (ed), *The Cambridge Handbook of the Law of Algorithms* (Cambridge University Press 2020) 116.

[32] Tomlison and others (n 30) 4.

[33] Chauhan (n 4) 289.

and implementation of such systems.[34]. Furthermore, as Chauhan notes, 'systemic review may help to circumvent opacity [non-transparency] by encouraging inquiries into both the input and output of ADM systems' as well as '[to] look at the risks introduced into the ADM system by human decision-makers'[35].

On the contrary, a review of the policymaking activity of public administration lay outside the jurisdiction of the administrative judiciary in Poland. Neither policies nor secondary acts passed by public administration appear on the closed list of acts and activities reviewed by administrative courts.[36] The role of the holistic reviewer is performed by the Constitutional Tribunal, competent to evaluate compliance of secondary acts with statutes[37] and statutes with the Constitution.[38] Due to the ruling concerning data collection used to profile the unemployed, one could observe that it would be the Tribunal's role to decide on, at least, the constitutionality of such administrative regimes. From the other end of the telescope, the inability to perform a systemic review does not mean that ADM is entirely outside the jurisdiction of Polish administrative courts. In fact, the latter are competent to examine errors in activities preceding administrative acts. Mistakes might appear, though, in terms of inputting the wrong data for the applicant or errors in data exchange between databases. As competent to adjudicate complaints against administrative decisions, the administrative court would then normally quash the decision, as the public body has not considered all relevant circumstances.[39] However, the court would not be competent to quash the whole regime of making decisions, on such grounds that the ADM system is intrinsically unfair, non-compliant with human rights or discriminatory. Depending on the type of law that empowers the public body to use the ADM system, the court could ask a Constitutional Tribunal for a preliminary ruling (when a legal basis is provided in a statute) or refuse to apply secondary law in that specific case (if a legal basis is stipulated in the secondary act). Nevertheless, the court could not review the ADM system itself. In Anglo-American law, jurisdiction to evaluate whole administrative regimes would appear as a shift in jurisprudence, while in civil law countries, at least in Poland, it would require an amendment of the Constitution.[40]

Although the UK has a legal framework that could be used to evaluate ADM systems, commentators have observed that the subject of systemic review would not only require some procedural amendments but also more creativity and engagement from the litigants.

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[34] Chauhan (n 4) 293.

[35] Chauhan (n 4) 293.

[36] Ustawa z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi, t.j. Dz.U. 2022 poz. 329 (Law on Proceedings before administrative courts), art. 3 § 2, art. 4.

[37] Art. 188 sec. 1 of the Polish Constitution.

[38] Art. 188 sec. 3 of the Polish Constitution.

[39] Art. 145 § 1 p. 1, c) of Law on proceedings before administrative courts (Poland).

[40] An exception are local enactments issued by local government authorities and territorial and territorial agencies of government administration; however, it is seldom that an ADM system would find its legal basis in such an act. See art. 3 § 2 p. 5 of Law on proceedings before administrative courts (Poland).

As J. Tomlison and others note, litigants will, *inter alia*, have to resort to new fact-finding techniques to establish evidence based on the operation and impact of an ADM system, as well as to rely more on legal routes to gain access to information.[41] On the other hand, courts will have to rely on expert evidence to 'translate complex technological issues to legal audiences'[42]. An alternative for the latter could be, as Lord Sales calls it, 'some system whereby the court can refer the code for neutral expert evaluation by [an] algorithm commission or an independently appointed expert, with a report back to inform the court'[43]. Lord Sales' idea originates from current forms of pre-legislative scrutiny of Acts of Parliament. It has also been included in the model proposed by the European Law Institute.[44] As an entirely different approach, with a limited role for judicial review, it will be discussed in a separate section.

It follows that an effective review of the ADM system would require competence to review legislation, secondary acts or the decisions made in a policymaking process. Jurisdiction over individual administrative acts does not allow the court to assess the whole regime of making decisions or legally oblige the public body not to use it. While in the UK, courts may evaluate whole administrative regimes in a systemic review, it would be outside the jurisdiction of administrative courts in Poland. Judges must be supported by other reviewers capable of assessing general rules and policies against structural problems, such as discrimination or bias. This supplementary role might be performed by central actors in the justice system, like constitutional courts. As it is noted in the UK, even with the general legal framework to address unlawful policies, judicial review would face challenges in the shape of evidential proceedings and permissible engagement of expert witnesses. That thought prompts me to reflect on alternative models of judicial review with the central role of an external expert commission.

V Algorithmic Impact Assessments, an Expert Commission and Supervisory Bodies

Considering the role of administrative courts in the evaluation of ADM systems, it is necessary to reflect on the 'Model Rules on Impact Assessment of Algorithmic Decision-Making Systems Used by Public Administration' by the European Law Institute.[45] The Model Rules propose an alternative to systemic review, promoting the idea of an independent

41 Tomlison and others (n 30) 19.

42 Tomlison and others (n 30) 21. It would also require extending the limitation period for a claim. See Jennifer Cobbe, 'Administrative Law and the Machines of Government: Judicial Review of Automated Public-Sector Decision-Making' (2019) 39 (4) Legal Studies 636–655, 654.

43 Lord Sales (n 10) 54.

44 Model Rules on Impact Assessment.

45 Model Rules on Impact Assessment.

Expert Board and Supervisory Authority. The role of judicial review is in this way limited to the procedure following a complaint lodged with the latter.

The approach in the Model Rules is shaded according to the risk that algorithms pose to individuals. The starting point is that the implementing authority shall carry out an impact assessment before deploying any system that is listed in Annex 1 (high-risk systems) or when the system constitutes at least a substantial risk according to the screening procedure[46]. The list of high-risk systems has not been proposed; nevertheless, the ELI refers to Annex III of the Proposal for an Artificial Intelligence Act, mentioned earlier in this article. The systems previously discussed in the context of access and enjoyment of essential public services and benefits, or migration and border control management, would be mandatorily evaluated in an impact assessment. After answering the list of questions, the implementing authority would draft a report, containing, among others, 'an assessment of the specific and systemic impact of the system on fundamental or other individual rights or interests, democracy, societal and environmental well-being'[47]. Additionally, the authority would make 'a reasoned statement on the legality of the use of the system under the applicable law, in particular data protection law, administrative procedure law and applicable sectoral legislation'[48].

While the role of the independent Expert Board would be to audit the report for its accuracy, adequacy, completeness and compliance with the Model Rules, the application of the Rules would be investigated by the Supervisory Authority – a body responsible for overseeing the use of ADM systems by public authorities. The proceedings could be commenced on its initiative or a complaint from members of the public having a sufficient interest, or alternatively, maintaining the impairment of a right, where administrative procedural law requires this as a precondition. Whereas the proceedings before a court of law could be initiated after an unsuccessful recommendation by the Supervisory Authority, the court would adjudicate also in cases concerning the rejection and dismissal of a complaint by the Supervisory Authority or its inactivity.

In my view, the idea of using impact assessments to perform ex-ante control of the ADM system has many advantages. First, it guarantees an independent expert evaluation before the system is implemented, eliminating the problem of the expert witness in administrative courts. Hence, the Model Rules circumvent the issues of evidential proceedings in administrative courts, by its nature limited to documents.[49] Second, it still guarantees the right to a fair trial before an independent, impartial court. Members of the public who have sufficient interest or maintain the impairment of a right, where administrative procedural law requires this as a precondition, may demand that the court evaluate the negative decision of the Supervisory Authority or continuing usage of a system by an implementing authority. A significant difference when it comes to the legal form of activity being the subject of the

[46] Model Rules on Impact Assessment, art. 1 sec. 2, art. 4 sec. 1.
[47] Model Rules on Impact Assessment, art. 6 sec. 2 c.
[48] Model Rules on Impact Assessment, art. 6 sec. 2 g.
[49] art. 106 § 3 of Law of Procedure before Administrative Courts.

review is that it is not a secondary act or policy but a decision of the Supervisory Authority. At the same time, individuals may challenge the legality of decisions that are reviewable in accordance with the applicable law. In effect, an individual might be provided with existing protection deriving from the current legal framework but, in addition, he or she gains new instruments that allow issues of a systemic nature to be challenged. Finally, Model Rules requires full transparency towards the expert board, making it possible to evaluate documentation regarding the ADM system and the system itself. Secrecy by contract, business secret or safety of the tool would be no obstacle to effective review. It does not end the discussion about the public nature of information regarding source code or algorithms.[50] Nevertheless, given measures of social participation in the Expert Board, it allows society to exercise control over ADM systems mitigating both the risk of disclosing the trade secret and governmental fears of society manipulating the system.

The Model Rules allow some of the issues discussed in the previous sections to be avoided. The idea of implementing them seems convincing to me, but it leads to additional questions for domestic legal orders. For instance, the state will have to decide who will perform the role of the Supervisory Authority (the European Law Institute proposes data Protection authorities[51]). Political decisions will have to be made also on which ADM systems should be mandatorily subject to impact assessment and which will not require it (annexes 1 and 2 to the Model Rules). It should also be noted that the idea to carry out algorithmic impact assessments is not a new one. In 2019, the European Parliament already stressed that 'algorithms in decision-making systems should not be deployed without a prior algorithmic impact assessment (AIA) unless it is clear that they have no significant impact on the life of individuals'[52]. The obligation to designate a supervisory authority was also provided in the provisions of the Proposal for an Artificial Intelligence Act.[53] The Model Rules are, however, a detailed conception of what should be the role of each body in the evaluation of ADM, in my opinion, balancing the role of administrative courts well with essential issues concerning jurisdiction, acceptable level of evidential proceedings, participation of experts and transparency towards individuals.

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[50] An interesting illustration might be reasoning against disclosure of an algorithm and source code of the electronic case distribution system in Poland (System Losowego Przydziału Spraw), see Wyrok Naczelnego Sądu Administracyjnego z dnia 19 kwietnia 2021 r., sygn. III OSK 836/21 (Judgement of the Supreme Administrative Court) and Wyrok Naczelnego Sądu Administracyjnego z dnia 26 maja 2022 r., sygn. III OSK 1189/21, (Judgement of the Supreme Administrative Court).

[51] Model Rules on Impact Assessment, 50.

[52] European Parliament resolution of 12 February 2019 on a comprehensive European industrial policy on artificial intelligence and robotics (2018/2088(INI)) (2020/C 449/06), 154. It is necessary to mention here also a proposal by AlgorithmWatch – Michele Loi, Anna Mätzener, Angela Müller, and Matthias Spielkamp, *Automated Decision-Making Systems in the Public Sector: An Impact Assessment Tool for Public Authorities* (AlgorithmWatch June 2021) https://algorithmwatch.org/en/adms-impact-assessment-public-sector-algorithmwatch/ accessed 29 September 2022.

[53] Art. 63 sec. 5 and art. 64.

VI Conclusions

There are various approaches to the role of administrative courts in the review of automated administrative decision-making. While there is already a discussion concerning the jurisdiction of administrative courts to perform a review of ADM systems and the required shift in approach to evidential proceedings in the UK, the power of the Polish judiciary to evaluate administrative regimes seems to be in question. There is no doubt that the risks ADM systems pose to individuals require providing the latter with legal protection. Part of it should be procedures before an administrative court, with the power not only to decide on the legality of individual decisions but of a whole administrative regime. The effectiveness of this protection calls for a way to be found to influence unfair, irrational or illegal practices by public bodies in countries where the review of administrative regimes is inadmissible. The Model Rules proposed by European Law Institute seem to fill that gap, by providing members of the public with a right to challenge the decisions of the supervisory body. In my opinion, the Rules balance the right to a fair trial with practical problems of administrative courts' jurisdiction, limited evidential proceedings and necessary technical expert knowledge. Moreover, the proposed model envisages social participation in the Expert Board. On the other hand, it is not certain that administrative courts don't have to evolve in order to face technological complexities. Further questions may appear in the review of the Supervisory Body's decisions, as well as continuing unlawful usage of ADM. The findings of UK scholarship might therefore still impact the direction of national courts' development and should be included in the discussion on the judicial review of the digital state.

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Peculiarities of Service in Slovakian Administrative Court Proceedings with a Large Number of Participants

Abstract

The success of serving documents has an impact on the smoothness of the proceedings before the administrative court, their speed and on the substantive decision itself.
This article focuses on research results on the specifics of service in administrative court proceedings with a large number of participants.
The Slovak Code of Administrative Procedure[1] has established a number of legal mechanisms aimed at speeding up court proceedings and preventing entities from avoiding documents being served
The authors set out to assess whether the mechanisms introduced are sufficient and whether there are any major obstacles within the process of serving documents in the practice of administrative courts that would cause delays in the proceedings.

Keywords: service of documents, administrative court proceedings, large number of participants, Slovak Code of Administrative Procedure, Slovak Law

I Introduction

The topic, the service of court documents in court proceedings, may appear unoriginal and exhausted for further legal research, as it has been present in jurisprudence and legal/judicial

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[1] Act. No. 162/2015 Coll., Administrative Procedure Code.

practice from their beginning. Life and socialisation in the legal community, however, brings a lot of surprising stimuli, experiences and observations that will open new discussions and initiatives, even on questions considered already answered. The idea of reviewing service in administrative court proceedings, with a focus on proceedings with a large number of participants,[2] arose precisely from such an initiative.

The authors already set the aims that determined the focus of the research at the stage of choosing the topic. These served to guide us throughout the research, influencing the choice of appropriate methods, as well as the division of the research into several phases. These aims can thus be described as primary. However, in the course of the research itself, various issues and problems that may be found in application practice arose, which could not be ignored in this paper and we deemed it necessary to raise awareness of these issues. Therefore, in the course of the research that was already underway, the authors formulated additional aims, focused on drawing attention to the shortcomings identified in our primary aims. These were hence labelled as secondary.

II Methodology of the Research

The results of quality legal scientific research must be verifiable. To enable the research results to be properly verified, it is necessary to begin this article by describing the steps taken by the authors prior to and during their scholarly work on the topic. The first step comprised specifying the research objectives, followed by selecting the appropriate methods for achieving these objectives and implementing them according to good scientific research practice. The last step was to evaluate whether the set objectives had been fulfilled and to process results into concrete and practical calls to action. The objectives and sequential steps of the research are elaborated in this part of the article.

1 Primary Aims of the Research

The primary objectives were to elicit the answers to the scientific questions posed and present *de lege ferenda* proposals regarding the legal regulation of the service of documents in the administrative justice system, with an emphasis on proceedings with a larger number of participants. These are the main lines of scientific activity, to which the research process is vested across all phases of the authors' scientific research. The primary objectives of the research are to reach the findings on the state of service of documents within the scope of the research subject, to identify potential problems and to find solutions to eliminate these.

[2] For the purposes of this article, the authors defined the term 'large number of participants' as the number of participants in the proceedings being greater than ten.

In order to achieve the stated findings, it was necessary to prepare questions to which the authors sought answers. The authors therefore formulated five interrelated research questions, namely:

Question No. 1:

Is there a problem with serving documents in administrative court proceedings with a large number of participants regarding the speed and economy of the proceedings?

Question No. 2:

If there is a problem with service in administrative court proceedings, where exactly do you see the problem?

Question No. 3:

What is the current court procedure in this respect?

Question No. 4:

Is the current court procedure as stated in question no. 3 regarding the speed and economy of the proceedings sufficient?

Question No. 5:

Are there any suggestions from your side on how to improve the service in administrative court proceedings?

As for the *de lege ferenda* proposals, these represent the findings identified after the answers to the posed questions were obtained. In order to formulate the *de lege ferenda* proposals, it was first necessary to evaluate all the responses, and then to compare these answers with each other and also with the requirements of the rule of law. This was necessary as some of the proposals for improvements might constitute a disproportionate interference with certain fundamental rights and freedoms, which cannot be tolerated. Their evaluation was followed by a focus group discussion.

2 Secondary Aims of the Research

The research is primarily aimed at answering the questions raised and at developing the *de lege ferenda* proposals for the normative regulation of document service of in administrative court proceedings with a large number of participants. However, the significance of the research does not lie solely in fulfilling the abovementioned primary objectives. The authors also aimed to unify the practice of judicial clerks in solving problems associated with serving documents in administrative court proceedings with a high number of participants. However, the broader goal was to increase judges' awareness about problems encountered by judicial clerks, as they are often not perceived by the judges at all, or they do not receive the attention they deserve.

3 Phases and Scientific Methods of the Scientific Process

The authors proceeded in five successive, logically and methodically connected phases, (i.e. data collection, data processing, data analysis, correlation and processing of conclusions). With reference to the theory of Slovak (and historically Czechoslovak) science of administrative law,[3] it is possible to subsume the phases of data collection, processing and analysis under the phase of scientific research defined in theory as the phase of abstraction. The purpose of the abstraction phase is to achieve a comprehensive picture of the general elements, context, features and relationships of individual problems within the subject of research, which in certain conditions keep recurring. The correlation, as a phase of scientific research, represents a form of gradual concretization. The gradual concretization represents a thought-logical process in which particular elements, contexts, aspects and individual problems in the subject of scientific research, recurring only under certain conditions, are considered.

Data collection, as the first phase of the research includes so-called desk research, as well as collecting of the necessary information and data from interviewing the administrative judiciary. Study materials were gathered from the available professional literature, as well as the available and relevant court decisions, which were analysed and compared in the subsequent stages. The main data source were with professionals) working in administrative courts in the Slovak Republic. Personal interviews were conducted with two judges of the Supreme Administrative Court of the Slovak Republic, one judge from a municipal court, four court clerks working at municipal courts and one assistant to the judge of the Supreme Court of the Slovak Republic from the former administrative college. The interviews were subsequently followed by a focus group, in which the addressed court clerks together with the authors discussed the possible *de lege ferenda* proposals on the research topic.

The data processing, (i.e. the second phase of scientific research), was carried out after the completion of data collection on the specific questions posed. In the of data analysis phase analysis and comparison were used as integral methods, whereby the outputs from the expert interviews were compared. In addition, we subjected them to legal interpretation. It is the basic step by which the authors have tried to recognise the idea contained within the legal norm.

Correlation, as the fourth phase was important in order to assess the mutual relations of dependence and conditionality between the individual legal norms of the court service system, especially with regard to the interconnectedness of the Code of Administrative Procedure and the Code of Civil Procedure.[4] At this stage, it was also necessary to assess whether the *de lege ferenda* proposals, as they emerged from the interviews and discussions in the focus group, would be in line with the legislation of the Slovak Republic and the

[3] For more information see: M. Gašpar et al., *Czechoslovak Administrative Law* (Obzor 1973) 30.

[4] Act No. 160/2015 Coll., Civil Procedure Code and on amendments and supplements to other acts (Civil Procedure Code).

European Union as a whole. In this part of the research, general scientific methods, such as abstraction, induction and deduction, and, similar to the previous phase, methods of analysis and synthesis were used. Last but not least, the authors used a historical-logical method in this part of the research, subsequently followed by historical comparison, primarily in relation to the reform of the judicial codes in the Slovak Republic from 2015.

Formulation of research conclusions represents the last part of the research process. In conclusions, the scientific activity of the authors culminates in the fulfilment of the primary research goals, which the authors presented above. In addition to the answers to the posed scientific questions, the conclusions also include a clear formulation of *de lege ferenda* proposals for further normative development in the field of court service of documents. The primary aim of these proposals is to help ensure effective court service of documents while respecting basic human rights and freedoms and also preserving the right to a fair trial.

Thus, the method of analysis and synthesis prevails in the formation of *de lege ferenda* proposal

III Current State of Legislation and Applicational Issues

A reform of the administrative justice system is currently underway in the Slovak Republic, which encompasses the establishment of administrative courts that shall, together with the Supreme Administrative Court of the Slovak Republic, form the courts of the administrative justice system. The system of courts under Article 143 (1) of the Constitution of the Slovak Republic will thus be dichotomous and consist of courts of the general judiciary (district courts, including municipal courts, regional courts, the Specialised Criminal Court, the Supreme Court of the Slovak Republic) and courts of the administrative judiciary, which will comprise the three administrative courts and the Supreme Administrative Court. According to the legislator, the administrative judiciary shall thus be institutionally separated from the system of general courts and become a fully autonomous part of the court system. This amendment will complete the process of the independence of the administrative judiciary at the institutional level, which was preceded by the procedural separation of the administrative judiciary from the general judiciary through the adoption of the Code of Administrative Procedure.[5] It may however be stated that this independence will not be absolute, which, for example is also reflected in the legislation on the service of documents, which largely refers to the rules applicable to civil proceedings.

Service of documents is a typical procedural act of the court. Its significance is considerable, both in terms of the consequences that are attached to such an act and the

[5] Explanatory memorandum online: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=508019> accessed 30 December 2022.

commencement of the time-limits that are linked to the moment of serving the document.[6] The success of service of documents has an impact on the smoothness of the proceedings before the administrative court, their speed and, last but not least, also on the substantive decision itself.[7]

The Slovak Code of Administrative Procedure (hereinafter CAP) establishes a number of legal mechanisms aimed at speeding up court proceedings and preventing entities from avoiding being served with court documents.

The authors set out to assess whether the aforementioned mechanisms are sufficient and whether there are any major obstacles within the process of serving documents in the practice of administrative courts that would cause delays in the proceedings. It is particularly important to note that the authors' research focused primarily on the service of the action - the first act of the court in proceedings with a large number of parties. In order to be able to draw conclusions based on the research carried out, it is necessary to know the manner of serving documents by the administrative courts in Slovakia.

In the regulating the service of documents in the CAP, the legislator limited itself to a relatively austere set of rules, included in the provisions of sections 72 to 75 of the CAP on the grounds that the institution of serving documents in the practice of administrative courts has not caused serious problems thus far, and therefore, in section 72 (3), refers to the service of documents under the Code of Civil Procedure (hereinafter CCP).[8] Moreover, the provision of section 25, which provides for the subsidiarity of the CCP in matters of the service of documents, also applies, and ,if the issue is not even regulated in the CCP, the court shall proceed pursuant to the basic procedural principles, so that the purpose of administrative justice is fulfilled.[9]

The CAP, in conjunction with the legislation in the CCP, thus provides for the service of documents in the following order:

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[6] Supreme Court of the Slovak Republic, Case No 5Cdo 179/2010: 'The legislation on service of documents in civil proceedings has a very important function. The court may act and decide only if it is duly proven that the parties have received all documents, the receipt and knowledge of which is a prerequisite for further proceedings, the use of remedies, means of procedural defence and protection and other acts which may only be performed within the time limit prescribed by law or by the court. In particular, the service of court decisions on the merits is a prerequisite for the valid closing of the case and, where applicable, for the enforceability of the court decision (if the decision is enforceable irrespective of its validity). Service of documents affects the examination of the procedural conditions of the main proceedings, the appeal proceedings and the proceedings on extraordinary appeals. The legislation on service of documents therefore fully respects the interests of the parties and the need for them to be fully and effectively informed by means of that procedural act. Failure to serve a document correctly, in accordance with the rules governing such act, directly results in a defect, the illegality of service of documents, which has serious procedural effects; if the decision is defective or if the court omits to serve it at all, the decision cannot become valid'.

[7] J. Baricová, M. Fečik, M. Števček, A. Filová et al. in J. Baricová, A. Kotrecová, K. Gešková et al. (eds), *Správny súdny poriadok. Komentár* (1st edn, C.H. Beck 2017, Bratislava) 439–459.

[8] Ibid.

[9] Ibid, 202–205.

1. by the administrative court at a hearing or during a different act,

2. to an electronic mailbox pursuant to special regulation,[10]

3. service to an electronic address at the request of a party to the proceedings, unless these are documents to be served to an own hand,

4. service of documents via a service authority at an address pursuant to section 106 of the CCP in conjunction with section 72 (3) of CAP, or service by a special service authority where the statutory conditions pursuant to section 107 (2) of the CCP in conjunction with section 72 (3) of the CAP are fulfilled cumulatively.[11]

In view of the fact that the first three delivery options assume active participation by the subject, or a participant with an activated data box for the delivery of public administration documents, no delays are foreseen for these options. However, serving documents to a party who is a natural person by means of a service authority appears to be problematic.[12]

1 Service of the Statement of Claim to a Natural Person

The statement of claim shall be served to the own hand of all the parties to the proceedings. Section 116 of the CCP provides for a special procedure of service of a document to a natural person when it concerns serving of a statement of claim action brought against that natural person, on the grounds that this is the most important procedural act of the court with the most significant consequences for the individual.

This procedure was introduced into the legislation to reflect the constant case law of the Court of Justice of the European Union (CJEU),[13] which in principle permits service by notice, subject to the due diligence required by the principles of diligence and good faith to ascertain the defendant's whereabouts.[14] This represents a major change from the previous legislation.

The action shall be served to the defendant who is a natural person, either to the address given by the plaintiff in the action or to the address registered in the Register of Residents of the Slovak Republic (or to the address of the foreigner's place of residence in the territory of the Slovak Republic). If the plaintiff states the defendant's address directly in the action, it is recommended that the address indicated by the plaintiff id be respected, as it may be assumed that the plaintiff is aware of the defendant's place of residence. If the service of the action fails pursuant to the aforementioned principle, the court is obliged to serve the action to the address registered in the Register of Residents of the Slovak Republic (or to the address

[10] Act no. 305/2013 Coll. on Electronic Form of Governance Conducted by Public Authorities and on amendments and supplements to other acts (e-Government Act).

[11] Baricová, Fečik, Števček, Filová et al. (n 7) 439–459.

[12] Service of documents to legal entities is conducted by depositing of the document to an electronic data box, activation of which is obligatory for the legal entities.

[13] Explanatory memorandum online: <https://www.nrsr.sk/web/Dynamic/DocumentPreview.aspx?DocID=508019> accessed 30 December 2022.

[14] Case C-292/10 *Cornelius de Visser* [2012] ECJ.

of the foreigner's place of residence in the territory of the Slovak Republic). If this procedure also fails in serving the action, the court shall be obliged to carry out investigative actions in order to establish the defendant's actual residence, in which case the fiction of service does not apply. Such investigative actions involve enquiries to the Social Insurance Agency, the tax office, the municipality, the institution for the enforcement of a prison sentence, etc. The legislator has not laid down an exhaustive list of acts that the court is obliged to carry out in the proceedings; however, according to court case-law, neglecting this obligation leads to a violation of the right to a fair trial.[15]

The further course of action will depend on the outcome of the investigations as mentioned above. In the event that the court succeeds in establishing the defendant's actual residence, any further documents shall be served to the defendant at the address corresponding to the actual residence thus established. Only subsequently, if the court does not establish the defendant's actual residence, may the statement of claim be served to the given person by publishing a notice on the action on the official notice board of the court and on its website. The fiction of service of the statement of claim[16] shall become effective after the expiry of a 15-day period from the publication of such notice.

All further documents are subsequently served by the court to the address listed in the Register of Residents of the Slovak Republic or to the address of the foreigner's place of residence in the territory of the Slovak Republic, depending on the type of the foreigner's residence, with the consequence of the fiction of service.[17] This rule applies due to the fact that the service of documents under the CCP was designed in a light of the fact that everyone is obliged to guard their residence. However, it also applies that incorporating a stricter regime of service of documents into the CCP should apply first and foremost if the defendant already has knowledge of the dispute.

> If a party is aware of the ongoing court proceedings, it can arrange its matters concerning service of documents in a way so as to avoid possible complications (notifying the court of the email

[15] Resolution of the Supreme Court of the Slovak Republic from 17. July 2019 case no. 7Cdo 51/2019.

[16] Constitutional Court of the Slovak Republic case no I. ÚS 190/07: 'In the case of substituted service of documents, the abovementioned provision constructs a legal fiction that the effects of service of documents occur *ex lege* after the expiry of a specified period of time, even against the person who did not actually receive the document. A legal fiction is a legal-technical procedure by which a situation is deemed to exist which is manifestly contrary to reality and which permits different legal consequences to be drawn from it than those that would flow from a mere statement of fact. The purpose of fiction in law is to enhance legal certainty. Legal fiction, as an instrument of the rejection of reality by law, is an exceptional instrument, strictly intended for the fulfilment of one of the main constitutional postulates of the legal order under the rule of law. In order for a legal fiction to fulfil its purpose (to achieve legal certainty), it must respect all the requirements that the law associates with it. If all the legal requirements are not met, the court is not entitled to find that the fiction has been fulfilled (see Article 2 (2) of the Constitution, according to which State power may be exercised only in the cases and within the limits laid down by law)'.

[17] R. Smyčková, M. Števček, M. Tomašovič, A. Kotrecová et al., *Civilný mimosporový poriadok. Komentár* (1st edn, C. H. Beck 2017, Bratislava) 419–421.

> address, appointing an attorney, etc.); whereas the plaintiff is always aware of the ongoing court proceedings, the defendant only becomes aware of them after the service of the statement of claim to him or her. Therefore, it must apply that the defendant shall be served the documents properly once, namely the statement of claim, and thereafter the responsibility for receiving documents rests on the side of the parties to the dispute.[18]

The above procedure may present itself as quite clear and unambiguous. It may seem that the service of documents in administrative court proceedings do not pose any serious problems, since the CAP refers to the rather elaborate legislation on service of documents laid down for civil proceedings by the CCP. However, some administrative proceedings and subsequent administrative court proceedings involve a large number of participants, in some cases numbering in the hundreds. Did the legislator also have the abovementioned specific of administrative proceedings in mind? Is the above procedure for service to a natural person also sufficient in those cases with a large number of participants, whose addresses are often unknown or insufficiently or incorrectly marked? To what extent should the administrative courts carry out investigative measures to establish the actual address of a party in order to preserve the principle of the economy of proceedings at the same time?

Pursuant to section 31 of the CAP, the statement of claim must be served to each party's own hand. The participants to administrative court proceedings are also participants in the administrative proceedings.[19]

The theory stipulates that there is an exception to the obligation of the administrative court to serve the administrative statement of claim to those participants that are viewed as additional participants under section 32 (3) a) if these parties are not readily ascertainable from the filed statement of claim, decision or measure contested in the action or from the administrative file. This will be the case, in particular, where, in the administrative procedure, the decision or measure challenged in the action was served to the participants by means of a public notice (section 26 of the Act on Administrative Proceedings[20]). In such a case, the administrative court should, by analogy, apply section 32 (3) a) and section 75 to the service to such additional participants to the proceedings, in accordance with the second sentence of section 25, and conduct the service by publication on the official notice board of the administrative court or on the website of the administrative court concerned.

However, this exception does not directly derive from the current legislation and thus causes a divergence of practice as to which participants the court should carry out the investigative acts and in relation to which participants it should not. Moreover, the aforementioned seems to be in contradiction with section 116 of the CCP, which does not

[18] Regional Court of the Slovak Republic no 7Cdo 51/2019.

[19] Section 32 (3) (a) of the Administrative Procedure Code.

[20] Act No. 71/1967 Coll., Act on Administrative Proceedings and on amendments and supplements to other acts (Act on Administrative Proceedings).

provide for an exception to the group of natural persons for whom the investigation of the actual address for service of the action does not have to be carried out.

In terms of the impact on subjective rights and obligations, the defendant in civil court proceedings may be identified with the additional party to the administrative court proceedings under section 32 (3) (a), who is a natural person and to whom the decision challenged by the action or measure of the public authority would establish or declare rights and obligations.[21]

The authors agree with this view, as the obligation to carry out an investigation of the actual address was derived from the case law of the CJEU in civil and commercial matters, where the decision generally establishes rights and obligations for all participants in the proceedings. In administrative proceedings, the range of participants is often wider and the decision often establishes or declares rights and obligations for only a portion of them.

In this case, service to an own hand pursuant to section 116 of the Civil Procedure Code shall not be controversial with regard to the natural person who is the addressee of the decision challenged by the action or measure of the public authority, (i.e. whose rights or obligations have been directly established or declared by the decision or measure) e.g. a builder in a general administrative action brought by a participant in construction proceedings against a building permit.[22] Thus, the unknown other participants to the proceedings in relation to whom the decision does not establish or declare rights and obligations, but the law requires service of the statement of claim into their own hands, e.g. owners of neighbouring land to the building in construction proceedings, become problematic.

IV Conclusions for Primary Aims

From the answers to Question No. 1, the authors conclude that there is a problem with the service of statements of claim at the courts of first instance regarding the speed and economy of the proceedings. It is caused by the adoption of a new legal regulation in the CAP. The aforementioned problem was not identified in the courts of second instance precisely because it is a relatively new legal arrangement, as well as because, in a large number of cases, the problem with the service of documents is already solved by the court of the first instance. Courts of second instance subsequently serve documents in the same manner as the court of first instance.

Regarding Question No. 2, the authors identified a problem with the service of the statement of claim to participants who were not properly identified in the administrative proceedings, or to whom it was served by public decree.

[21] Baricová, Fečik, Števček, Filová et al. (n 7) 224–232.
[22] Baricová, Fečik, Števček, Filová et al. (n 7) 224–232.

Based on the responses to Question No. 3, it may be stated, that when choosing the service procedure, the respondents' approaches of are very individual. In this respect, the workload of court clerks is often considered. In principle, they use the investigative actions so that the documents can be served correctly. Such a process already causes delays at the beginning of the court proceedings. Application of the procedure recommended by the theory (i.e. delivery by notice of the court on the official notice board, if delivery was made by public decree within the administrative procedure without further investigative actions) is only applied by the court clerks as a last option. In order to achieve more reliable research results, the authors conducted further research through an in-depth search of the database of court decisions and identified the use of the given recommended procedure in one case only. It was resolved by the Regional Court of Banská Bystrica Case No. 23S/107/2017 dated 12/07/2018. Even in this case, it is not clear whether the public decree was used to deliver the lawsuit or only to announce the date of the hearing. In no other case, after analysing the relevant results from the available sources, was this procedure used.[23]

When answering Question No. 4 and Question No. 5, respondents do not consider the current legislation to be sufficient, with which the authors, after completing their research, agree. Hence, the authors also propose several improvements to the legislation. Some proposals of court clerks, even *de lege ferenda* proposals, could not be adopted by the authors. This is because, based on their own analysis of the given problem and a discussion in a focus group, the authors and the respondents concluded that the problem leads to a violation of the right to a fair trial.

In our opinion, the procedure, partially proposed by the theory, seems to be the most probable and correct procedure. According to this, the courts shall serve the statement of claim only to the participants in relation to whom the rights or obligations in the administrative proceedings were directly constituted or declared. In the case of these participants, the administrative court shall also be obliged to perform investigative actions to establish the real address for serving a statement of claim. On the other hand, participants whose rights or obligations were not directly constituted or declared in the administrative proceedings shall be served by the notification without further examination in the event that they were served by public decree in the administrative proceedings. However, this proposal requires an amendment to the Slovak legislation, since the legislator, when adopting the CAP, took over the legal regulation of service in civil proceedings without considering the specifics of administrative proceedings and administrative court proceedings. In the opinion of the authors, the given solution is balanced from the point of view of the speed and economy of the proceedings as well as from the point of view of diligence and good faith when ascertaining the actual address of the participant required by the CJEU.

[23] The state database of general court decisions available online at <www.slov-lex.sk> was used.

V Conclusions for Secondary Aims

Regarding the secondary aims, we believe that society should first debate the application issues. This should shall take place within the professional public, who deal with this problem in everyday practice. After the hearing their experience, having discussions and adopting conclusions based on them, a qualitative amendment to the legislation can be proposed, which will be stable and will be based on the opinions and experience of the experts.

It is essential that the approach of administrative courts is uniform when solving the given application problems, in order to ensure the continuity of decision-making practice and to prevent surprising decisions and legal uncertainty. At the same time, it is necessary for the Supreme Administrative Court to supervise this uniformity.

> In the context of supervising the continuity of court proceedings, administrative supervision must be aimed primarily at ensuring the unification of decision-making practice, so as to avoid unjustified differences and discrepancies. Judicial case-law must be stable and must treat similar cases in the same way and dissimilar cases differently.[24]

Also considering that, on the basis of our research, a contradiction was found between the opinions of judges and court clerks, we conclude that judges in the Supreme Administrative Court do not have any knowledge of the given problem. We consider it necessary that the discussions on this topic shall take place and be lively.

[24] M. Horvat, M. Radosa, *Considerations on the supervision exercised over courts and judges* (vol 30, Supervision over Courts and Judges, Dia-Logos 2021) 95.