VWGH

Der Präsident
des Verwaltungsgerichtshofes
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Some Remarks on the Efficiency and Quality of Administrative Justice

Mr. President, dear Collegues!

(I) The question of quality

To identify proper standards for measuring the quality of administrative justice is indeed delicate and difficult. Regarded basically this is due to the epistemological argument that every administrative court's "agere" aims at producing an "actum". But judgments are individual legal norms, which cannot be falsified either by logical analysis or by empirical evidence. The modality of judgements is their validity (or "legal force").

In a pragmatic approach we could nevertheless name certain criteria which enable us to evaluate the quality of administrative justice:

- The decisions of lower administrative tribunals are controlled by the higher instances and often, finally, by the supreme administrative court. Keeping in mind that a lot of decisions of questionable legal quality are not challenged for various reasons, the quota of successful complaints may indicate the judicial quality of a given administrative tribunal, above all when those tribunals have a territorial competence and are horizontally comparable.

Evaluation is more difficult with the supreme court itself. However, if a legal order provides that the supreme administrative court's judgements can be challenged before a constitutional court – as in Poland and Germany but not in Austria or in systems without a constitutional review – then a special parameter, even for supreme administrative courts, is at ones disposal. In the European concert the said decisions can receive bad rates either in the light of a ECHR decision against the state or of state liability following the judgement of the EC.

In the very spectacular "Köbler-case" case from 2003 the Administrative Court provoked the judgement of the EC that state liability for infringements of the Unions law comprises also sentences of national supreme courts, when the court has manifestly infringed the applicable law (which was not the case). In this case the Administrative court failed to submit a question concerning the relevance of periods in which a university professor did not served in Austria. In the following procedure for state liability the civil court requested a preliminary ruling by the European Court.

- Another criterion is the acceptance of a decision - or a sample of decisions - by the parties of the procedure. While the winning party will accept the decision very easily, the party which has lost the game - or the tribunal whose decision has been quashed or reshaped - is harder to convince. If a court succeeds in giving its reasons in a way understandable even for laymen and if the defeated party is civilised enough to overcome its frustration then acceptance is possible, even in this direction. The administrative authorities whose decisions are at stake usually do react less emotionally. In a system of cassation - as in Austria - the authorities are bound to follow the legal opinion of the (supreme) administrative court. In their willingness to do so we might see a - quite problematic - criterion.

- Especially with regard to the supreme administrative court the reaction of the specialised legal science is of importance. We regard it as its task not to describe the judiciary or to give predictions - we do not take a "realistic" view - but to criticize the judiciary in legal, not in political terms. It is obvious that the judges, even of a supreme administrative court, are embedded in an established legal culture. This aims at the "professional honour" of judges who - as with everyone - are desirous of approval, if not for themselves so for their court.

(II) Quality, independence and time

The value of an administrative jurisdiction is based on three pillars: The maximal independence of the judges (and the courts), the legal quality of their decisions and an output in a "reasonable time". According to the experience of a president the factor "time" is the most sensible. While the Austrian Administrative Court is never criticised for the quality

of its judgements on a general basis and politicians do not dare to exercise influence on the courts, there is a certain criticism regarding the "reasonable time". It may be justified when this comes from the parties involved in the procedure. When this comes from politicians they are sometimes in fact aiming at a jurisdiction they do not approve of, for instance the level of control in asylum cases, but by way of substitution they criticise the court for its lack of speed.

The tension between quality and time is softened by various procedural instruments such as narrowing the access to the supreme administrative court to enable its concentration on difficult and important cases, the possibility to decide cases in smaller panels, the empowerment to decide cases "prima vista" without going into the files of the forgoing procedure etc. Also all forms of preliminary legal protection belong to this chapter. But the Austrian system does not take into account "speeding up" of procedures at the applicant's request. To evaluate the temporal ranking and urgency of the case falls in the independent sphere of the judge himself. Nevertheless the parties of the proceedings are not hindered in bringing up circumstances which call for an urgent judgement eg age of the applicant, connection to other lawsuits, economic effects and so on. The administrative authority might be interested in a quick judgement when a model case in taxation law is at stake etc. Well founded wishes are normally successful.

But all these formal and informal precautions cannot prevent weak points in the court. In my opinion and with good reasons a court is never able to perform as efficient as an administrative body. One main reason is the principle of the equal treatment of judges. Notwithstanding some exceptions it is impossible to appoint more and more difficult cases to a more expeditious judge and the less to another. Furthermore the in Austria utmost important constitutional principles of a fixed distribution of cases in advance and the prohibition to remove a case from a judge do not allow for "queuing up and taking the next free cash desk".

Only when an administrative tribunal of first instance does not act within a certain time the Supreme Administrative Court can, at the request of the applicant, impose a time limit for reaching a decision. Disciplinary measures against a tardy judge remain as the last resort.

(III) The Janus head of the European legal sources

Art. 6 of the European convention had and still has an utmost strong impact on the national systems of administrative jurisdiction. Art. 47 of the EU Charta enlarged the scope of Art. 6.

The emphasis on and the steady deepening of fundamental procedural rules has a positive and refreshing effect above all for systems, which are less oriented on the "rule of law" but on the concept of the "Rechtsstaat". The last principle is not primarily aimed at the perfection of the judicial control. Its main purpose is rather to secure the administrative function as a legal one meaning the strict commitment to the (democratically enacted) law and observing formal rules of procedure. That in Austria there is still something to make up for, is to be seen in the fact that the long awaited reform of the system will not be in force before 2014, when it will then be introducing administrative tribunals of a first instance with full cognition.

Notwithstanding this progress we should not look away from the fact that the procedural guarantees have a "blind spot" too. The emphasis on the formal skeleton can overshadow the material quality of the jurisdiction. There is no reason to be astonished at this because a fundamental right for a "right decision" is impossible for obvious reasons. Imaginable is at most – we introduce this for a heuristic purpose – a fundamental right for a "good justice", for a "quality judgement".

The different national systems of jurisdiction have a long tradition, they all pursue more or less the idea of a "quality jurisdiction". In Austria for instance, as certainly in all countries, the appropriate instruments to achieve this goal are inter alia the appointment of judges, their education, the fact that they have to be graduates in law, the installation of specialized jurisdictions, the vertical structure of instances, supreme courts etc. Let us – for a short moment and this would be inexcusable – imagine a jurisdiction which is appropriate to Art. 6 but not more: Tribunals on the level of municipalities, their members elected by the communities, not necessarily people with any (legal) experience – but independent and appointed for a period long enough, oral hearings on the market place, appellations only in the cases where the European Convention demands it. Well, all that is nonsensical but it

expresses a fear. "Quality jurisdiction" is expensive and in times of austerity packages parliament may attempted to pay attention to minimum, making more quality very expensive. In extremis this could lead to private arbitration instead of public courts.

(IV) Preliminary decisions and traditional structures

There can be no doubts of the necessity, quality and effectiveness of the preliminary procedure before the EC. It is certainly the royal way to guarantee a fast implementation of the union's law. But we have to accept that this procedure does not favor the orthodox vertical and horizontal structures of domestic jurisdictions. President Skouris convinced us once that all the important decisions of the EC have been the consequence of initiatives by tribunals of first instance and that Europe would be essentially poorer without these judgements.[1] But this evolution obviously weakens the position of the supreme courts and if we estimate them as the guardians of quality, some kind of tension is unavoidable.

In addition the application of European law cannot be divided between specialised branches of the jurisdiction. Prominent victims of this development are the constitutional courts: Their interpretation of those national fundamental rights which are overshadowed by charta rights is suffering a loss of importance. The same is true for their competence to declare a general law for unconstitutional.

But perhaps we should take leave of distinct competences and instances - not necessarily a disadvantage. We are reminded on Tocqueville's ironic description of the English judiciary of his time: Because after having criticised some unclear legal sources and competences, he tells us the following:

"...Yet there does not exist a country in which, even in Blackstone's time, the great ends of justice were more fully attained than in England; not one where every man, of whatever rank, and whether his suit was against a private individual or the sovereign, was more certain of

[1] Stellung und Bedeutung des Vorabentscheidungsverfahrens im europäischen Rechtsschutzsystem, Europäische Grundrechtezeitschrift 2008, 343, p. 348.

being heard, and more assured of finding in the court ample guarantees for the defense of his fortune, his liberty, and his life."[2]

Transferred to our time: The positive effect for the protection of rights is undeniable- even when the systems of judiciary might appear somehow diffused.

Thank you for your attention!

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[2] New English translation by Stuart Gilbert, 1955. In the original version: *"Voilà bien des vices, et, si l'on compare cette machine énorme et vieille de la justice anglaise à la fabrique moderne de notre système judiciaire, la simplicité, la cohérence, l'enchaînement qu'on aperçoit dans celui-ci, avec la complication, l'incohérence qui se remarquent dans celle-là, les vices de la première paraîtront plus grands encore. Cependant il n'y a pas de pays au monde où, dès le temps de Blackstone, la grande fin de la justice fut aussi complètement atteinte qu'en Angleterre, c'est-à-dire où chaque homme, quelle que fût sa condition, et qu'il plaidât contre un particulier ou contre le prince, fût plus sûr de se faire entendre, et trouvât dans tous le tribunaux de son pays de meilleures garanties pour la défense de sa fortune, de sa liberté et de sa vie.",* L' ancien régime et la révolution, 1856, p. 419.