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Efficient, high-quality administrative justice

First round table
Administering administrative justice: How to combine the independence of justice and the control of its efficiency?

Marion Eckertz-Höfer,
President of the Federal Administrative Court of Germany

1. General financial situation: Budgetary Constraints without Co-Determination

Leafing through the international press and watching the media's reports on the economic situation in Germany, one might be persuaded that German administrative courts enjoy a **carefree state of budgetary bliss**. This, however, would be jumping to conclusions I am afraid I cannot confirm. The German judiciary is completely independent only in its judicial function, whereas it depends on the ministry in quite a lot of administrative matters, especially in the allocation of its budget. The government's continual striving **to have jurisdiction administered at a minimum of costs** has made the courts accustomed to rather plain furnishings and meagre equipment, sometimes touching the very means necessary for efficient work. To give you some examples: Since I was appointed as a judge in a civil court in 1977, judges have been supposed to dictate the minutes of their oral hearings, because the courts lack means to pay a clerk for this task. In the 1990s, young colleagues sometimes were not even provided with the most important statute books for their work: they were supposed to share a single copy with 20 other judges in the court's library. Or: If a judge had to go to an on-site hearing to take evidence in the presence of the parties, he had to use his own car, because the court

could not place an official car at his disposal. And when I was appointed judge at the federal administrative court in 1993, I had to buy my own personal computer as the court's budget did not allow providing this equipment to judges. That has changed by now!

We may well wonder about the **reasons for taking the policy of austerity for the judicial system so far**. I dare say the judicial system as a whole needs more lobbyists. I suppose the government would find it much easier to allocate the necessary means for an independent and efficient judiciary, if this were recognised by all as indispensable and of paramount importance in a modern state governed by the rule of law - even by the European Institutions. There I was a bit taken aback when the EU-Commissioner for Justice, Ms. **Viviane Reding**, in her presentation of the first **European Index of Justice** (2013), described the importance of jurisdiction almost only as a **factor for economic growth**. As its main functions she named the promoting of a good investment climate and an early warning system for the EU policy in economic matters. Such a narrow view seems hardly adequate. It tends to eclipse all judicial branches except the civil jurisdiction. I don't ignore the importance of administrative jurisdiction for the investment climate, notably as far as the planning of infrastructural projects, building law, public subsidies and public procurement law are concerned. But much more important is the **main function of administrative justice** i.e. **protecting citizens against unlawful governmental acts** and, at the worst, against administrative arbitrariness. Much more important than economic aspects is **jurisdiction as a specific cultural achievement.** Let us hope that the European Index of Justice may be improved, and administrative jurisdiction be appreciated in European politics in all its essential functions as a basic element of any social and democratic state governed by the rule of law. I am convinced that not only the German administrative jurisdiction would be the better for it.

What is the general financial situation of the administrative courts in Germany? Compared with the working conditions of the administrative courts of second and especially first instance, the Federal Administrative Court is fairly sufficiently provided. Even though, it too has to economise and has known **severe budgetary constraints** up to the freezing of last year's budget in the middle of the year.

On a yearly basis, financial resources are allocated to the Federal Administrative Court on the basis of a **budget**, in which our different areas of expenditure are described **fairly detailed**. For instance, (only) a certain proportion of our financial resources for material expenditure (about 2 mill €) are to be spent on electronic equipment, investments, and so on. Equally, a fixed amount of money – roughly 13 mill € - is at our disposal for covering our cost for personnel, judges and clerks, but we are given exact numbers as to how many judges and clerks we are allowed to employ. Within these bounds, we can decide freely, but: The **legal framework is strict** and gives little room for flexibility. The ministry of justice treats us in many ways as any other part of the federal administration. As a court, no budgetary advantages are granted and we are equally often controlled.

So who decides on the amount of financial resources we receive? Formally, it is the **Parliament's decision** as our budget is part of the budget of the ministry of justice. One year in advance of passing the national budget, we are being asked about our financial needs. Yet making demands that even slightly deviate from the restrictive medium-term financial planning of the government seems pointless because every single additional claim has to be reasoned in extensive detail, regularly **counter-financed by ourselves**. There is **no real negotiating**, we are only being asked. We do not take part in the negotiations between the Ministry of Justice and the Ministry of Finance, we don't argue with the Parliament's Committee on Budgets. The same goes, by the way, for the courts on the state

level. The **only means of protest** would be addressing the Parliament unofficially using diplomatic channels or even the Press taking the opportunity of the yearly press conference of our court.

For many years, all administrative bodies and courts on the federal level were required to realize **global reductions** from their budget. For the Federal Administrative Court, this meant saving another 100,000 or 200,000 € per year. We were only free to decide where this would come from. This obligation, by the way, led to the already mentioned freezing of last year's budget, which could only be resolved due to the lucky incident that the Ministry of Justice was able to allocate some unexpectedly spare money to us.

It is not only in these situations but also **on a daily basis** that we have to deal with compulsory savings: Since 1993, the Federal Administrative Court had to **reduce the number of judges** by 15 positions – and also has to economize concerning non-judicial personnel year by year. This can partly be explained by the considerable decline in pending cases – for example due to the changes made to the administrative procedural law or the lower number of asylum proceedings. However, at the same time the average preparation time for a single case has increased tenfold in the last 50, and at least doubled in the last 20 years, as European law becomes part of all fields of law more extensively. This means that the number of proceedings perceived alone is of **limited meaning** only! At least: We have nearly no proceedings that are older than two years and the **average duration** of proceedings is below one year. This shows that in the last couple of years, we have been sufficiently equipped in terms of staff. But the **threat of backlog is increasing** as the duration of proceedings goes up at the moment. Also, the Federal Administrative Court is the competent and only instance for nearly all high profile infrastructure projects in Germany as a whole, occupying 16 judges. Effectively, we would need two or three more judges.

2. Indirect performance indicators instead of target agreements on the federal level – more specific means on the state level

The judges' work as such at the Federal Administrative Court – in terms of quality as well as of quantity – is **not controlled externally**, not even by the Ministry of Justice. **No external objectives** are given, but the judiciary is well aware of the significance of a short duration of proceedings for the parties of a legal proceedings. The mentioned average duration of less than a year at our court is quite respectable, and it is our aim to keep it at this level. In order to remind all judges of this, all panels of our court have to **report to me** twice a year the number of pending cases that are older than six or twelve months and give reasons for that. Until now, there have always been good grounds for prolonged proceedings and I may say: The judges at the Federal Administrative Court are very committed and highly motivated!

On the state ("Länder") level, courts are more tightly controlled, and compulsory savings seem to be even more important. By now, there are various methods to increase transparency concerning the costs of courts. Many states oblige the courts to install a **cost and performance accounting system**. However, the independence of the judiciary as granted by the German constitution forbids to break down the calculation into the costs of a single judgement. But everything else is quantified, which – from what I have heard – has yet to prove its beneficial effects. In some states, there is a **benchmark system** involving several judicial districts – this works on a voluntary basis but is positively perceived as a form of institutional exchange of experiences as to **best practise**. Other states utilize a **system of Balanced Scorecards** which might increase the transparency when it comes to expenditure. Nonetheless, all this only rarely leads to successful savings.

These **business management-based methods** are relatively costly to implement and of doubtful merit in the administration of courts. Courts have no operative leeway; they are legally obliged to work on every single case and may not be guided by aspects of costs or time while doing so.

More interesting might be to know how the states try to find measurable criteria for assigning personnel to the courts: They installed a statistic-based **Manpower Requirement Planning System** (called "**PEBB§Y**") on an analytic basis to calculate the courts' need for personnel. Over the course of three months, statistics concerning the duration of proceedings were collected by counting up the hours of work for all judicial and non-judicial tasks; courts were understood as more or less standardized providers of services. On the basis of these results, the average time required to handle a case in the different fields of law was established. Then, those time requirements were totalised and by that calculated, if a court had sufficient personnel.

As a whole, the results proved to be quite useful for courts of 1st and 2nd instance. But this method seems **unsuitable for the Federal Administrative Court** and for needs of complex and large scale proceedings (as there is no statistical method to gather the hours of work for these cases during the three-month survey).

3. Quantitative improvements vs. Quality

Coming to the end I'd like to give some reflections on the question if it is possible to ensure that quantitative improvements are not detrimental to the quality of the judiciary. To me, this seems to be the **key question** as to any attempt to get the judiciary's costs under control.

We are in substantial agreement that in a state founded on the rule of law, the **main criterion** for assessing a judge's work should be the **quali-**

ty of his work. Decisions of the courts have to meet the **highest professional standards** and the product "time of litigation settlement" should not be seen isolated. Of equal importance are aspects of **law and order**, **legal certainty, transparency of justice** and **trust in our legal system**. Those are more than just by-products of a state under the rule of law; they are part of the relevant standards when measuring the quality of a judge's work.

But is it even possible to examine and evaluate the quality of decisions of the courts and other acts of a court? Certainly yes, as there are several efficient – especially procedural - means:

- Obligation to state reasons in court decisions
- Principle of collegiate responsibility
- Mandatory reporting of all panels to the court's president to avoid backlog
- Judicial review through 2nd and 3rd instance courts
- Statistics to deliver transparency
- Press and Public as means to monitor and of critical analysis of justice (public, press)
- Scientific criticism of decisions in specialist journals
- Customer enquiries involving parties and lawyers

And in some court districts, judges have set up working groups to discuss and develop common criteria for best practise judicial work. By doing so they ensure that the self-set quality standards can be met.

A good judge will hardly ever solve the conflict between "quantity" and "quality" purely in favour of quantity. It is up to the judges themselves to review when the expectations concerning quantity cannot be reconciled with their own and approved quality goals. In Germany, no judge can be forced to work more and faster than what he sees appropriate regarding

the quality of his work. Due to the independence of the judiciary, this is also true if the competent president has worked on comparable proceedings him- or herself and knows that an average judge could work faster and with higher quality. The majority of German judges will not misuse this privilege – part of which is also free time management. As they are hardly supported by trained legal staff, German judges work hard and predominantly independent. And if misuse occurs, this rarely goes unnoticed by colleagues which will result in a certain amount of "social pressure".

When it comes to the question at what point the pressure to deliver a certain quantity becomes too high so that the quality suffers, I would suggest to listen to the judges above all: As soon as not only a single one but a considerable number of judges make such an observation, this should be taken very seriously by the management of any court. If political decisions-makers fail to take note of these warning signs, judges guided by constitutional and ethical principles will not relinquish from taking the proper time to deliver quality work. Their judicial independence provides them – in Germany at least – with a very powerful tool to comply with these requirements.