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The Discretion of the Administrative Court Judge Understood as the Weighing of Constitutional Values*

Swoboda sędziego sądu administracyjnego rozumiana jako ważenie wartości konstytucyjnych

ABSTRACT

The article demonstrates the relevant role of the administrative court judge in the process of institutional constitutionalisation. The discretionary power of the administrative judges is provided by the activities undertaken within the framework of the adopted jurisprudential strategies, whose value is expressed in taking into account the need to build the foundations for the possibility of carrying out the widest possible dialogue both in the constitutional and European fields. The criticism of the judicature justifies the claim that to the extent relating to the interpretation of law, the constitutional principles and the principles of the European law bear significant importance, established already by a certain tradition, which causes the scope of the concept of law to be relatively wide and subject to the said balancing while adjudicating a specific case.

Keywords: administrative court judge; discretionary power; weighing of constitutional values; institutional constitutionalisation

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INTRODUCTION

I would like to begin my considerations by recalling that, pursuant to Article 1 § 2 of the Act of 25 July 2002 – Law on the administrative court system[1] and Article 135 of the Act of 30 August 2002 – Law on proceedings before administrative courts,[2] the judicial review of appealed decisions, provisions or other acts enumerated in Article 3 § 2 of the latter statute is exercised in accordance with the criterion of compliance with the law. This should be borne in mind, as it entails that the content of law is to a large extent agreed in judicial interpretative discourse, which is independent of political power. This means, firstly, that the justification of legal decisions that both create and apply the law favours formal compliance with the law; and, secondly, that there is a 'test of legality' for acts of law creation and application.

The legitimisation of legality as a specific cultural value is mainly achieved through the law's guarantee that certain fundamental values are protected. The autonomous values of law are human rights and the institutions of the democratic rule of law. However, the literature aptly emphasises that the unreflective adoption of certain socially shared patterns of behaviour should be considered as heteronomous actions, although nothing prevents the autonomous recognition of socially shared standards of behaviour.

Whenever the judge does not approach the process of applying the law in a strictly formalised and constrained manner, discretionary power arises. In such situations, the judge is not required to perform a simple, rational subsumption, but is instead authorised to weigh up a number of alternatives; in other words, a decision must be made on the merits. The term 'discretion' is also used in the sense of 'judgment' when referring to the evaluative judgment that constitutes the nature of judicial discretion and the scope of discretion granted to the judge. The contemporary Anglophone literature on 'judicial discretion' emphasises that the issue should be discussed in a broad context, allowing for the consideration of semantic and epistemic aspects. This allows us to address such issues as knowledge about social phenomena, the status of social ontology, and the relationship between law and language.

Judicial discretion concerns every instantiation of the judge's freedom, regardless of whether its genesis can be traced to a statutory authorisation, or whether the judiciary exercises this freedom *praeter* or *contra legem* in the adjudication of a specific case that has not been defined by law with sufficient precision. Moreover, the adjudication process itself is a mechanism for the development, learning and maturation of judges, who are not 'workhorses of justice' but rather sensitive subjects approaching each situation in an individualised manner, seeking to combine rigid legal premises and arguments with the requirements ensuing from analyses of

[1] Consolidated text, Journal of Laws 2022, item 2492.
[2] Journal of Laws 2017, item 1369.

the specific situation. Such corrections are made possible by proficiency in referring to principles and in the use of functional interpretation.

The role of administrative courts in the administration of justice is growing, for several reasons. Of the greatest importance is the special position of administrative law in the system of law, which is understood as an essential part of the constitution 'in practice'. As J. Boć notes, administrative law is 'closest to constitutional law', and one can even speak of an organic connection between these two fields. Here, of significance is the conviction that 'camouflaging the ageing of the constitutional text' is largely accomplished through amendments to administrative law.[3] For this to be possible, it has to be accepted that the constitution is the basis of the legal order, rather than the state,[4] and this enables administrative law to 'transcend' the state.[5]

Such an understanding of administrative law allows the administrative courts to systematically reflect on the critical exercise of constitutional governance, which takes a twofold form: (1) descriptive, when the basic values, principles, rights or institutions that legitimise power in a particular political and legal order are described; or (2) normative, when – assuming the authorities are committed to human rights, democracy, the rule of law, freedom and equality of citizens – the desired legal, political, economic, institutional, social transformations are postulated, or when the changes actually being introduced are evaluated. In this context, the Supreme Administrative Court becomes a kind of 'guardian of the constitution', given the premise that values exist insofar as they are realized, and that it is not sufficient to only respect values, but that committed action by individuals or institutions on their behalf is required in order to maintain existence. The Supreme Administrative Court has become a particularly engaged court over the past few years: in addition to considering the content of legal norms and analysing the effects of rulings, it is guided by its own enduring dispositions developed in the course of legal practice, which are also based on an understanding of the objectives of specific legal regulations, as well as the general functions and social significance of the court. In this context, the justification of legal rulings should be purposeful, taking into account the 'openness' of the law to social needs and aspirations, as well as a conception of morality that presupposes cooperation in society.

The currently postulated value of interpretation is chiefly that it can reconcile the process of interpreting legal texts containing administrative law with the fundamental rights of the individual, entailing that administrative courts are obliged to refer to general principles of law stemming from the constitution and EU and international

[3] J. Boć, *Konstytucja a prawo administracyjne*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2011, vol. 2, pp. 72–75.

[4] M. La Torre, *Constitutionalism and Legal Reasoning*, Dordrecht 2007, p. 33.

[5] Cf. K.M. Cern, *Filozofia prawa administracyjnego. Zarys i podstawy*, [in:] *Administrowanie i zarządzanie w sektorze publicznym*, ed. T. Bojar-Fijałkowski, Bydgoszcz 2019, pp. 27–48.

law. This perspective rejects the conception of law as an object of cognition that is objective and purely external to the lawyer. It assumes that law has many sources, that the statute is only one such, and that law is justified by the authority of the people, hence the will of the legislator can be only one point of reference for the judge. In other words, the legal text only clarifies the law, which, however, is not exhausted by the legal provision itself; and the judge is the guarantor of the law thus broadly understood, protecting it from the arbitrariness of the legislator. In such conditions, a permanent element of the practice of administrative courts is the actions taken within the framework of the adjudication strategies adopted by them, whose value is expressed in taking into account the need to create a basis for ensuring the widest possible dialogue – in the constitutional and European fields. The Supreme Administrative Court addressed this issue in an interesting way in its judgment of 6 August 2013 (II FSK 2530/11), indicating that the collision of conflicting principles in the process of argumentation highlights the need to understand the process of applying the law as a model that involves balancing relevant principles and objectives.[6]

The weighing of values and principles is becoming increasingly relevant and problematic nowadays, as the conception of law as a system of norms is giving way to an alternative perspective that views law through the prism of the interpretative work performed by pluralistic legal institutions. This position highlights the special role of the courts, which have a significant impact not only on the understanding of the law, but also on its shaping, e.g. by declaring certain regulations unconstitutional or contrary to European law. Such activity occurs within a complex system of law, referred to as a multicentric or multifaceted legal system.[7]

CONSTITUTIONAL PLURALISM AND THE REFLEXIVE MODEL OF ADJUDICATION

This task is particularly significant when considered in the light of attempts to rethink the distribution of competences between the various institutions of the European Union and the governments of the Member States, in the context of the vision, justification and the way in which the tripartite division of power is imple-

[6] To justify this thesis, reference is made to R. Alexy's balancing model, according to which preferences, interests, goods, values, or principles can be considered as the object of balancing. The balancing of principles here involves a reasoned determination of the priority relationship between conflicting principles. Such a collision of principles or objectives results from the fact that the various principles (objectives) applicable in a particular case cannot be fulfilled simultaneously in a comprehensive manner.

[7] For a more extensive discussion, see B. Wojciechowski, *Stosowanie prawa podatkowego przez sądy administracyjne w sytuacji interpretacyjnego pluralizmu instytucjonalnego i otwartej tekstowości prawa*, "Państwo i Prawo" 2019, no. 12, pp. 58–72.

mented in the European Union and its Member States. Another extremely important issue arises at this juncture – that of constitutional pluralism. This concept refers to the legal order of the European Union and its relationship with the national legal systems of the Member States of the EU. The phenomenon of plurality of constitutional sources may lead to conflicts of constitutional norms, which should be resolved without institutional subordination, in a non-hierarchical manner.[8] The structure (institutional environment) thus formed affects the functioning and jurisprudence of national courts.[9]

At least two types of pluralism can be distinguished: internal and external. Internal pluralism refers to the plurality of constitutional sources, at the level of both EU and national law, which has led, among other things, to the identification of the so-called general principles of law in the case law of the Court of Justice of the European Union (CJEU). At the same time, it is worth remembering that the principle of the primacy of EU law has not been adopted unequivocally in the legal orders of the Member States. In particular, this applies to the primacy of EU law over the Member States' constitutional norms, as in this regard the principle of primacy has been questioned by some national constitutional courts. This situation entails that EU law can be described as an uncertain (negotiated) normative order. The principle of effectiveness and the State's liability for damages in this aspect was broadly pointed out by the Supreme Administrative Court in its judgment of 4 November 2021 (III FSK 3626/21). The raising of the issue of liability for damages was important in the context of the controversial judgment of the Constitutional Tribunal of 7 October 2021 (K 3/21), issued earlier.[10]

Internal pluralism also refers to new legal forms, particularly those that disrupt the traditional division between public and private spheres. External pluralism relates to the fact that there is increased 'communication' between EU law and other legal orders at the international level. In this context, forms of interdependence can be distinguished, such as legal integration (where the EU participates in another legal order), interpretive competition (where the EU does not participate in a given legal order, but contains a similar set of norms and jurisprudence), and

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[8] Cf. M.P. Maduro, *Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism*, "European Journal of Legal Studies" 2007, vol. 2, p. 137.

[9] Cf. resolution of the Supreme Administrative Court of 16 October 2017 (I FPS 1/17), in which the Court stated that "the basis for reopening the proceedings referred to in Article 272 § 3 of the Act of 30 August 2002 – Law on proceedings before administrative courts (Journal of Laws 2017, item 1369), a ruling of the Court of Justice of the European Union may be issued as a preliminary ruling, even if the ruling has not been delivered to the party filing the complaint for reopening the proceedings".

[10] In the judgment of 4 November 2021 (III FSK 3626/21) the Supreme Administrative Court did not directly refer to the effects of the Constitutional Tribunal's judgment of 7 October 2021 (K 3/21, Journal of Laws 2021, item 1852) because as at the date of its issuance there was no justification in case K 3/21.

the phenomenon of legal externalities (where a decision taken in one jurisdiction has social and economic – though not legal – effects in another jurisdiction).

The phenomenon of 'post-sovereignty' was diagnosed in relation to the Member States of the European Union by N. MacCormick as early as 2001, in the conclusion of his analysis of the intersection or overlap between the rule of recognition and the rule of change in the sphere of EU law[11]. On the basis of his analyses, he formulated a thesis concerning national legal systems, namely that they form a 'plurality within international law',[12] which was the starting point for his proposed first theory of EU law.

A.J. Menéndez, on the other hand, points out that the ongoing European constitutional transformation is the cumulative result of decisions that were not adopted through 'standard' supranational treaty amendment processes or national constitutional reform processes, but which emerged outside the usual constitutional route, through ordinary law-making procedures, in individual intergovernmental negotiations or through tolerance of new institutional practices, such as judicial activism.[13]

As was mentioned, constitutional pluralism requires a departure from the theoretical conception of law based on the classical principles of the hierarchical subordination of norms and the rules of centrality and precedence, and its replacement by a more flexible conception that takes into account the parallel coexistence and application of different legal orders. The new theory has been referred to as 'contrapuntal law'.[14] The name of this theory refers to the musical concept of the simultaneous consonance of different melodies within a single piece of music. Similarly, different legal mechanisms for recognising the primacy of EU law can coexist as long as they lead to a uniform result. In this aspect, it is important to promote such mechanisms and actions that reduce the potential field of conflict between norms from different legal orders and increase the field of mutually harmonious interaction and communication.

According to contrapuntal theory, it is necessary to maintain the requirement of systemic compatibility within the European institutional environment, so that the different legal systems can accommodate each other's jurisdictional claims. In this view, it is important to distinguish a certain larger whole, based on the fundamental values respected in the different legal orders. The legal system of the European Union does not pose a threat to the national legal orders of the Member

[11] N. MacCormick, *Questioning Sovereignty: Law, State, and Nation in the European Commonwealth*, Oxford–New York 2001, p. 94, 115.

[12] G. de Búrca, *The ECJ and the International Legal Order: A Re-evaluation*, [in:] *The Worlds of European Constitutionalism*, eds. G. de Búrca, J.H.H. Weiler, Cambridge–New York 2012, p. 117.

[13] A.J. Menéndez, *Editorial: A European Union in Constitutional Mutation?*, "European Law Journal" 2014, vol. 20(2), p. 127.

[14] Cf. M.P. Maduro, *Contrapunctual Law: Europe's Constitutional Pluralism in Action*, [in:] *Sovereignty in Transition*, ed. N. Walker, Oxford 2003, pp. 501–537.

States because they are based on the same legal values.[15] To clarify how the role of the CJEU's rulings is understood, it can even be said that the Court satisfies the requirement that legitimate justifications should be sought for the system of law on behalf of citizens – as both creators and addressees of that law. But that is not all, as attention is drawn to M. Kumm's thesis that "competing methodological accounts of how courts should interpret constitutions are grounded in competing conceptions of the role of the institutions charged with enforcing the constitution. In this sense, questions of legal methodology are questions of institutional design or questions concerning the interpretation of an institutional role. Debates on legal methodology are typically debates about what courts should do. They are closely connected to arguments about the appropriate function of courts in their relationship to other actors within a particular scheme of institutional division of labour".[16] In line with this idea, methodological issues in law are also concerned with visions of the institutional role of courts and judges in relation to other institutional actors in the legal system, and with viewing the role of courts and judges in the broader perspective of political-legal culture.

In this context, J.E. Fossum and A.J. Menéndez propose a normative understanding of the constitution, which, as they note, can be grounded in normative theories of the constitution that are either procedural, i.e. emphasizing the quality of law-making procedures, or substantive, i.e. emphasizing the internal normative quality of constitutional norms.[17]

CONCLUSIONS

The Supreme Administrative Court seems to take the position that respect for the principles of the statutory law of the Republic of Poland should not primarily aim in its reforms at taking into account the desired changes in legal and political realities, that is towards increasing the space for judicial activism, but rather towards the establishment of a substantive discourse between the judiciary and the legislature, with a view to reasonably shaping a democratic constitutional culture, an ethos of reasonable self-determination of the law to which one is subjected; thus creating space and structures for discourse on the quality of law, and on the problems that the realisation of the idea of making good law should be able to address.

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[15] A similar line of argument is also used by the European Court of Human Rights. See judgment of the European Court of Human Rights of 30 June 2005, *Bosphorus Airways v. Ireland*, HUDOC.

[16] M. Kumm, *The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty*, "European Law Journal" 2005, vol. 11(3), p. 283.

[17] J.E. Fossum, A.J. Menéndez, *The Constitution's Gift: A Constitutional Theory for a Democratic European Union*, Lanham 2011, p. 24.

In this context, judicial rulings, especially those indicating the need to correct the law, or even containing a creative correction of the law, are an expression of public reason. The dichotomous understanding of rulings to date – either the judge applies the law, or the judge makes the law, which under Polish law or in the tradition of statutory law in general always gives rise to the suspicion that the judge exceeds his or her competences – is too rigid and at the same time too narrow to capture the real impact of judicial rulings on the other institutional actors in the law-making system.[18] Most importantly, however, such an understanding fails to articulate those normative expectations of judicial power which, in my view, have given rise to contemporary democratic societies, in particular those of the Member States of the EU. These normative expectations, in turn, relate to the participation of judgments issued by judges in the institutional discourse of law-making, in particular when judges are confronted with a defective law which requires correction in order to satisfy the requirements of justice. In other words, judicial rulings should also perform the function of public reason, and this is precisely the task performed by the decisions of the Supreme Administrative Court, in particular its resolutions. Thus, the rulings of the Supreme Administrative Court are related to the construction of public morality,[19] on the assumption that the judicial power fulfils democratic requirements and thus takes into account the rules and norms pertaining to the normative order, as well as common standards of conduct.[20]

The jurisprudential activity of the Supreme Administrative Court is part and parcel of institutional constitutionalisation. When we take into account the direct connection of this process with administrative law, we recognise that it has a normative character, as it formulates prescriptive recommendations on the basis of an assessment of reality and the changes occurring in it. This means that the Supreme Administrative Court, when participating in public discourse, cooperates with other participants (in particular the parties, but also the national and EU legislators, the CJEU or the European Court of Human Rights) by exchanging and elaborating public reasons, with which it can and does influence the understanding of public institutions and their legitimacy or absence of legitimacy.[21] It is therefore crucial that, on the one hand, the reasons developed in the jurisprudence of meaning and standards can actually change the institutions shaping our socio-political reality

[18] Cf. M.J. Golecki, B. Wojciechowski, *Conceptualising Judicial Application of Law in the Polish Theory of Legal Interpretation*, "Review of Central and East European Law" 2020, vol. 45(2–3), pp. 229–247.

[19] J. Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford 1996, pp. 374–375.

[20] Cf. N. MacCormick, *Institutions of Law: An Essay in Legal Theory*, Oxford 2008, pp. 249–252.

[21] T. Hitzel-Cassagnes, *Are We Beyond Sovereignty? The Sovereignty of Process and Democratic Legitimacy of the European Union*, [in:] *Law and Democracy in Neil MacCormick's Legal and Political Philosophy: The Post-Sovereign Constellation*, eds. J. Menéndez, J.E. Fossum, Dordrecht 2011, p. 154.

and, on the other hand, that the conditions are created for the formulation of such reasons and claims. This means that effective processes of legitimisation, delegitimisation or questioning (with a view to a certain change) of institutions must meet certain normative requirements in order to be legitimised themselves. These are the requirements of legitimacy and rationality, such that a reciprocal game of giving reasons and accepting reasons, open to contestation and revision, must be established on their basis. Institutional constitutionalisation can only be considered legitimised if it is able to meet the normative standards of discourse. The normative demands indicated above relate precisely to administrative law, including public institutions and public administration. The notion of institutional constitutionalisation is therefore closely linked to the assumption that 'the will of the constitution' is indeed definitely 'the will of discourse'.[22] It is important to understand that this constitutionally guaranteed discourse takes place to a large extent – if we assume that, in addition to its legitimacy, what is important, is its effectiveness in terms of changing the surrounding reality, i.e. also the institutional order – on the basis and within the limits of administrative law, which is, after all, an emanation of constitutional law.

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ABSTRAKT

Artykuł ukazuje istotną rolę sędziego sądu administracyjnego w procesie konstytucjonalizacji instytucjonalnej. Władza dyskrecjonalna sędziów administracyjnych wynika z działań podejmowanych w ramach przyjętych strategii orzeczniczych, których wartość wyraża się w uwzględnieniu potrzeby budowania podstaw dla możliwości prowadzenia jak najszerszego dialogu w obszarze zarówno konstytucyjnym, jak i europejskim. Krytyka judykatury uzasadnia twierdzenie, że w zakresie dotyczącym wykładni prawa zasady konstytucyjne i zasady prawa europejskiego mają istotne znaczenie, ugruntowane już pewną tradycją, co powoduje, że koncepcja prawa jest relatywnie szeroka i stanowi przedmiot wspomnianego wyważania przy rozstrzyganiu konkretnej sprawy.

Słowa kluczowe: sędzia sądu administracyjnego; władza dyskrecjonalna; ważenie wartości konstytucyjnych; konstytucjonalizacja instytucjonalna