ITALIAN JOURNAL OF PUBLIC LAW, VOL. 10 ISSUE 1/2018
TABLE OF CONTENTS

EDITORIAL

ARTICLES

EDITORIAL

THE RULE OF LAW AND THE ROLE OF COURTS

*Marta Cartabia**

1.

"Constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go. […] To prevent this abuse, it is necessary from the very nature of things that power should be a check to power"[1].

Contemporary Europe is facing once again the bitter truth that the rule of law is always at risk. Unexpectedly powerful leaders supported by strong majorities have dismantled all restraints; the separation of powers has been eroded and the rule of law, as well as judicial independence, are under attack. Many international actors are sounding the alarm and sending warnings in the form of recommendations, resolutions and other documents: from the institutions of the European Union to the Council of Europe and the Venice Commission[2].

Risks for judicial independence and the separation of powers have always been there: at the time of the Act of Settlement of 1701 and under the constitutional monarchies in the XIX centuries, not to speak of the authoritarian regimes between the two world wars.

* Full Professor of Constitutional Law, Vice President of the Italian Constitutional Court

[1] de Montesquieu, *The Spirit of Laws*, Book XI, *In what Liberty Consists* (1748) 4.

[2] See for example the *Report on the Rule of law*, adopted in Venice, March 25-26, 2011 - CDL-AD(2011)003rev. – and the *Rule of Law Checklist*, adopted in Venice, March 11-12, 2016 - CDL-AD(2016)007.

During the Twentieth century, new institutions were set up over time in most European countries in order to defend judicial independence. Many constitutions established Councils of the Judiciary as a safeguard against the pressures of other branches of government and, for decades, European liberal democracies were free from major attacks[3]. But it is no longer the case. Preserving liberty, democracy and the rule of law is not overnight achievement; it is rather an endless business.

2.

While the rule of law is a perennial value, though always under threat, the historical context has changed dramatically since John Locke penned the Two Treaties of Government in the late Seventeenth century (1690) and Montesquieu expounded upon it in The Spirit of Laws in the mid-Eighteenth century. And it is important to reason about the present challenges to the rule of law, the separation of powers and the authority of the judiciary in concrete, rather than in abstract, terms.

The main dividing line to be preserved is between *political institutions* on the one hand and *safeguard institutions* on the other. The historical dichotomy between *gubernaculum* – government – and *iurisdictio* – judicial branch – is topical again today: judicial independence is put at risk when a clear duality between *gubernaculum* and *iurisdictio* is blurred.

However, the times have changed in many respects. The judicial power today is no longer the mute, null power of the Nineteenth century. The current dangers for judicial independence are materializing after a period of the "rise of the judiciary" within the constitutional system, as Mauro Cappelletti wrote, some thirty-five years ago[4]. Today, the judiciary plays a much more significant role than the *bouche de la loi*, the mouthpiece of the law, described by Montesquieu. In truth, this image of the judge was not much more than a myth even in the Nineteenth

[3] S. Merlini, *Magistratura e politica. Una introduzione,* in S. Merlini (ed), *Magistratura e politica* (2016), 13-48.

[4] M. Cappelletti, *Giudici legislatori?* (1984).

century, but in any case it certainly does not match with the contemporary reality.

First, the establishment of *judicial review of legislation* has given the courts not only the power to act as "negative legislators" (as Kelsen would say), but also to supplement the role of legislators at least by means of "interstitial" judge-made law.

Second, a robust *constitutional culture and consciousness* permeates the mentality of all judges, also first-level judges, and gives them a broad discretionary power. Given the poor quality of parliamentary legislation, the interpretative power of judges has hugely expanded, in the form of interpretation value-oriented, in the form of interpretation in conformity with the constitution, with the European Convention and with EU law[5].

Third, the *judicial empowerment* that was prompted by the European courts – both the ECHR and the Court of Justice of the EU – encouraged judges who had previously been strictly "subject to the law" (i.e. art. 101 of the Italian Constitution) to disregard the law when appropriate.

3.

In the meanwhile, the flourishing of a culture of individual rights stimulates the judiciary to take a more proactive role in the public square. Most of the new issues of social life that touch upon new, sensitive, and unsettled issues of our day are framed in terms of individual rights and they are often claimed directly before the courts. Claims concerning bioethical issues, new technologies, the transformation of family law, multicultural concerns, law and religion, and immigration are part and parcel of the everyday work of courts. In many cases, courts have to decide these issues without the support of a clear piece of legislation. These cases push the judiciary to the forefront of the public debate and keep it always under the spotlight.

In more general terms political issues are more and more often brought before the bench.

During his visit in America, the French aristocrat Alexis de Tocqueville was struck by the powerful position of the judiciary in

[5] N. Zanon, F. Biondi, *Il sistema costituzionale della magistratura*, 4° ed., (2014).

that legal and political system. Among other things he noticed that, "there is almost no political question in the United States that is not resolved, sooner or later, into a judicial question"[6]. Nowadays, his remark could be easily applied to many legal orders of Europe, although belonging to the so-called "civil law tradition", or continental tradition. *Judicialization of political issues* – to borrow from Martin Shapiro and Alec Stone Sweet[7] – is a common trend in many countries: a large part of questions once reserved for politics and legislators are now handled by the courts. Suffice it to mention the two major decisions of the Italian Constitutional Court on electoral laws (no. 1 of 2014 and no. 35 of 2017), by means of which the Court incisively corrected, and almost re-wrote, the legislation approved by Parliament. For a long time, electoral laws have been considered the "domain of politics". However, for many years, political bodies had been unable to reach any agreement on new legislation, and the public debate was growing more and more critical of the legislation in force because of its misrepresentative effects. As a result, the electoral legislation was challenged before the Constitutional Court.

Another example that cannot be overlooked is the famous Miller case decided by the Supreme Court of the UK on January 24, 2017, which required, in the name of the parliamentary supremacy, that the Parliament have a say on Brexit, after the referendum approving it.

We can see everywhere an "ever accelerating reliance on courts and judicial means for addressing core moral predicaments, public policy and political controversies"[8]. And, again, this trend brings the courts under the spotlight, indeed.

There is no doubt that we live at a time in which the judiciary is thriving. *Le juge bouche de la loi* is an archaeological relic in Europe (if he ever existed at all). The judiciary has gained relevance in public life. It is not at all a "null power", as it was once considered, but has become, on the contrary, one of the most relevant actors in the constitutional system. In many countries

[6] A. De Tocqueville, *Democracy in America*, (1838), Book 2, 8.

[7] M. Shapiro, A. Stone Sweet, *On Law, Politics and Judicialization* (2002).

[8] R. Hirschl, *Towards Juristocracy* (2004) 12.

judges have become much more visible in public debate. They make statements through the media and form an extraordinary pool of experts often called to the highest positions of the administration, working next door to the political bodies; significant numbers of them leave the judicial branch to compete in political elections and take seats in Parliament. Therefore, the judiciary cannot be longer depicted as "the least dangerous branch", as Alexander Hamilton wrote in Federalist no. 78, and an air of criticism is spreading, one that often condemns the "political role of the courts".

4.

These are the conditions in which we have to consider the present, serious attacks on the judiciary. In some cases, the attacks are *open and large-scale*; in other cases, they are *veiled, disguised and discrete*.

As for the first class of attacks, those that are open and large-scale, suffice it to mention the endemic situation in Poland, which induced the Commission of the European Union in December 2017 to open the procedure under Article 7 of the Treaty of the European Union[9]. The Commission noticed that "over a period of two years, the Polish authorities have adopted more than 13 laws affecting the entire structure of the justice system in Poland, impacting the Constitutional Tribunal, Supreme Court, ordinary courts, National Council for the Judiciary, prosecution service and National School of Judiciary. The executive and legislative branches have been systematically enabled to politically interfere in the composition, powers, administration and functioning of the judicial branch". Therefore "despite repeated efforts, for almost two years, to engage the Polish authorities in a constructive dialogue in the context of the Rule of Law Framework, the Commission has […] concluded that there is a clear risk of a serious breach of the rule of law in Poland". The Commission believes that the country's judiciary is now under the political control of the ruling majority and, in consequence, it has proposed to the Council to adopt a decision

[9] Reasoned Proposal regarding the Rule of Law in Poland (COM(2017) 835 final.

under Article 7(1) of the Treaty on European Union to protect the rule of law in Europe.

In other countries, there may be subtler underway attempts to control the role of the judiciary. Arbitrary changes in laws concerning the tenure, term, promotion, transfer, and responsibility of judges may affect the independence of the judiciary. Unexpected and hasty changes in retirement age rules, arbitrary termination of terms in office of judges, or forced dismissal of judges and prosecutors are just some examples of intrusion by political bodies in the judiciary. Particular vulnerable are those positions that are covered for a short fixed term (5-6 years) and are renewable at the discretion of the executive branch, among which are to be unexpectedly included the members of the Court of Justice of the European Union[10].

Another weak point may be judges' remuneration and funding of the judiciary. Whereas temporary sacrifices are inevitable in times of crisis, chronic underfunding can impair the working condition of the judiciary: lack of appropriate remuneration, security risks, cuts in staff, and cuts in peripheral judicial bodies can increase the workload of courts and undermine their ability to decide cases with the necessary quality and care and within a reasonable time. Moreover, cuts in legal aid may be an obstacle to access to justice.

As for judicial activity as such, a range of interference by political bodies can occur: retroactive legislation can be approved by political bodies in order to interfere with a specific case or a class of pending proceedings; partisan pardon laws or milder legislation on criminal matters can stop trials in place and can be used in order to stop judges from issuing sentences or ordering convictions; any reform of procedural rules can easily encroach upon trials in place; and restrictive rules on standing or on access to justice can quickly neutralize the role of courts.

[10] For a critical remark on this point, see J.H.H. Weiler, *Editorial: Those Who Live in Glass Houses…*, in Eur. J. Int'l L., 3 (2017) 666.

5.

To sum up, many of the guarantees of the rule of law and of judicial independence "depend" on legislation. But what if legislation itself takes an illiberal turn? Many European legal orders have a constitutional court and it falls to that body to make sure that constitutional principles – including the rule of law, the separation of power and the independence of the judiciary – are complied with by all actors.

Constitutional courts can do a lot of work, but they themselves are judges. And, like all the other judges, they may be attacked on tenure, funding, salaries, and procedures, as the Polish experience shows. Moreover, like all other judges, they do not have the power of sword: if their decisions are disregarded, or are not implemented, they are mute. They are disabled; their decisions go unenforced or ignored.

Defending the rule of law is not the job of a single actor least of all of a single judge[11]. As Kim Scheppele has pointed out, the crisis of the rule of law is more cultural than (il)legal. Better: it was cultural before becoming (il)legal and (un)constitutional. The disruptive effect on judicial independence in many European countries is coming from the system rather than from a single piece of legislation. The culture itself is permeated by "constitutional bad faith", as Lech Garlicki puts it[12]. The challenge is at the cultural level. And the answer is to be found at the cultural level as well, where a number of actors can play a role: politicians, intellectuals, media, law journals, national and international organizations, economic actors and many others.

What about the courts themselves? To oppose and to prevent this cultural crisis, we, the courts, can do a lot of work to strengthen our *authority* even when our *powers* are under threat. Especially by means of the Courts networks. Notice: I am using the word authority in the original Latin meaning. *Auctoritas* and *potestas* (or *imperium*) were not equivalent in Roman law, as

[11] C. Closa, D. Kochenov, *Reinforcing Rule of Law Oversight in the European Union*, (2016).

[12] L. Garlicki, *Die Ausschaltung des Verfassungsgerichtshofes in Poland? = Disabling the Constitutional Court in Poland?*, in B. Banaszak, A. Szmyt (eds.) *Transformation of Law Systems. Liber Amicorum in Honorem Professor Rainer Arnold*, (2016) 63.

Giorgio Agamben says[13]. *Auctoritas* has to do with reputation, consideration, respect, and legitimacy. A number of factors affect – enhance or undermine – the *auctoritas* of judges: respect for *stare decisis*; the credibility of the reasoning and opinions; due consideration for all the arguments brought before the bench; the political exposure of judges; good relations with public opinion, and so on and so forth.

In front of the challenges that blatantly and grossly harm judicial independence by means of legislative and constitutional reforms, and in front of those that silently erode the credibility of the judiciary, we, the courts, can do a lot on both levels: protecting the rule of law as well as enhancing the *auctoritas* of the judiciary in the long term, in the public sphere.

[13] G. Agamben, *Stato di eccezione*, (2003); English translation: *State of Exception*, (2005).

ARTICLES

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE AUSTRO-HUNGARIAN EMPIRE. THE FORMATIVE YEARS (1890-1910)[1]

*Angela Ferrari Zumbini**

Abstract

The purpose of this paper is to identify the standards of judicial control over administrative activity developed by the Austrian Administrative Court between the late XIX and early XX centuries. This analysis will highlight the considerable development of administrative law as early as the end of the nineteenth century. Indeed, even at that time the Austrian Administrative Court had elaborated a series of principles for administrative action on the basis of which to carry out judicial review. For this purpose, the paper will analyze various emblematic cases decided by the *Verwaltungsgerichtshof*.

---

[1] This paper is part of the CoCEAL Project, which has received funding from the European Research Council (ERC) under the European Union's Horizon 2020 research and innovation programme (grant agreement no. 694697). It was presented at the "Fin de Siècle Administrative Law: Judicial Standards for Public Authorities 1890-1910" workshop held on December 1st, 2017, at CNEL, Rome. I am very thankful to many people for helping me carry out this study. I wish to thank Prof. Giacinto della Cananea for entrusting me with this research, Dr. Irene Förster, the director of the VwGH library for guiding me in the meanders of the historical collection of the VwGH decisions, Prof. Clemens Jabloner for his priceless support, Prof. Thomas Olechowski for his kindness in explaining some features of the old Austrian administrative jurisdiction to me, Prof. Otto Pfersamnn for his encouragement and for our enlightening conversations about Austrian legal history, and Prof. Stefan Storr for helping me with bibliographical research.

All translations in this paper from German to English are mine; they are not official translations.

* Tenured Assistant Professor of Administrative Law, University of Naples "Federico II"

TABLE OF CONTENTS

1. Introduction

The purpose of this paper is to identify the standards of judicial control over administrative activity developed by the Austrian Administrative Court between the late XIX and early XX centuries. This analysis will highlight the considerable development of administrative law as early as the close of the nineteenth century. Indeed, even at that time the Austrian Administrative Court had elaborated a series of principles for administrative action on the basis of which to carry out judicial review.

At the time of the decisions taken into account in this paper (1890-1910) there was no general law of administrative procedure in Austria, enacted only in 1925.

Judicial review of administrative acts was made by a special Administrative Court, the *Verwaltungsgerichtshof* (from now on VwGH), established in 1875.

It was a Court of single instance[2] and had only cassatory power. Nevertheless, as will be demonstrated in this paper, even if the VwGH only had powers to annul, and neither the power to consider the merit of the administrative decisions nor the facts,

[2] This changed only in 2014, when the 2012 Reform came into force, implementing a two-step judiciary system. For a general overview of the 2012 Reform, on which there is obviously an extensive bibliography, we limit ourselves to referring to the manual edited by J. Fischer, K. Pabel, N. Raschauer, *Handbuch des Verwaltungsgerichtsbarkeit* (2014), in which the Chapter of W. Steiner, *Systemüberblick zum Modell 9+2*, 105, gives a quick overview of the Reform. Moreover, the recent volume edited by M. Holoubek, M. Lang, *Die Verwaltungsgerichtsbarkeit erster Instanz* (2013) is entirely dedicated to the courts of first instance.

and even if it could only annul on formal grounds, it developed a very well-structured system of protection of the individual.

The members of the VwGH were independent judges, not administrators and were appointed by the Emperor upon proposal by the Ministry. At least half of the judges of the VwGH had to be professional justices. They were granted autonomy and independence and had their own independent disciplinary boards. They were not bound by instructions and were subject only to the law. In addition, the office of judge of the VwGH was incompatible with any other kind of public office.

During the period in question, the Presidents of the VwGH were always politicians. The first two Presidents during the period of interest (Richard Graf Belcredi, 1881 – 1895, and Friedrich Graf Schönborn, 1895 – 1907) were members of the House of Lords, the third one (Olivier Marquis Bacquehem, 1908 – 1917) was the former President of Silesia[3].

All the original judgments in hard copy were collected each year into one or more volumes, the "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" and are stored in the library of the VwGH, in Vienna.

2. The constitutional framework

On December 21st 1867, Emperor Franz Joseph proclaimed the so-called December Constitution (*Dezemberverfassung*), which was made up of six different acts. The constitution contained a Basic Law on the General Rights of Nationals[4], which is still in force today. It also contained a Basic Law Establishing a Supreme Court of the Empire[5], a Basic Law on the Judiciary[6], a Basic Law

[3] The names and a short biography of all the presidents of the VwGH are reported in the book W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich* (1966) 11.

[4] *Das Staatsgrundgesetz vom 21. Dezember 1867 über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder* (StGG-ARStB).

[5] *Das Staatsgrundgesetz vom 21. Dezember 1867 über die Einsetzung eines Reichsgerichts* (StGG-ERG).

[6] *Das Staatsgrundgesetz vom 21. Dezember 1867 über die richterliche Gewalt* (StGG-RiG).

on the Executive[7], a Basic Law on the Legislature[8], and the so-called *Delegationsgesetz* regulating the relations between the two parts of the Empire, the Cisleithanian part and the Transleithanian part[9].

The issuing of the December Constitution is usually seen as the starting point of the Constitutional era in the Augsburg monarchy (and the end of Neoabsolutismus)[10]. Various factors drove the Emperor to adopt the Constitution, including the aftermath of the revolutionary period of 1848 and the effects of defeat in the wars against Germany and Italy.

The creation of an administrative Court was stipulated by art. 15 of the Basic Law on the Judiciary [11].

The December Constitution also established the *Reichsgericht*[12] (Imperial Court). The *Reichsgericht* had the power to decide cases where citizens asserted the infringement of political rights protected by the Constitution, even when the infringement was caused by an administrative action[13]. The decisions of the *Reichsgericht* only had declaratory power, and the administration was not obliged to enforce the decision. However, the power of

---

[7] *Das Staatsgrundgesetz vom 21. Dezember 1867 über die Ausübung der Regierungs- und Vollzugsgewalt* (StGG-ARVG).

[8] *Das Gesetz vom 21. Dezember 1867, wodurch das Grundgesetz über die Reichsvertretung vom 26. Februar 1861 abgeändert wird* (StGG-RV), which modified the act of 1861 and attributed to the Imperial Council (*Reichsrat*) the legislative power for the Cisleithanian part of the Empire.

[9] *Das Gesetz vom 21. Dezember 1867 über die allen Ländern der österreichischen Monarchie gemeinsamen Angelegenheiten und die Art ihrer Behandlung*; the name of this act contained the old designation *österreichische Monarchie,* which was changed in November 1868 and became *österreichisch-ungarische Monarchie.*

[10] Among the most accredited manuals of Austrian constitution history, see O. Lehner, *Österreichische Verfassungs- und Verwaltungsgeschichte*, 4° ed. (2007), and E.C. Hellbling, *Österreichische Verfassungs- und Verwaltungsgeschichte**:** ein Lehrbuch für Studierende* (1956).

[11] *„Wenn außerdem Jemand behauptet, durch eine Entscheidung oder Verfügung einer Verwaltungsbehörde in seinen Rechten verletzt zu sein, so steht im frei, seine Ansprüche vor dem Verwaltungs-Gerichtshofe im öffentlichen mündlichen Verfahren wider einen Vertreter der Verwaltungsbehörde geltend zu machen*".

[12] *The Staatsgrundgesetz of 21. Dezember 1867 über die Einsetzung eines Reichsgerichtes*.

[13] Art. 3, lett. b) "*Dem Reichsgerichte steht ferners die endgiltige Entscheidung zu:* [...] *b) über Beschwerden der Staatsbürger wegen Verletzung der ihnen durch die Verfassung gewährleisteten politischen Rechte nachdem die Angelegenheit im gesetzlich vorgeschriebenen administrativen Wege ausgetragen worden ist*".

moral suasion of this court was highly respected, and the administration voluntarily complied with the decisions[14] as it was considered socially reprehensible not to do so, in accordance with the principle of good administration developed within the framework of the Cameralistic[15], by then widespread in Austria too. The rulings of the *Reichsgericht* are not discussed in this paper.

3. The Law establishing the *Verwaltungsgerichtshof*

The *Verwaltugsgerichtshof* was established in 1875 by the *Gesetz vom 22 Oktober 1875, betreffend die Errichtung eines Verwaltungsgerichtshofes* (from now on VwGG). The law entered into force on April 2nd, 1876 and the first judgment was handed down on October 26th, 1876[16].

Administrative jurisdiction was established by a general clause (and not by an enumerative clause). Art. 2 VwGG states that "The VwGH has to decide in those cases in which someone claims that their rights have been infringed by an unlawful decision by an administrative authority"[17]. The choice of a general clause was made in order to be sure that no individual administrative act whose legitimacy was doubtful could escape from judicial control[18]. Therefore, the jurisdiction was general, and only some subject-matter was expressly enumerated in art. 3, excluding them from jurisdiction[19].

---

[14] A. Dziadzio, *Der Begriff des "freien Ermessens" in der Rechtsprechung des österreichischen Verwaltungsgerichtshofes 1876-1918*, in Zeitschrift für Neuere Rechtsgeschichte 39 (2003).

[15] P. Schiera, *Dall'arte di governo alle scienze dello Stato. Il cameralismo e l'assolutismo tedesco* (1968).

[16] The very first decision of the VwGH was made on October 26th, 1876. It concerned a matter of State-church law and it addressed exemptions from royal burdens on the part of certain parishioners.

[17] „*Der VwGH hat in den Fällen zu erkennen, in denen Jemand durch eine gesetzwidrige Entscheidung oder Verfügung einer Verwaltungsbehörde in seinen Rechten verletzt zu sein behauptet*".

[18] This explanation of the choice in favour of the *Generalklausel* rather then the *Enumerationsmethode* is given by the Senatspräsident of the VwGH Leopold Werner in his article *Altes und Neues von der Verwaltungsgerichtsbarkeit*, in W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich*, cit at. 3.

[19] For a list of the cases excluded from jurisdiction, see *infra* § 6.3. let. a).

The VwGH had the power to assess the legality of administrative acts enacted by any kind of administration at any level (central and local). Art. 2.2. VwGG states that the administrative authorities whose acts could be challenged before the VwGH are all Organs of both the central State and all autonomous local administrations[20].

Regarding the kinds of acts that can be challenged, the VwGG states that the VwGH has jurisdiction regarding "*Entscheidungen und Verfügungen*", without giving a definition of either[21]. The Court interpreted this notion as inclusive of all kinds of individual acts that infringed the juridical sphere of a person[22].

4. Grounds for the invalidity of administrative acts

The VwGG essentially provided two reasons for the annulment of an administrative act by the VwGH.

The first was when essential forms of the administrative procedure had been disregarded (art. 6 of the VwGG)[23]. The wording of the law provided neither a definition nor a list of the essential forms. The VwGH developed several fundamental

[20] Art. 2.2. VwGG „*Die Verwaltungsbehörden, gegen deren Entscheidungen oder Verfügungen bei dem Verwaltungsgerichtshofe Beschwerde erhoben werden kann, sind sowohl die Organe der Staatsverwaltung, als die Organe der Landes-, Bezirks- und Gemeindeverwaltung*".

[21] Since 1925, the term *Bescheid* has been introduced in the Austrian legal terminology, which includes both concepts. The term *Bescheid* was imported from Prussian legal terminology. In the general law on the administrative procedure of 1925, part III is dedicated to the *Bescheides,* and Art. 56 clarifies that this term includes both the *Entscheidungen* and the *Verfügungen*.

[22] „*durch den Verwaltungsact in eine individuelle Rechtssphäre eingegriffen wurde*". This definition was written by the vice-president of the VwGH, Karl von Lemayer in his book celebrating the 25th anniversary of its foundation: *Der Begriff des Rechtsschutzes im öffentlichen Rechte, (Verwaltungsgerichtsbarkeit); im Zusammenhange der Wandlungen der Staatsauffassung betrachtet; Festschrift aus Anlaß der Feier des 25jährigen Bestandes des Österreichischen Verwaltungsgerichtshofes* (1902), 210.

[23] „*Findet jedoch der Verwaltungsgerichtshof, daß der Thatbestand actenwidrig angenommen wurde, oder daß derselbe in wesentlichen Punkten einer Ergänzung bedarf, oder daß wesentliche Formen des Administrativverfahrens außer Acht gelassen worden sind, so hat er di angefochtene Entscheidung oder Verfügung wegen mangelhaften Verfahrens aufzuheben und die Sache an die Verwaltungsbehörde zurückzuleiten, welche die Mängel zu beheben und hierauf eine neue Entscheidung oder Verfügung zu treffen hat*".

principles for proceedings, defining them as essential forms. This provision gave the VwGH the power to develop a system of essential forms of proceedings that the administration had to respect.

The second was if the decision was unlawful (*gesetzwidrig*), meaning that it did not apply a relevant rule, or the administration was not competent (art. 7 of the VwGG). The VwGH interpreted the word *gesetzwidrig* (unlawful) as *rechtswidrig*, which is a broader concept because it includes the infringement not only of formal law but also other kinds of general rules (such as *Verordnungen*)[24].

In both cases, if the VwGH annulled the act and sent it back to the administration, the authority was obliged to repeat the procedure taking into account the grounds of the Court's decision. The law stated that the administration had to remove the flaw from the procedure (if annulled under art. 6) and apply the *Rechtsanschauung* of the VwGH (if annulled under art. 7).

An important difference between claims made under art. 6 (lack of procedure) and art. 7 (unlawfulness) is that in a case before the VwGH there is no oral discussion when the claim is made under art. 6. This is because it was believed that a procedural error would be clearly discernible from the records and there would be no need for an oral discussion[25].

5. The number of decisions made by the *Verwaltungsgerichtshof* between 1890 and 1910

5.1. Previous years

It is interesting to take a glance at the number of cases from the establishment of the VwGH to the period in question in order to evaluate the growth of case law.

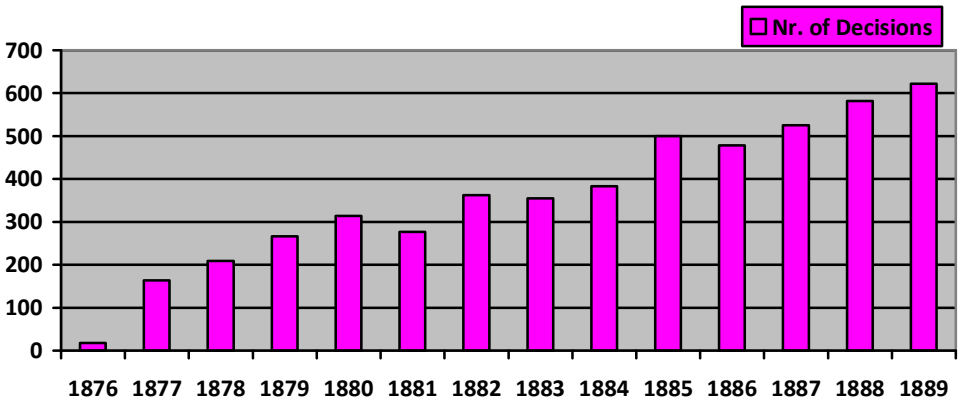
[24] T. Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich* (1999) 172 ff.

[25] From 1876 to 1890 the Budwinski collection of the VwGH decisions was published in two volumes, the main one collecting the decisions made under art. 7, and a second small book, called "*Heft*" (notebook) collecting the decisions made under art. 6. These *Hefte* are not digitalized and are only available at the VwGH library. After 1891, both sets of decisions were brought together in one single volume. In order to distinguish between them, in judgments made under art. 6 the name of the Parties were indicated only by their initials, while in the other decisions the name of the Parties was given in full.

1876: decisions nn. 1 – 18. Total decisions: **18**.
1877: decisions nn. 19 – 182. Total decisions: **164**.
1878: decisions nn. 183 – 391. Total decisions: **209**.
1879: decisions nn. 392 – 657. Total decisions: **266**.
1880: decisions nn. 658 – 971. Total decisions: **314**.
1881: decisions nn. 972 – 1248. Total decisions: **277**.
1882: decisions nn. 1249 – 1610. Total decisions: **362**.
1883: decisions nn. 1611 – 1965. Total decisions: **355**.
1884: decisions nn. 1966 – 2348. Total decisions: **383**.
1885: decisions nn. 2349 – 2848. Total decisions: **500**.
1886: decisions nn. 2849 – 3326. Total decisions: **478**.
1887: decisions nn. 3327 – 3851. Total decisions: **525**.
1888: decisions nn. 3852 – 4433. Total decisions: **582**.
1889: decisions nn. 4434 – 5055. Total decisions: **622**.

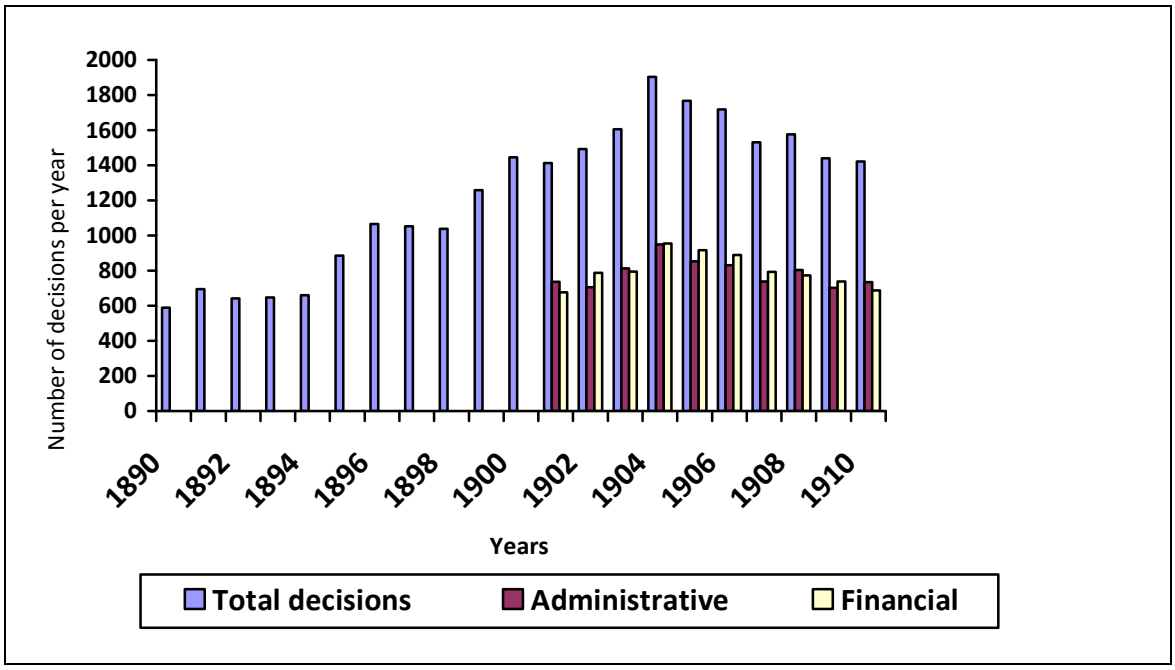
In the first 14 years of its existence, the VwGH heard 5,055 cases.

When calculating the average, we should exclude the first year (in which the VwGH was only active for two months, deciding 18 cases). Therefore, if we subtract the 18 sentences from the total 5,055, the VwGH handed down 5,037 decisions between 1877 and 1889, averaging 387 sentences per year (the first 8 years are below average, the last 5 are above average).



5.2. Number of decisions between 1890 and 1910

YEAR	NUMBER OF TOTAL DECISIONS PER YEAR
1890	590
1891	694
1892	642
1893	647
1894	660
1895	885
1896	1,065
1897	1,052
1898	1,038
1899	1,258
1900	1,445
1901	1,413
1902	1,492
1903	1,606
1904	1,903
1905	1,768
1906	1,719
1907	1,530
1908	1,576
1909	1,440
1910	1,421



5.3. Explanations of the numbers and some statistics

Between 1890 and 1900 (the first 11 years), 9,976 decisions were handed down, averaging 907 per year (the first 6 years are below average, the last 5 are above average).

Between 1901 and 1910 (the last 10 years), 15,868 decisions were handed down, showing a marked and constant growth, reaching a peak in 1904. After this there was a marked and constant decrease until 1910.

The decisions were numbered in progressive order from the beginning until 1900 (following the numbering of previous years).

1890: decisions nn. 5056 – 5645. Total decisions: **590**.
1891: decisions nn. 5646 – 6339. Total decisions: **694**.
1892: decisions nn. 6340 – 6981. Total decisions: **642**.
1893: decisions nn. 6982 – 7628. Total decisions: **647**.
1894: decisions nn. 7629 – 8288. Total decisions: **660**.
1895: decisions nn. 8289 – 9173. Total decisions: **885**.
1896: decisions nn. 9174 – 10238. Total decisions: **1,065**.
1897: decisions nn. 10239 – 11290. Total decisions: **1,052**.

A law on personal direct taxation came into force on January 1st, 1898, whose application was under the jurisdiction of the VwGH. Of course, there were immediately many cases relating to this law, so from 1898 the collection of the VwGH decisions was split into two parts, an Administrative Part and a Financial Part. However, the numbering of the judgments for both parts was still progressive and shared between the two. In order to distinguish between the decisions, after the number of the decision either the initials "F.A." (*finanzrechtliche Teil*) or "A.T." (*administrativrechtliche Teil*) were added.

1898: decisions nn. 11291 – 12328. Total decisions: **1,038**.
1899: decisions nn. 12329 – 13586. Total decisions: **1,258**.
1900: decisions nn. 13587 – 15031. Total decisions: **1,445**.

After 1901 the numeration of the sentences started again from nr. 1. The numbering for administrative decisions and financial decisions was also divided, so that from then on they had distinct numbering instead of just one shared progressive numbering. Thus, in 1901 (and thereafter) there are administrative decisions nn. 1(A) – 737(A) and Financial decisions nn. 1(F) – 676(F) totaling 1,413 decisions handed down by the VwGH (737 Administrative + 676 Financial).

1901: decisions [1(A) – 737(A)] + [1(F) – 676(F)]
Total: 737(A) + 676(F) = **1,413**.
1902: decisions [738(A) – 1442(A)] + [677(F) – 1463(F)]
Total: 705(A) + 787(F) =**1,492**.
1903: decisions [1443(A) – 2254(A)] + [1464(F) – 2257(F)]
Total: 812(A) + 794(F) =**1,606**.
1904: decisions [2255(A) – 3203(A)] + [2258(F) – 3211(F)]
Total: 949(A) + 954(F) =**1,903**.
1905: decisions [3204(A) – 4055(A)] + [3212(F) – 4127(F)]
Total: 852(A) + 916(F) =**1,768**.
1906: decisions [4056(A) – 4885(A)] + [4128(F) – 5016(F)]
Total: 830(A) + 889(F) =**1,719**.

From 1907 both parts of the register of decisions (the Administrative part and the Financial part) were split into three parts:

1) Decisions (A1) (F1);

2) *Beschlüsse womit nach § 22 des Gesetzes vom 21 September 1905, RGBl. N. 149, die Beschwerde ohneweiters zurückgewiesen wurde* (A2) (F2)[26];

3) The *Plenarbeschlüsse* (Adm. and Fin.), which followed the general progressive numbering but also had different numbering starting again from nr. 1 (the *Plenarbeschlüsse* therefore had two numbers: the general progressive one and a specific numeration of the plenary decisions).

Thus, after 1907 the *Sammlung* had six parts (A1), (A2), (Adm. Plenar), (F1), (F2), (Fin. Plenar).

1907: Total: 738 (A) + 792 (F) = **1,530**.

(A1) 4886 – 5620	(F1) 5017– 5800
(A2) 5621– 5623	(F2) 5801– 5808
Of which 3 Plenary (1 – 3)	10 (1 - 10)

1908: Total: 804 (A) + 772 (F) = **1,576**.

(A1) 5624– 6422	(F1) 5809– 6572
(A2) 6423– 6427	(F2) 6573– 6580
Of which 10 Plenary (4 – 13)	19 (11 – 29)

1909: Total: 701 (A) + 739 (F) = **1,440**.

(A1) 6428– 7124	(F1) 6581 – 7311
(A2) 7125 – 7128	(F2) 7312 – 7319
Of which 11 Plenary (14 – 24)	9 (30 – 38)

1910: Total: 734 (A) + 687 (F) = **1,421**.

(A1) 7129 – 7860	(F1) 7320 – 7997
(A2) 7861 – 7862	(F2) 7998 – 8006
Of which 13 Plenary (25 – 37)	6 (39 – 44)

[26] These were cases in which the claim was clearly unfounded, so the VwGH could dismiss them very quickly.

In the monumental work of Friedrich Tezner[27], the judgments are referenced as follows:

Judgments for the years from 1876 to 1897: B (followed by the number). Example: B 8147 (the choice of the letter B is due to the fact that these sentences were collected by Budwinski).

Judgments for the years from 1898 to 1900: A I (followed by the number) for administrative decisions and F I (followed by the number) for financial decisions. Examples: A I 12327 and F I 11857.

Judgments for the years from 1901 to 1910: A II (followed by the number) for administrative decisions and F II (followed by the number) for financial decisions. Examples: A II 730 and F II 950.

Simply to see the evolution more than one hundred years later, consider that in 2016 the VwGH decided 5,546 cases and received 5,128 new petitions.

5.4. More frequently discussed subject-matter

In the period covered by the present study, the issues most frequently subject to judicial review concern the following areas: urban planning and construction law, electoral matters, expropriations, state-owned public roads, contingent orders for reasons of public security, school, public waters, railway matters.

Moreover, since tax matters were included in the jurisdiction of VwGH in 1898, the court had an ever-increasing number of appeals in this area. From 1901, when administrative decisions and financial decisions were recorded in different registers, making it possible to count each of them, the financial decisions amounted to roughly 50% of the total decisions.

6. Objective and subjective limits to judicial review

6.1. Standing. Interests subject to legal protection

The party had to claim that a subjective right had been infringed by an unlawful act. Art. 2 VwGG states that "The VwGH has to decide in those cases in which someone claims that their

[27] For an explanation of the importance of the work of F. Tezner see *infra,* §8.

rights have been infringed by an unlawful decision by an administrative authority"[28].

There had to be a violation of a subjective right. If there was no violation of a subjective right, the party had no standing and could not challenge the decision of the authority before the VwGH.

The VwGH has always interpreted the concept of subjective right very broadly in order to grant jurisdiction wherever possible[29].

A party has a subjective right if the law clearly intends to give him/her a right to obtain something. Conversely, if the law states that the administration can decide *whether* to concede something (at its discretion) there is no subjective right, as in the case of concessions.

There exists a *Dispositionsmaxime*, whereby the judge must decide on the claim as defined by the party. It is a subjective assessment defending subjective rights; there is no general objective assessment of the legitimacy of the administrative act.

6.2. Subjective restrictions.

There were no subjective restrictions.

It is interesting to note that the December Constitution contained an act called "Basic Law on General Rights of Citizens"[30], which contained a catalogue of fundamental rights that is still in force today. According to the wording of the Act, it recognized only the fundamental rights of Citizens, but from the outset the VwGH recognized them in respect of all.

6.3. Objective restrictions. Administrative acts not subject to judicial review.

As mentioned earlier, administrative jurisdiction was established by a general clause that granted judicial control in all cases in which someone claimed that their rights had been infringed by an unlawful administrative decision. However, art. 3

[28] *„Der VwGH hat in den Fällen zu erkennen, in denen Jemand durch eine gesetzwidrige Entscheidung oder Verfügung einer Verwaltungsbehörde in seinen Rechten verletzt zu sein behauptet*".

[29] T. Olechowski, *Die Einführung der Verwaltungsgerichtsbarkeit in Österreich,* cit. at 24, esp. 141 ff.

[30] *Staats Grundgesetz über die allgemeinen Rechte der Staatsbürger.*

VwGG enumerated the cases in which administrative acts were not subject to judicial review by the VwGH. Moreover, further objective limitations on judicial review could be inferred from the interpretation of other rules. Lastly, in a Plenary Assembly decision of 1909, the VwGH denied its jurisdiction over the decisions of the political authorities, which were deemed not to be challenged[31].

a) Cases of exclusion provided by art. 3 VwGG

- ✓ Cases under the jurisdiction of ordinary courts.
- ✓ Cases under the jurisdiction of the *Reichsgericht* (namely cases where citizens asserted the infringement of constitutionally protected political rights, even when the infringement was caused by an administrative action).
- ✓ Areas to be administered together in the two parts of the Empire under the *Ausgleich* Act between the Austrian and the Hungarian parts of the Empire (namely the armed forces, foreign affairs, and all budget decisions regarding these two areas).
- ✓ Matters in which – and only to the extent that – the administrative authority is entitled to act at its "free discretion" (on which see *infra*, next paragraph).
- ✓ Nominations of civil servants (this means that the recruitment system of functionaries was completely out of the control of the VwGH. Nevertheless, during the Empire the recruitment of civil servants was, as a rule, carried out according to a meritocratic principle). The only case in which the VwGH could control nominations was if an organ had the right to propose someone for nomination and this "right to propose" was violated.
- ✓ Disciplinary matters. All categories of workers (including public functionaries) had their own professional association, which had its own commissions with the power to decide on disciplinary sanctions.
- ✓ Cases where, when the administration reviewed its own decision responding to an administrative claim made by a

[31] Plenarbeschluβ 6497(A)/1909 „*Entscheidungen der politischen Behörden* […] *sind als Ablehnung des staatsbehördlichen Aufsichtsrechtes vor dem VwGH nicht anfechtbar*".

party, the commission of the administration deciding the case included a judge (the so-called *Kollegialbehörden mit richterlichem Einschlag*).

✓ Tax matters (until 1898, when the jurisdiction of the VwGH was widened to include tax matters).

b) In detail: the case of "*freies Ermessen*" – free discretion

Art. 3, let. *e*), VwGG specifically excludes "matters in which – and only to the extent that – the administrative authority is entitled to act at its free discretion" (my own translation, the original wording is "*nach freiem Ermessen*").

The law did not specify what *freies Ermessen* might mean, nor did it give any definition of the term. The notion of *freies Ermessen* has therefore been one of the most disputed concepts.

The first draft bill had simply stated that the acts adopted by *freies Ermessen* were outside the judicial control of the VwGH. In the second draft – which was then approved – Parliament added the specification "and to the extent that". This addition made the VwGH the unchallengeable arbitrator of which acts were excluded from its jurisdiction[32].

The only help that the judges received from the legislator in determining the notion of free discretion can be found in the notes to the first draft of the law[33]. It is interesting to note that in order to define free administration, the legislator refers to the French notion of *pouvoir discrétionnaire,* stating that "In the activity of the administrative organs there are two distinct functions: the '*eigentliche Verwaltung*' (*freie Verwaltung, pouvoir discrétionnaire*) and the '*Verwaltungsrechtspflege*'. The former consists in carrying out political tasks according to the requirements of opportunity, and the latter in decisions on the rights and obligations of citizens, founded on the applicable public law. The task of the

[32] The drafts of the law can be read in J. Kaserer, *Die Gesetze vom 22 Oktober 1875, betreffend die Errichtung eines Verwaltungsgerichtshofes und die Entscheidung von Competenzconflicten, mit Materialen* (1876). The same book contains the parliamentary discussions that took place during the approval of the law.

[33] *Motivenbericht zu dem 1. Gesetzentwurfe, betreffend die Errichtung eines Verwaltungsgerichtshofes, (Nr. 148 der Beilagen zu den stenographischen Protokollen des Herrenhauses, VII. Session.)*, contained in J. Kaserer, *Die Gesetze vom 22 Oktober 1875,* cit. at 32, 26 ff.

Administrative Court is concerned only with the functions of the latter kind"[34].

Basically, the VwGH identified the cases from which its jurisdiction was excluded as follows: where a norm regulating the rights and obligations of the individuals allows the authority various alternative means of execution and the authority can choose one or the other mode of execution. Therefore, when the administration has various legitimate alternatives to act (or not), free discretion is available, so the VwGH has no jurisdiction[35].

Sometimes, even if the authority is legally obliged to act in a certain way, the jurisdiction of the VwGH can nevertheless be excluded because no one is entitled to bring an action. For example, as mentioned above, there is no subjective right to obtain a concession. If the concession is not granted, the party cannot challenge the refusal before the VwGH because he or she has no standing (even if the authority did not have *freies Ermessen* in deciding his petition).

The jurisdiction of the VwGH is excluded on the ground of *freies Ermessen* also in cases of factual administrative discretion: when there is a difficulty in fitting a specific factual situation into a definition provided by a rule of public law. For example, when a rule states that an order is admissible only if it pursues the "common good" or the "public interest", or when an order is admissible as far as it constitutes a suitable or useful means for the attainment of a certain purpose. The law provides for "*Gemeinwohl*", "*öffentliche Interesse*" or many different public purposes. In these cases, it goes about bringing a specific factual situation within a definition provided by a rule of public law, and

[34] „*In der Thätigkeit der administrativen Organe sind 2 verschieden artige Functionen begriffen: die eigentliche Verwaltung (freie Verwaltung, pouvoir discrétionaire) und die Verwaltungsrechts pflege. Die erstere besteht in der Durchführung der politischen Aufgaben nach den Geboten der Zweckmäßigkeit, die letztere in der Entscheidung über die in dem geltenden öffentlichen Rechte gegründeten Befugnisse und Verbindlichkeiten der Staatsbürger. Nur auf die Functionen der letzteren Art bezieht sich die Aufgabe des Verwaltungsgerichtshofes*". J. Kaserer, *Motivenbericht zu dem 1. Gesetzentwurfe, betreffend die Errichtung eines Verwaltungsgerichtshofes*, cit. at 33, 26.

[35] F. Tezner, *Zur Lehre von dem freien Ermessen der Verwaltungsbehörden als Grund der Unzuständigkeit der Verwaltungsgerichte* (1888); F. Tezner, *Das freie Ermessen der Verwaltungsbehörden. Kritisch- Systematisch erörtert auf Grund der verwaltungsgerichtlichen Rechtsprechung* (1924).

the VwGH usually denies its jurisdiction, invoking the free discretion of the authority.

Unbestimmte Begriffe (undetermined concepts) would also exclude the jurisdiction of VwGH, because they would bring the administrative act under the umbrella of free discretion[36].

c) The case of general administrative acts

Individuals were only entitled to bring a case against an individual act that infringed his/her rights. General acts (*Verordnungen*) could only be challenged together with the applicative individual act. Furthermore, if the VwGH was called upon to verify the legality of a general act, the composition of the court was enlarged[37].

I the event that the VwGH declared a general act unlawful, this unlawfulness had effect only in that specific case (*inter partes*), while the general act had to be applied normally in all other cases. If the same general act – declared unlawful in a previous case – should be subject again to the control of the VwGH in a successive case, the VwGH was not bound by its previous decision and could declare it lawful with regard to the facts of the later case.

With the entry into force of the 1920 Constitution, the VwGH can no longer judge the legality of general acts, as since that time this control has been within the exclusive competence of the *Verfassungsgericht* – the Constitutional Court (in line with the Kelsenian *Stufenbau* theory[38]).

---

[36] K. Lemayer, *Der Begriff des Rechtsschutzes im öffentlichen Rechte: (Verwaltungsgerichtsbarkeit); im Zusammenhange der Wandlungen der Staatsauffassung betrachtet; Festschrift aus Anlaß der Feier des 25jährigen Bestandes des Österreichischen Verwaltungsgerichtshofes*, cit. at 22, 900.

[37] The VwGH was normally made up of a bench of four judges and one president. If the legitimacy of a general act was challenged, than the VwGH had to decide with a bench of six judges and one president. Art. 13.1 VwGG „*Der Verwaltungsgerichtshof verhandelt und entscheidet regelmäßig in Senaten von vier Räthen und einem Vorsitzenden*"; art. 13.3 VwGG „*Entscheidungen über die Giltigkeit einer Verordnung können nur in Senaten von sechs Räthen und einem Vorsitzenden getroffen werden*".

[38] In an article of 1942, H. Kelsen clarifies that the Constitution of 1920 established that the general administrative acts (ordinances) adopted on the basis of statutes had to correspond to these statutes; therefore the violation of the statutes directly constituted the unconstitutionality of the general administrative act. Kelsen considered judicial review of the legitimacy of general administrative acts to be more important than the constitutional review

d) Other objective restrictions. The facts.

Art. 6.1. VwGG states that the VwGH "must usually decide on the basis of the facts as recognized in the last administrative instance"[39]. Therefore, it precludes the VwGH from evaluating the facts. This limitation was much criticized during the parliamentary discussion because many members of the parliament affirmed that a judge cannot decide without evaluating the facts. The Ministry Josef Unger (considered together with Karl Freiherr von Lemayer[40] – who then became the vice President of the VwGH[41] – the 'father of the law') replied that it would be impossible for only one Court to evaluate the facts of the cases for the whole Empire, and it would be appropriate to assume the facts as they emerged from the records.

Moreover, the VwGH had no opportunity to elicit proof or evidence.

All the decisions of the VwGH bear the heading of the judgment immediately followed by the "decision and its reasons", with no factual parts. Indeed, the decisions are also quite short, usually only 2-3 pages long.

6.4.) Inertia and interim reliefs

It was not possible to bring a claim for a public authority's failure to act (*inertia*)[42] nor to claim interim reliefs.

However, a claimant was entitled to ask the administrative authority itself to suspend the execution. Art. 17 VwGG, headed "Legal effect of the complaints submitted" stated that "Claims

---

of laws, since "the danger that administrative organs will exceed the limits of their power of creating general legal rules is much greater than the danger of an unconstitutional statute". H. Kelsen, *Judicial Review of Legislation, A Comparative Study of the Austrian and the American Constitution*, in 4 The Journal of Politics 183 (1942), the sentence quoted is at p. 184.

[39] *„Der Verwaltungsgerichtshof hat in der Regel auf Grund des in der letzten administrativen Instanz angenommenen Tatbestand zu erkennen"*.

[40] For an overview of Lemayer's life and works, see the chapter dedicated to him in the volume of W. Ogris, *Elemente europäischer Rechtskultur: Rechtshistorische Aufsätze aus den Jahren 1961-2003* (2003). Lemayer wrote both, the first draft of the law and the report on the law (*Motivenbericht*) presented at both Houses during the parliamentary discussion.

[41] Lemayer was appointed to the VwGH in 1881, became a section president in 1888 and vice president in 1894.

[42] The *Säumnisbeschwerde* (claim against inactivity of the administration) was introduced later.

before the VwGH have no suspensive effect. The complainant is, however, free to seek such a suspension from the administrative authority. The administrative authority shall grant the suspension if immediate execution is not required by the public interest and the party would incur an irretrievable disadvantage through this execution"[43].

7. The goals of judicial review

Judicial review aims only to verify the formal legitimacy of administrative action, and it is not possible to file other kinds of actions (a control on the merits is completely precluded).

The VwGH does not normally verify the adequacy of the measure for the purpose established by the law because it considers such evaluation proper and exclusive to the administration.

It verifies competence and the formal proceedings followed to achieve the decision.

It also verifies whether the administration has applied the law, but not whether it has correctly pursued the purposes set out by law.

The VwGH only had the power to quash. If the administrative act was unlawful, it could annul it and send it back to the competent administration. The administration then had to begin a new proceeding, correcting the defect in the first proceeding and adopting a new decision. The administration was therefore wholly independent, and administrative power was wholly reserved to the administration.

Separation of powers was conceived in a rigid manner. The *Staatsgrundgestez* on the Judiciary stated in art. 14 that "jurisdiction and administration are completely separated in all instances"[44].

During the parliamentary discussion for the approval of the law that would establish the VwGH, some called for the Prussian

[43] "*Rechtswirkung der eingebrachten Beschwerden. Die Beschwerde an den Verwaltungsgerichtshof hat von Rechtswegen keine aufschiebende Wirkung. Der beschwerdeführenden Partei steht jedoch frei, um einen solchen Aufschub bei der Verwaltungsbehörde anzusuchen, welche denselben zu bewilligen hat, wenn der sofortige Vollzug durch öffentliche Rücksichten nicht geboten ist, und der Partei durch diesen Vollzug ein unwiederbringlicher Nachteil erwachsen würde*".

[44] "*Die Rechtspflege wird von der Verwaltung in allen Instanzen getrennt*".

model of administrative justice with the power to decide on the merits to be imported into the Austro-Hungarian system. Minister Josef Unger replied that importing the Prussian model was impossible due to Austria's specific characteristics, especially those regarding the autonomy of municipalities and states within the Empire[45]. The constitution envisaged only *one* Administrative Court, so this Court could have only cassatory powers.

In his speech to the *Abgeordnetenhaus* in defense of the government proposal, Minister Josef Unger also refers to the "so thoroughly misunderstood English Self-government"[46], the French *droit administratif* "so carefully elaborated theoretically and practically"[47], the "pioneering reform of the Administrative Jurisdiction in Baden"[48], "the peculiar configuration of Administrative Justice in the Kingdom of Italy"[49], and "the great reform which is currently taking place in Prussia"[50].

Finally, it is interesting to note that in a previous period, during the Theresian era, there had already been a special administrative jurisdiction which not only had cassatory powers but also powers to rule on the merits and to grant damages[51].

---

[45] The speech by Minister Josef Unger, held on March 18th, 1875, is reported in P. Gautsch von Frankenthurn, *Die Gesetze vom 22. October 1875, R.G.B. Nr. 36 und 37, Jahrgang 1876 über den Verwaltungsgerichtshof: mit Materialien* (1876) at pp. 183 ff. The comparison between Austria and Prussia are made especially at p. 185 ff.

[46] "*so gründlich mißverstandene Selfgovernment in England*". All the definition provided here are in P. Gautsch von Frankenthurn, *Die Gesetze vom 22. October 1875,* cit. at 45,183.

[47] "*das theoretisch und praktisch so sorgfältig ausgearbeite droit administratif in Frankreich*".

[48] "*bahnbrechende Reform der Verwaltungsrechtspflege in Großherzogthume Baden*".

[49] "*eigentümliche Gestaltung der Administrativjustiz im Königreiche Italien*".

[50] "*das große Reformwerk, das gegenwärtig sich in Preußen vollzieht*".

[51] F. Tezner, *Die landesfürstliche Verwaltungsrechtspflege in Österreich vom Ausgang des 15. Bis zum Ausgang Ausgang des 18. Jahrhunderts* (1898). The Senatspräsident des Verwaltungsgerichtshofes Friedrich Lehne, discussing the special administrative Court during the Theresian period, compares its power to the „*recours de plein contentieux*" of the French Conseil d'Etat. F. Lehne, *Aus dem lebendigen Erbe des k.k. Verwaltungsgerichtshofes*, in Lehne, F., Loebenstein, E., Schimetschek, B., *Die Entwicklung der österreichischen Verwaltungsgerichtsbarkeit* (1976), the comparison is made at p. 4, fn. 7.

8. The creative power of the *Verwaltungsgerichtshof*

The creative power of the VwGH was put in place and recognized from the very beginning. The legislator, while adopting the law enacting the VwGH, knew that the expressions used in this law were very general and that there was no legal definition of those expressions. Above all, the legislator knew that there was no rule on "essential forms of procedure".

In the first volume collecting the decisions of the VwGH, the editor of the collection writes that there was no codification of administrative law at that time; many laws were more than one hundred years old, and the more recent laws sometimes had *lacunae*. Budwinski therefore affirmes in 1877 that it is clear that the importance of VwGH decisions goes far beyond the single case, because the rule applicable to concrete cases is determined through these decisions[52].

From the title of one of the most famous books on Austrian administrative law, it is easy to understand the great importance of VwGH case law in the development of general principles and administrative law in general: F. Tezner, *Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis* (1925).

Professor Friedrich Tezner was the first to construe an organic systematization of Austrian administrative procedural law based on the VwGH case law. In essence, Tezner made a systematic collection, divided by subject matter, of the decisions of the VwGH, on which he then founded a dogmatic reconstruction of the institutes.

In 1896 he published the *Handbuch des österreichischen Administrativverfahrens* in which he calls the administrative procedure a phantom for Austrian jurists[53]. He then elaborated his

---

[52] *„Daß den Erkenntnissen des Verwaltungsgerichtshofes schon darum eine über den speciellen Fall hinausreichende Bedeutung zuerkannt werden darf, weil durch dieselbe das auf den concreten Fall anwendbare gesetzmaterial gesichtet und der demselben innewohnende Sinn festgestellt wird*". *Vorwort* to the first book of the collection, written by Budwinski, Wien, 31 December 1877.

[53] Tezner, F., *Das Handbuch des österreichischen Administrativverfahrens* (1896) Vorwort, V *„Wenn nun diese Gesetz auf der Voraussetzung des Bestandes eines Administrativverfahrens ruht und, wenn der österreichische Verwaltungsgerichtshof in weitem Umfange die Prüfung der Ordnungsmäßigkeit des Verfahrens vor den Verwaltungsbehörden übt, so ist es aus allen diesen Gründen für den österreichischen Juristen nicht gut möglich, ein von dem verwaltungsgerichtlichen sich scharf*

systematization still further and published „*Das österreichische Administrativverfahren, dargestellt auf Grund der verwaltungsrechtlichen Praxis*" in 1922, whose second edition, re-elaborated and enlarged, flows into his monumental work in four volumes *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung* (of which it constitutes the fourth and largest volume: the first three concern legal dogmatics, sources of law, and organization)[54].

Tezner became Senatspräsident[55] of the VwGH, and his systematization shaped the Austrian law of administrative procedure. The VwGH exercised creative power in some specific cases. Tezner's monumental work, in which he picked out some single concrete decisions and built on them some general principles, has been a key element in the development of the general principles of the proceedings.

In 1976 the Senatspräsident of the VwGH, Friedrich Lehne, stated that in many cases the legislator adopted the solutions created by case law[56].

The most important example of the legislator adopting case law is considered to be the *Parteiengehör* – the right to a hearing.

---

abhebendes administratives verfahren als bloßes Phantom zu behandeln und von sich abzuweisen". My translation: "If this law [the VwGG n.d.r.] is based on the condition of the existence of an administrative procedure, and if the Austrian Administrative Court extensively examines the regularity of the proceedings before the administrative authorities, for all these reasons it not possible for the Austrian jurists to treat administrative procedure as a mere phantom and dismiss it".

[54] The monumental work *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung* (1925) consists of four volumes: the first one is *Rechtslogik und Rechtswirklichkeit: eine empirisch-realistische Studie*; the second one is *Die Rechtsquellen des österreichischen Verwaltungsrechtes. Für das Bedürfnis der Praxis dargestellt auf Grund der verwaltungsgerichtlichen Rechtsprechung*, the third one is *Die Ordnung der Zuständigkeiten der österreichischen Verwaltungsbehörden. Systhematisch dargestellt auf Grund der verwaltungsgerichtlichen Rechtsprechung,* and the fourth and last one is dedicated to administrative proceedings *Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis*, 2° Auflage.

[55] Tezner was appointed to the VwGH on 1907 and became Senatspräsident in 1921.

[56] "*die Übernahme der Rechtsprechung durch das Gesetz behandelt*". F. Lehne, *Aus dem lebendigen Erbe des k.k. Verwaltungsgerichtshofes,* in Lehne, F., Loebenstein, E., Schimetschek, B., *Die Entwicklung der österreichischen Verwaltungsgerichtsbarkeit* cit. at 51, 8.

9. Emblematic cases and principles developed.

a) Judgment n. 2263/1884: The right to a hearing

The case was about the declaration of the public nature of a road that connected some other roads to the railway station. The claimants contested the choice of which road to declare public, as there were some others that were also suitable for this purpose. The VwGH dismissed the case on this point, as the choice of which road was best suited to connect the railway station was a matter for the free discretion of the authority.

The claimants also contested that they had not participated in hearings before the administrative authority took a decision, but there was no legal provision for any such participation. Nonetheless, the VwGH stated that the absence of a legal provision had no decisive weight, because participation belongs to the Nature of Things (*der Natur der Sache*) in order to properly determine the relevant facts for the decision in hand[57].

b) Judgment n. 2452/1885: The right to equal treatment

The case concerned an expropriation order to make way for a railway line. The authority had to make some choices, and the parties whose rights might have been infringed by the decision had been heard. However, the Court decided that the expropriation procedure for matters concerning the railway was nonetheless inadequate for a number of reasons. The first of these was that only the contrasting claims of the interested parties had been heard, but not the relevant conditions for expropriation that had been ascertained on site through official channels; in addition, the parties did not have the opportunity to consult the records[58]. The parties thus did not have specific knowledge of the factual

[57] "*daß das Gesetz die Einvernehmung der Gemeindevorstände nicht vorschreibe, kein entscheidendes Gewicht beigemessen werden kann, weil eine solche Einvernehmung nach der Natur der Sache zur ordnungsmäßigen Feststellung des für die Entscheidung maßgebenden Tatbestandes gehört*", Judgment n. 2263 of October 24th, 1884, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1884, pp. 493-495; the sentence quoted is at p. 494.

[58] „*Das Enteignungsverfahren in Eisenbahnsachen ist mangelhaft: a) wenn die Parteien nur gegeneinender abgehört, nicht auch die für die Enteignung maßgebenden Verhältnisse an Ort und Stelle von Amtswegen erhoben werden*". Judgment n. 2452 of March 13th, 1885, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1885, pp. 164-167; the sentence quoted is at p. 164.

findings upon which the commission was deciding. Secondly, it had not been ascertained whether the expropriation of other suitable land would have led to equal economic damages due to the expropriation[59]. This kind of double check is necessary "since such an intrusion into property, like expropriation, always constitutes an exception, and therefore it is self evident that existing private rights must be safeguarded with the strongest forms of protection"[60]. Thirdly, as an infringement of the principle of equal treatment, the expert nominated by the complainants was not admitted to the hearing, while the local railway company was permitted to appoint an expert in addition to its lawyer[61].

c) Judgment n. 5805/1891: A broad interpretation of standing and subjective right

A local authority decided to build a new elementary school. A number of locals contested the decision (the law established the conditions under which a new school may be built as opposed to the conditions under which an already existing school must be divided into two). The authority claimed that locals had no standing as there was no individual right to the division of an existing school or the building of a new one. The VwGH declared in favour of the standing, stating that the locals in this case "undoubtedly have a financial interest and therefore have standing"[62].

---

[59] *„wenn nicht erhoben wird, ob auch die Enteignung anderer geeigneter Grundflächen mit gleichen wirtschaftlichen Nachteilen für die Enteignung verbunden sei*". Judgment n. 2452 of March 13th, 1885, p. 165.

[60] *„da ein solcher Eingriff in das Eigenthum wie die Expropriation stets ein Ausnahmebefugniß darstellt, bei welchem sich von selbst versteht, daß es mit thunlichster Schonung der bestehenden Privatrechte geübt werden muß", Ibidem*.

[61] *„Entgegen dem Grundsatze des gleichen rechtlichen Gehörs, der von den Beschwerdeführern beigezogene Sachverständige zu der fortgesetzten Verhandlung am 16. März 1884 nicht zugelassen wurde, während der Localeisenbahn-Gesellschaft die Beiziehung eines solchen Sachverständigen neben ihrem Rechtsfreunde gestattet war", Ibidem*.

[62] *„Die Gemeinden zweifellos finanziell interessiert und daher beschwerdeberechtigt erscheinen*". Judgment n. 5805 of March 6th, 1891, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1891, pp. 217-218; the sentence quoted is at p. 217.

d) Judgment n. 8150/1894: The right to be informed

An authority ordered a company to stipulate insurance policies for all its workers. This order was issued without hearing the company.

The Court stated that there was a procedural error because "it belongs to the Nature of Things, and it is a self-evident requirement of a complete and proper procedure, that the records be communicated to all parties whose interests will be affected"[63].

e) Judgment n. 8686/1895: The right to have full knowledge of the findings

The case concerned a Cistercian convent that had been damaged due to a soil collapse, allegedly caused by the intense activity of a mining company nearby. The authority decided that the damages were due to the nature of the building and to changes in the load-bearing capacity of the subsoil. Moreover, as the future of the convent building appeared to be in no way endangered by the continued operation of the mining company, the need to impose safety rules for the mining industry was no longer necessary.

The Cistercian friars claimed that the authority's decision was based on incomplete fact finding and inconsistent findings by experts. During the survey, the authority heard the opinions of three experts (on construction, mountains and mining). These experts also went *in loco* to control the real situation.

The representative of the Abbey made an objection, questioning the impartiality of the first two mountain experts called during the surveys. Following the request by the Abbey, two more experts were called to express their opinion, and no one raised any objection to the two new experts. They examined everything from the scratch.

Therefore, the VwGH found that the procedure was not incomplete.

---

[63] *„Nun ist es gewiß eine in der Natur der Sache gelegene und darum selbstverständliche Forderung eines geordneten und vollständigen Verfahrens, daß von der in einer Streitsache erfließenden Entscheidung alle Parteien, deren Interesse dadurch berührt wird, verständigt werden*". Judgment n. 8150 of November 10th, 1894, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1894, pp. 979-980; the sentence quoted is at p. 980.

However, the Court revealed some contradictions in the findings of the experts. In fact, the experts affirmed that the damage to the convent was caused only by the nature of the soil and that there was no causal connection with activity of the mine. However, the experts affirmed that some cracks in the walls of other buildings were caused by the mining company and that some safety buttresses were necessary. The expert concluded that the cracks in the walls of the Abbey buildings and in the nearby houses were of a different nature, the first being caused only by the soil, and the second by mining work.

The Court declared that in this case the procedure was flawed "because the written reports submitted to the authority were merely communicated to the Parties. The Parties were not given the opportunity to exercise their rights in respect of the findings of the reports, while the findings of the expert reports form an integral part of the fact-finding. Therefore, the Parties must have the right to have full knowledge of the findings and to present the requests and submissions which they consider necessary for the purpose of representing their rights"[64].

Consequently, the VwGH annulled the act and sent it back to the authority for an integration of the procedure.

f) Judgment n. 9441/1896: The right to present allegations

Angela and Anton Ravanelli asked the community of Lona-Lafez in Tyrol to be allowed to use the woodland coming under the fraction of Lafez, which was a public good, despite the fact that they came under the fraction of Lona. The authority accepted them, stating that the public good had been used regularly by both communities (Lona and Lafez) since the formerly united fraction had been divided. This continuous use of the public good was demonstrated by the testimony of four witnesses. The Lafez

[64] *„Daß das schriftliche der Behörde überreichte Gutachten lediglich den Parteien mitgetheilt, denselben aber nicht die Gelegenheit gegeben wurde, den Ergebnissen des Gutachtens gegenüber ihre Rechte wahrzunehmen, während doch die Feststellungen des Sachverständigenbefundes einen integrirenden Bestandtheil der Thatbestandserhebung bilden und den Parteien daher das Recht gewahrt bleiben muß, in voller Kenntnis dieser Feststellung diejenigen Anträge und Ausführungen anbringen zu können, welche sie zur Vertretung ihrer Rechte für nöthig erachten*". Judgment n. 8686 of May 22nd, 1895, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1895, pp. 654-656; the sentence quoted is at p. 656.

community challenged this decision. The VwGH annulled the decision because of a flaw in the essential form of the procedure.

The Court affirmed that the parties "should have had the opportunity to make their allegations during the administrative proceedings and to present them in an appropriate manner"[65], which did not happen.

g) Judgment n. 11393/1898: **The right to a hearing must be granted even when there is no positive law stating such a right**

The case was about the right of workers to have their own bed to sleep in. The local authority issued an injunction to a company forbidding them to make two people sleep in the same bed, except for married couples. Single workers hosted in families to which they had no family ties, should be kept separate from the family during the night.

The court acknowledged that such injunctions are made "in order to avoid behavior harmful to health and morality"[66].

The complainant claimed that the procedure was flawed for three reasons: 1) he was not invited to participate in the fact finding that took place before the administrative decision was taken; 2) he was not heard at all during the whole proceeding, neither formally nor informally; 3) the resulting administrative measure (deciding on his claims during an administrative review of the primary administrative act) contained neither a statement of reasons nor a reference to relevant laws[67].

---

[65] *„den Streitteilen* […] *Gelegenheit gegeben werden müßte, ihre Behauptungen im Administrativverfahren zu concretiren und in geeigneter Weise darzuthun*". Judgment n. 9441 of March 14th, 1896, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1896, pp. 457-458; the sentence quoted is at p. 458.

[66] "*Die Verfügungen, welche mit der angefochtenen Entscheidung getroffen werden, haben die Abstellung gesundheits- und sittlichkeitswidriger Zustände zum Zwecke*". Judgment n. 11393 of February 5th, 1898, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1898, pp. 144-147; the sentence quoted is at p. 145.

[67] "*Die Beschwerde erhebt gegen die angefochtene Entscheidung zunächst die Einwendung der Mangelhaftigkeit des Verfahrens, weil die der Verfügung des magistratischen Bezirksamtes vorangegangene Erhebung ohne Zuziehung des Beschwerdeführers, und ohne dass derselbe in tatsächlicher oder rechtlicher Beziehung gehört wurde, vorgenommen worden und weil weder der Verfügung der erste, noch der Entscheidung der zweite Instanz eine Begründung oder die Anführung der maßgebenden Gesetze stellen beigefügt sei*". Judgment n. 11393 of 1898, p. 144.
My translation of the text is: "The appeal raises, first of all, the objection of the defectiveness of the procedure, because the survey that was made before the

Consequently, the decision of the authority was declared unlawful and annulled.

The Court stated that "It is self-evident that such orders, which create an obligation for the party, must be preceded by an examination of the remedies to the situations, and this did in fact take place in the case in hand"[68].

The VwGH decided that the respondent must have an opportunity to present objections and suggestions (either regarding the facts or the law). Moreover, the party must participate in the fact-finding procedure (that precedes the emission of the order) or must in any case be heard with regard to the results of fact-finding even when no positive law affirms such a right to participation[69].

Conversely, regarding the third claim (lack of reasons for the decisions and lack of reference to the relevant laws), the Court stated that in this case the lack of a statement of reasons and the lack of relevant norms does not cause a substantial defect in the procedure. This is for a twofold reason: a) there is no provision requiring a justification of such police orders; b) on grounds of

---

decision of the authority was carried out without inviting the appellant to participate, and without hearing him in either a formal nor in an informal way, and because neither the decision of the first instance, nor the decision of the second instance is accompanied by a statement of reasons or the reference of the relevant laws".

[68] „*Es ist selbstverständlich, dass solchen Verfügungen, wenn durch dieselben einer Partei positive Leistungen auserlegt werden sollen, die Erhebung der Abhilfe heischende Zustände und Verhältnisse voranzugehen hat, wie es auch im vorliegenden Falle tatsächlich geschehen ist*". Judgment n. 11393 of 1898, p. 145.

[69] "*Zur ordnungsmäßigen Feststellung des Tatbestandes gehört aber dass der zu verpflichtenden Partei Gelegenheit geboten werde, tatsächliche oder rechtliche Aufklärungen und Einwendungen vorzubringen, und hat sohin die Beiziehung der Partei zu der Erhebung oder nach Umständen ihre Einvernehmung über den ausgenommenen Sachbefund auch dann stattzufinden, wenn eine positive gesetzliche Anordnung dieselbe nicht vorschreibt*". Judgment n. 11393 of 1898, p. 145. My translation of the text is: "in order to establish the facts of the case properly, it is necessary that the party to be obliged should be given the opportunity to provide factual or legal clarifications and raise objections, and so the participation of the party to the fact finding phase – or under particular circumstances his audition on the results of the fact finding – must take place even when a positive legal rule does not prescribe it".

subject-matter, because the order is based, and relies, on the actions of the sanitary and morality police[70].

h) Judgment n. 11996/1898: Any administrative decision must conform to the principles of due process

In 1877, porcelain painter Karl K. registered a trademark (an upside down stylized shield). This trademark was the one used by the famous Viennese porcelain manufactory that closed in 1864. In 1893 the Chamber of Commerce and Trade cancelled Karl K.'s trademark, affirming that the symbol was not registerable. The decision of the Chamber was taken on the basis of the sworn statements of several outstanding Viennese porcelain painters and porcelain merchants, as well as expert opinions stating that the registered trademark was in general use at that time to designate porcelain goods painted in Vienna.

The records of the proceedings provided no names of porcelain painters, porcelain merchants, or experts interviewed; nor did they provide the evidence upon which their statements were made; the claimant had no possibility to see the results and the contents of their depositions.

Moreover, the claimant issued a request to the Ministry of Commerce for access to the documents of the procedure, but the authority denied access to the files.

The trademark protection law did not regulate the procedure for the cancellation of trademarks. However, the VwGH notes that the decision to cancel a trademark is an administrative decision. "Therefore, if such a decision has been preceded by a procedure, it must also conform to certain general principles which language and jurisprudence associate with the notion of due process. One of these general principles is, first and foremost, that the person whose rights are involved should be

[70] *„Der Mangel einer Begründung der Entscheidung der I und II Instanz und der Anführung der bezüglichen Gesetzestellen aber bildet einen wesentlichen Mangel des Verfahrens deshalb nicht, weil eine Vorschrift in Betreff der an die Partei hinauszugebenden Begründung derartiger polizeilicher Verfügungen nicht besteht und übrigens durch den Hinweis auf die Sanitäts- und Sittlichkeitspolizei die Vorschriften, auf welche die getroffenen Anordnungen sich stützen, im allgemeinen angedeutet erscheinen*". Judgment n. 11393 of 1898, p. 145.

informed of the results of the investigations carried out, and be given the opportunity to protect his rights against them"[71].

Moreover, the VwGH stated that persons on whose statements the assumption of a certain fact is constructed should be named individually in the records.

i) Judgment n. 2501(A)/1904: Misapplication of the law

The claimants challenged the results of the municipal elections in Zuckmantel (Prague) because the election was not based on the original voter lists submitted but on newly-written lists. In particular, through an act taken on his own initiative in the absence of a decision by the competent commission, the mayor reintroduced seven persons to the voting list. As a matter of fact, only four of these seven reintroduced people participated in the elections, and it is undoubted that their vote could not determine the elections results. But this factual consideration was irrelevant for the Court, and it assumed that the facts were correct as presented.

The municipal election rules stipulated that the competent committee had to deliberate before people could be added to the list. The VwGG stated that "the aforementioned statutory provision is one whose unconditional and inflexible observance is essential if the right of the parties to control the legality of the electoral processes is not to become illusory"[72]. The claimants challenged the decisions, alleging a procedural error (the absence of the decision of the competent commission), while the VwGH declared it null and void because the administration did not apply

[71] „*Es muss daher, wenn einem solchen Erkenntnisse ein Verfahren vorangegangen ist, dieses Verfahren auch gewissen allgemeinen Grundsätzen, welche der Sprachgebrauch und die Rechtswissenschaft mit dem Begriffe eines Rechtsverfahren verbindet, entsprechen, und zu diesen Grundsätzen gehört vor Allem der, dass derjenige, um dessen Rechte es sich handelt, auch Kenntnis erhält von Resultate der gepflogenen Erhebungen, und dass ihm Gelegenheit geboten wird, demselben gegenüber seine rechte zu verwahren*". Judgment n. 11996 of October 5th, 1898, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1898, pp. 999-1000; the sentence quoted is at p. 1000.

[72] „*Die erwähnte gesetzliche Bestimmung gehört aber zu jenen, deren unbedingte und ausnahmslose Einhaltung unerlässlich ist, wenn das Recht der Beteiligten auf die Kontrolle der Gesetzmäßigkeit der Wahlvorgänge nicht illusorisch werden soll*". Judgment n. 2501(A) of March 24th, 1904, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1904, pp. 459-460; the sentence quoted is at p. 460.

the law correctly. In reality, the Court stated that in all circumstances and without regard to the extent of the consequences resulting from each case, any breach of this provision would result in the voter lists being void and thus the elections being void too.

j) Judgment n. 3212(F)/1905: The duty of the administration to take into account the documents presented by the party

The Court annulled a tax assessment due to a procedural flaw and because the Tax Administration did not consider the documents presented by the tax payer.

The complaint concerns a tax assessment that the Tax authority had issued notwithstanding the documents presented by the tax payer proving that he did not earn the amount of money asserted by the authority. "The assumptions made by the tax authority are based on flawed investigations. Moreover, the proceedings are defective because the tax authority did not take into account the documents presented by the taxpayer[73].

The VwGH found that the procedure behind the contested tax assessment revealed significant deficiencies. According to § 1 of the personal tax law, tax assessments must be based on an inquiry and on the ascertainment of specific facts; when the taxpayer denies the facts and the authority nevertheless assumes the contrary to what the taxpayer states, the specific data submitted by the party must be taken into account. The contracts and the documents used by the authority to determine the tax assessments were not disclosed to him, "and therefore he was afforded no opportunity to comment on the assumptions made by the tax authority nor to disprove or refute them. The above-mentioned assessment procedure thus appears to be essentially flawed[74].

---

[73] *„Die Annahmen der Steuerbehörde auf mangelhaften Erhebungen beruhen und daß das Verfahren überdies aus dem Grunde mangelhaft war, weil das Ergebnis der behördlichen Erhebungen dem Beschwerdeführer nicht vorgehalten wurde*". Judgment n. 3212(F) of January 3rd, 1905, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1905, pp. 3-4; the sentence quoted is at p. 3.

[74] *„auch keine Gelegenheit geboten, über die Annahmen der Steuerbehörde sich zu äußern, dieselben aufzuklären oder zu widerlegen. Das abgeführte Veranlagungsverfahren stellt sich sonach als wesentlich mangelhaft dar*". Judgment n. 3212(F) of 1905, p. 4.

In this case, the VwGH finds two main flaws in the proceedings: on the one hand, the authority should have taken into account the documents presented by the party; on the other hand, the party had no opportunity to comment on the assumptions of the tax authority and thus to clarify or refute them.

It is worth pointing out that the principle in question is affirmed in a ruling concerning tax matters, a sector in which even today protections safeguarding the rights of private individuals are still subject to unjustified limitations.

k) Judgment n. 3544(A)/1905: Participation and effectiveness

This case is about the withdrawal of a pharmacist's license.

The administration had re-awarded three pharmacist's licenses to the previous license holders without going to tender. A pharmacist (Anton T.) challenged this decision in an administrative Instanz (to the administration itself) and the administration recognized that the decision was unlawful. The authority therefore annulled the reassignments. One of the three previous license holders (Franz Z.) challenged this annulment decision, through which his license was withdrawn.

The VwGH annulled the withdrawal because during the withdrawal procedure (started on the initiative of Anton T., who claimed that a tenure was necessary), license holder Franz Z. was not heard, although he was undoubtedly a legally interested party or "*rechtlicher Interessent*". The Court recognized as a principle of administrative procedure that every interested party must be granted the right to be heard. If an interested party is excluded from the procedure it is null and void, and the decision taken cannot be binding on the excluded party.

Since the proceedings concerning Anton's T. request were carried out without the participation of the complainant, the decisions taken on the basis of the flawed procedure could have no legal effect on the complainant[75].

[75] „*Da das Verfahren über das Begehren des Anton T. […] ohne Zuziehung des Beschwerdeführers durchgeführt wurde, konnten auch die auf Grund derselben gefällten Entscheidungen* […] *dem Beschwerdeführer gegenüber eine Rechtswirkung nicht äußern*". Judgment n. 3544(A) of May 13th, 1905, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1905, pp. 562-567; the sentence quoted is at p. 566.

Therefore, the VwGH stated that an administrative act cannot have effect with respect to someone who has had no opportunity to participate in the proceeding.

l) Judgment n. 4084(A)/1906: The standing of communities

The school community at the elementary school of Oftrau is consisted of the Community of Ellhotten and the Community of Oftrau. The two communities decided on a fixed percentage breakdown of school expenses between them in an oral agreement made in 1873. In the budget for school year 1902/1903 the school board decided on a different breakdown of the costs.

The Community of Ellhotten challenged this decision and the VwGH stated that the Community had standing[76].

m) Judgment n. 5622(A)/1907: The right to be fully informed of the results of fact finding

Johann Großkopf asked the authority in Neuern to be admitted into that Community. The authority accepted him after carrying out a proceeding in order to verify the existence of the legal conditions to become a member of the Community (ten-year voluntary and uninterrupted residence in Neuern). The Community of Neuern challenged this decision for the sole reason that the authority failed to inform the community of the results of the official investigations carried out in order to prove the ten-year voluntary and uninterrupted residence of Johann Grosskopf in Neuern[77].

The Court said that it is a requirement of a complete administrative procedure that the parties be aware of the findings regarding the facts of the case that served as a basis for the decision of the authorities. When parties are not fully informed, their right to express their opinion and to challenge the authority's fact-finding is infringed. In the case in hand it was necessary to

[76] Judgment n. 4084(A) of January 12th, 1906, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1906, pp. 60-62.

[77] *„Die Beschwerde gründet sich lediglich auf dem Umstand, dass seitens der entscheidenden Behörden unterlassen wurde, die Gemeinde Neuern von dem Resultate jener amtlichen Erhebungen in Kenntnis zu setzen, welche zwecks Nachweis des zehnjährigen freiwilligen und ununterbrochenen Aufenthaltes des Johann Großkopf in Neuern gepflogen wurde*". Judgment n. 5622(A) of June 10th, 1907, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1907, p. 1304.

grant the Community of Neuern the opportunity to express its view.

n) Judgment n. 6218(A)/1908: *Rechtlicher Gehör*

The first and fundamental principle of an administrative proceeding is that all parties must be given the opportunity to express their opinion on the merits of the findings. A summons to a hearing to be held on October 24th 1907 sent to the claimant on October 21st and in a language that he did not understand did not guarantee the claimant's right to participate[78]. The act was therefore annulled on the grounds of defective procedure.

o) Judgment n. 6573(F)/1908: Lack of reasons in tax matters.

This was a financial decision concerning income tax[79]. The claimant declared an annual weekly average of 50/80 pigs and 1/2 bovine in his tax return. The tax commission established a tax of 100K. Soon after, the Commission met again and decided to increase the tax to 520K. The tax payer challenged this decision because he was not informed of the reasons for the second meeting of the Committee, hence he could not express his opinion in this regard. He was merely informed of the meeting, but no reason was given. In this case, the VwGH did not annul the act, because the lack of reasons was not considered as a substantial flaw in the proceeding. The VwGH stated no financial regulation stipulated any requirement to give reasons, so there were no grounds for deducing that this kind of right existed in the specific field of taxation (despite the existence of such a general principle).

p) Judgment n. 6837(A)/1909: **Notice to participate must be sent in good time**

The regional school board of Bohemia decided to build a new elementary school in Trebetin. The local school board in Běla challenged this decision, alleging that it would be much better to enlarge the school in Běla instead of building a new one in Trebetin. The claimant advanced objections on both the merits and

[78] Judgment n. 6218(A) of October 22th, 1908, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1908, pp. 1045-1046.
[79] Judgment n. 6573(F) of January 27th, 1908, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1908, pp. 1443-1444.

the procedure. The VwGH dismissed the case on the merits, invoking the free discretion of the authority. However, the Court annulled the decision because of a procedural flaw.

In fact, the local school board in Běla was notified of the hearing, but the notification was sent too late, preventing the board from sending a representative. The VwGH stated that "the absence of timely notification to the local school board as an interested party, which would have allowed its proper representation during the hearing, must be considered a major flaw in the procedure"[80].

10. Conclusions

Upon analysis, it seems that the VwGH developed a very well-structured system of guarantees protecting individuals during administrative proceedings, despite all the limitations of its jurisdiction.

In fact, the jurisdiction of the VwGH was highly restricted: it had only cassatory power, because it could only annul the act and send it back to the Administration, but it could not exercise any other kind of power: it could not assess the facts, as the VwGH had to decide on the basis of the facts as recognized in the last administrative instance, so any kind of assessment of the merits was precluded. Therefore, the VwGH could not control the proportionality of the administrative action, nor could it verify whether the administration had pursued the purposes set out by the law. The VwGH could exercise only a formal control, i.e. whether the proceeding had been carried out properly, and if the Administration had respected the law and had acted within its competence.

Despite these very strict limitations, VwGH case law (and thanks to Tezner's systematization of the case-law) established a very well-developed system of guarantees for individuals. Its formal control allowed it to focus on the proceeding, establishing several fundamental principles that were then codified in the 1925 Austrian general law on administrative procedure.

---

[80] "*Musste in dem Unterbleiben der rechtzeitigen Einladung des Ortschulrates als Interessenten, welche die ordnungsmäßige Vertretung desselben bei der Verhandlung ermöglicht hatte, ein wesentlicher Mangel des Verfahrens erblickt werden*". Judgment n. 6837(A) of June 26th, 1909, "*Sammlung der Erkenntnisse des k. k. Verwaltungsgerichtshofes*" of 1909, pp. 780-781, the sentence quoted is at p. 781.

Since there were no general rules on administrative action at that time, and the grounds for the unlawfulness of administrative acts were not specified in the law, the VwGH had to develop the general abstract standard of judicial review mostly by itself through its case law, in order to have a general standard to apply to concrete individual acts for deciding its unlawfulness[81].

The VwGH was not competent to assess the merits of the administrative decision, but from the very beginning it stated the right of the party to be heard before a decision is taken and the right to know the reasons of a decision. By way of example, the VwGH had already stated in 1884 (judgment n. 2263) that participation belonged to the Nature of Things, so it was not decisive that the law did not explicitly provide for this requirement. This was a general unwritten principle, rooted in natural justice.

Tezner refers to the concept of "*der Natur der Sache*" eight times in his monumental work. He clarifies that "Unlawful is not synonymous with illegal. The term unlawful includes also what is in contradiction with the law as emerging from the case law without a precisely demonstrable legal basis. Law is everything which the Verwaltungsgerichtshof has brought to light with reference to the Nature of Things and general principles of law"[82].

The Austrian Administrative Court played a crucial role in drawing up the general principles of administrative action. The legislator granted the judge the power to annul administrative acts for "lack in the essential forms of the procedure" but avoided

---

[81] H.R. Klecatsky, *Der Verwaltungsgerichtshof und das Gesetz*, in W. Dorazil, B. Schimetschek, F. Lehne (eds.), *90 Jahre Verwaltungsgerichtsbarkeit in Österreich*, cit. at 3. He states that the VwGH "not only controlled the objective legitimacy of administrative action, but also developed a claim of the parties to a legally regulated proceedings" (my own translation, p. 46.)

[82] "Rechtswidrig ist nicht gleichbedeutend mit Gesetzwidrig. Rechtswidrig ist auch das, was dem durch die Rechtsprechung ohne genau nachweisbare Grundlage gefundenen Recht im Wiederspruche steht. Alles, was der Verwaltungsgerichtshof unter Heranziehung der Natur der Sache, allgemeiner Rechtsgrundsätze […] zutage gefördert hat, ist Recht". F. Tezner, *Die rechtsbildende Funktion der österreichischen verwaltungsgerichtlichen Rechtsprechung, IV. Das österreichische Administrativverfahren. Systhematisch dargestellt auf Grund der verwaltungsrechtlichen Praxis*, 2° ed., cit. at 54, p. 305.

defining or listing these essential forms, leaving this task to the VwGH.

The VwGH elaborated several procedural rights that individuals could exercise against the administrative authorities.

The first and most important principle established by Austrian administrative case law is the *Parteigehör*, whereby the person who will be adversely affected by the administrative act must be heard before the act is passed. The principle of participation as stated by the Court not only has a defensive function but also a collaborative function, because it is necessary for the correct reconstruction of the relevant facts.

The VwGH does not limit itself to affirming the right to be heard but also requires that the *Gehör* must always be a *rechtlicher Gehör*, which means that private individuals are guaranteed a series of rights and protections during the proceedings.

First of all, equal treatment must be guaranteed to all the parties involved. Furthermore, notice to take part in the hearings must be received by the person concerned well in advance to allow him/her to participate effectively, and must be written in a language that the recipient understands.

With respect to exercisable rights, parties must have access to the records. Indeed, those concerned must have full knowledge of all the documents that the Administration uses to establish the facts and circumstances relevant to the adoption of the act. In addition, private individuals must have the right to submit documents to comment on and oppose the facts and circumstances as they emerge from the documents held by the administration.

In addition to the right to present documents, the VwGH also established the corresponding and fundamental obligation for the Administration to give due consideration to any documents produced by private individuals.

Participation rights also have an impact on the effectiveness of the acts. According to the VwGH, an act passed without the involvement of the person concerned cannot produce legal effects on that person. Therefore, the participation of the interested party is an essential condition for the full effectiveness of the act.

Lastly, the court affirms the general principle of due process, a principle that all administrative procedures must comply with regardless of the specific sectorial regulatory discipline. Thus, whenever the Administration carries out a

procedure (*Verfahren*) it is legally bound to ensure that it is a fair proceeding (*Rechtsverfahren*).

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE UNITED KINGDOM: THE STATUS OF STANDARDS BETWEEN 1890 AND 1910

Conor McCormick[1]

Abstract

This paper analyses judicially developed standards for reviewing administrative actions in the United Kingdom between 1890 and 1910. By exploring the context, reach, types and frequency of judicial review during that timeframe – fin de siècle – this historical analysis reveals both significant changes and significant continuities by comparison with twenty-first century standards.

TABLE OF CONTENTS

[1] School of Law, Queen's University Belfast. The author would like to thank Professor Giacinto della Cananea for involving him in a research project funded by the European Research Council (Grant 694697) which gave rise to this paper. Thanks are also due to all participants at a workshop held in Rome on 1 December 2017, where the paper was first presented and discussed. Further thanks are owed to Professor Gordon Anthony, Ms Allison McAreavey, Ms Róise Connolly, Ms Sarah Craig and Ms Patricia O'Lynn for their invaluable academic support while the paper was being drafted.

1. Introduction

The United Kingdom ('UK') as it existed between 1890 and 1910 ('the relevant timeframe') was in some ways very different and in other ways very similar to modern times in respect of judicial standards for reviewing administrative actions. Charting such change and continuity makes historical legal research on this topic a uniquely important type of scholarship. An uncontested historical account can, for example, operate as a source of further constitutional continuity; whereas a contested history can stimulate debates which may lead to change[2]. In spite of its importance, historical legal analysis centred primarily on the empirical study of judicial decisions, as this paper does, is somewhat scarce. A contextual backdrop situating that analysis in its broader historical setting is provided in the first and second sections which follow this introductory paragraph. Most of the remainder of the paper focuses on key law reports printed during the relevant timeframe which disclose evidence about judicial thinking in relation to administrative law questions concerning the appropriate reach and various types of review. A short section detailing a separate quantitative analysis on the frequency of administrative law cases decided by UK courts during the relevant timeframe follows these enquiries, preceding some concluding remarks on the findings of the paper as a whole.

2. The Historical Context

The UK itself was constituted somewhat differently in the late nineteenth and early twentieth centuries, namely as the United Kingdom of Great Britain and Ireland[3]. Moreover, variances between the constituent nations of the UK as it then was calls for an immediate word of warning to readers of this paper. The focus herein is on the state of administrative law in England

[2] J. Allison, *The English Historical Constitution: Continuity, Change and European Effects* (2007) 40.

[3] Great Britain then comprised, as it does today, the three nations of England, Scotland and Wales. Only the six counties comprising what would come to be known as Northern Ireland would remain in the Union subsequent to the Government of Ireland Act 1920 and the Irish Free State (Constitution) Act 1922.

and Wales within the relevant timeframe[4]. This means that distinctive traits of the Scottish legal system, in particular, are generally treated with the same 'respectful silence' other writers have felt compelled to use in order to avoid misrepresentation or trivialisation of that system arising from limitations of time and resources[5]. It can be noted briefly, nonetheless, that the Scottish system of judicial review evolved differently from that of the English system in several significant respects. While the grounds of review which developed in the Scottish system closely resembled those that developed in England and Wales, for example, where such grounds could be established the Scottish Court of Session exercised its supervisory jurisdiction by way of general remedies which were likewise available in private law actions (namely reduction; declarator; suspension and interdict; specific performance and specific implement) rather than by way of special public law remedies akin to the prerogative writs (certiorari; prohibition; mandamus) recognised in England and Wales[6]. Consequently, it has been suggested that:

> ….whereas in English law the three prerogative orders enabled the court to exercise an integrated supervisory jurisdiction in the public law field, in Scotland it has not been possible by reference to judicial remedies alone to identify a distinct branch of judicial practice; nor has the law in Scotland been

[4] Stephen Sedley describes public law in England and Wales as having been 'effectively uniform' as of when the two countries were unified by legislation in the sixteenth century, at least until the coming of devolution in 1998: S. Sedley, *Lions under the Throne: Essays on the History of English Public Law* (2015) 1. The jurisprudence of England and Wales is also commonly assumed to have been mirrored by judges across the Irish Sea during the relevant timeframe. Given that the remit of this study meant it was not possible to conduct a systematic comparison of the law reports for Ireland (or Scotland) and those for England and Wales, the verification of that assumption has had to be parked for another occasion.

[5] Ibid.

[6] A. Bradley and C. Himsworth, *Administrative Law*, in *The Laws of Scotland: Stair Memorial Encyclopaedia,* 2000 Reissue, at para 4.

> dominated, as has often been the case in England, by the restraints of a remedy-based system[7].

The character of English judicial practice and the restraints of the prerogative writ system will be explored in greater detail below, but for now let it suffice to note that even within the UK it is arguable that the extent to which there existed a 'common core' of administrative law during the relevant timeframe is uncertain.

While the UK Parliament had established its legislative supremacy as a consequence of the constitutional struggles in seventeenth century England, public administration was of course carried on by government delegates of one sort or another. Justices of the peace, who once functioned as 'all-purpose administrative authorities', gave way over time to a more diversely labelled array of administrators such as councils, boards, commissioners, authorities and so on[8]. Subsequent to the abolition of the Star Chamber (an executive-controlled body closely associated with the arbitrary rule of the Stuart monarchy)[9] and a substantial reduction in the powers of the Privy Council (an order of noblemen from whom the reigning monarch took advice) resulting from the Glorious Revolution[10], common law courts 'stepped into the breach' and assumed a supervisory role over public administrators[11]. A major consequence of the Stuarts' failed attempt to remove government affairs from common law jurisdiction was to create 'an all but invincible prejudice against encroachments upon the province annexed by the common-law courts in the field of public law' which was buttressed by 'the exceptional degree of public esteem earned by the superior judges'

---

[7] Ibid. For further discussion on the distinctive development of judicial review in Scotland, see C. Himsworth, *Judicial Review in Scotland*, in B. Hadfield (ed.), *Judicial Review: A Thematic Approach* (1995); L. Clyde and D. Edwards, *Judicial Review* (1999).

[8] W. Wade and C. Forsyth, *Administrative Law*, 10th ed. (2009) 11-12.

[9] S. Galeotti, *The Judicial Control of Public Authorities in England and in Italy: A Comparative Study* (1954) 28.

[10] An Act for the Regulating of the Privy Council and for Taking Away the Court Commonly Called the Star Chamber (16 Car I c 10). For a detailed discussion about the historical evolution and present day roles of the Privy Council, see: D. Rogers, *By Royal Appointment: Tales from the Privy Council – The Unknown Arm of Government* (2015).

[11] W. Wade and C. Forsyth cit. at 8, 12.

who had established their independence of the executive[12]. This sequence of historical events became constitutional in the sense that they operated as a 'permanent obstacle to any development of a dual system' of courts resembling those which flourished elsewhere in Europe[13]. A similar sort of prejudice was later effectuated by Diceyan insularity, which will be addressed further in due course.

In the absence of specific legislation passed for the purpose of delimiting the role of the courts in their supervisory role, and the related absence of a specially designated administrative court system, the ordinary courts incrementally developed their own supervisory jurisdiction over a new range of administrative authorities in the UK. The main exception to this general tendency of the legislature to leave the courts to their own jurisdictional devices is the relatively significant structural reform which occurred in the 1870s. The ancient courts of common law, chancery, admiralty, probate and divorce were all supplanted by a Supreme Court of Judicature which was sub-divided into a High Court of Justice and a Court of Appeal[14]. The High Court of Justice consisted of divisions that closely corresponded to the older courts which it replaced, though 'all three divisions were empowered to dispense law and equity alike'[15]. Thus, while the Chancery Division continued to administer a familiar jurisdiction, the new Queen's Bench Division 'amalgamated the once disparate common law jurisdictions of the King's Bench, Exchequer and Common Pleas' – though this amalgamation did not take effect 'until the chief justices of the erstwhile separate courts had retired' in 1881[16]. The newly constituted Court of Appeal subsumed jurisdiction over matters which had previously been held by a range of appeal courts[17]. The creation of this court, among other things, called into question the future of the appellate jurisdiction of the House of Lords, which would have been abolished were it

[12] J. Evans, *De Smith's Judicial Review of Administrative* Action, 4th ed. (1980) 5-6.
[13] S. Galeotti cit. at 9.
[14] Judicature Acts 1873-1875.
[15] S. Anderson, *Public Law*, in W. Cornish and others (eds.), *The Oxford History of the Laws of England: Volume XI: 1820-1914* (2010) at 525.
[16] T. Watkin, *The Legal History of Wales,* 2nd ed. (2012) 171-172.
[17] Judicature Acts 1873-1875.

not for considerable conservative opposition to the proposal[18]. In the end, a 'double appeal' system was retained; first to the Court of Appeal, then to the House of Lords. Thus, as Baker points out, while 'the court established under the 1873 Act kept the name *Supreme* Court of Judicature', its supremacy had been 'snatched from it before birth'[19]. By way of a compromise between reformers and traditionalists, the judicial House of Lords which in fact topped the court hierarchy was, from 1876, staffed by professional judges styled as 'Lords of Appeal in Ordinary' who sat in the House in a non-parliamentary capacity[20]. It should be noted, however, that while judicial sittings took place separately from parliamentary sittings at this time, the formal Appellate Committee of the House which prefigured the UK Supreme Court that exists today was not established until 1948 and thus after the relevant timeframe[21].

The contentious and radical rationalisation of court structures set out above stands in stark contrast to the legislative vacuum in which the interconnected procedures and standards for judicial review had developed by the relevant timeframe, and which remained untouched by legislative intervention throughout it. It is unsurprising, therefore, that there is a broad consensus among legal historians as to the fact that the substantive law of judicial review blossomed primarily within the confines of an ancient procedural framework inherited by the common law courts of several generations[22]. The writ system is of course the procedural framework in question, and a short summary of its

[18] R. Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (1979) at ch 2; D. Steele, *The Judicial House of Lords: Abolition and Restoration 1873-6*, in L. Blom-Cooper, B. Dickson and G. Drewry (eds.), *The Judicial House of Lords 1876-2009* (2009).

[19] J. Baker, *An Introduction to English Legal History,* 3rd ed. (1990) 163.

[20] Appellate Jurisdiction Act 1876; R. Stevens cit. at 18.

[21] J. White, *The Judicial Office*, in L. Blom-Cooper, B. Dickson and G. Drewry (eds.), *The Judicial House of Lords 1876-2009* (2009) at 36. On the constitution of the current UK Supreme Court, see: Constitutional Reform Act 2005, Pt 3; A. Le Seur, *From Appellate Committee to Supreme Court: A Narrative*, in L. Blom-Cooper, B. Dickson and G. Drewry (eds.), *The Judicial House of Lords 1876-2009* (2009).

[22] See, for example: E. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (1963) 1-2; P. Craig, *Administrative Law*, 8th ed. (2016) 4.

provenance is a necessary precursor to any informed analysis of how judicial standards for review developed.

Writs were originally sealed royal orders issued by the monarch in order to, for example, serve notices or demand information[23]. Dissatisfied royal subjects could initially petition the King directly to complain of injustices resulting from decisions made by the courts within his realm, hoping that the King might then decide to exercise his prerogative to issue remedial writs to those courts[24]. By the twelfth century royal interventions of this nature ceased to be available from the King personally and were instead issued indirectly via the King's Court, and by the mid-thirteenth century the categories of writ which were available from the King's Court had ossified into an exhaustive Register of Writs[25]. The inflexible formality created by these procedural strictures meant that writs once obtainable for certain distinct purposes had to be creatively adapted by the courts of common law in order to serve different purposes, so as to protect new public interests brought about by changed societal conditions. As such, long before the advent of the industrial age closely preceding the relevant timeframe, the writ system had been transformed into a judicial apparatus for reviewing previously unimaginable government responsibilities for administering public functions relating to factories, welfare, railways and public health, among others[26]. The particulars of what had come to be classed as the main 'prerogative writs' of certiorari, prohibition and mandamus will be discussed at more appropriate junctures below, but it is of historical significance that each of those common law remedies had developed largely in isolation from one another, only coming to be grouped together over a century after they had acquired their respective 'prerogative characteristics'[27]. Prerogative characteristics were retrospectively exemplified by those discretionary remedies which judges sitting primarily on the King's Bench would issue where a recognised cause could be established, according to the demands of justice

[23] H. Woolf and others (eds.), *De Smith's Judicial Review,* 7th ed. (2016) at 857.
[24] Ibid.
[25] Ibid.
[26] P. Craig cit. at 22, 36-39.
[27] H. Woolf and others (eds.) cit. at 23, 858-860.

which certain royalist judges had been keen to associate with the King's benevolence towards his subjects[28].

In tandem with these advances towards administrative oversight within the common law court system, there developed in Chancery two equitable remedies – firstly, injunctions; and subsequently, declarations – which by the relevant timeframe had assumed some complementary importance in respect of administrative actions. Their particulars, as with the prerogative writs, will be extrapolated in greater detail below. For now, the relative adaptability of equitable remedies as compared with 'the labyrinthine by-ways of the common law prerogative writs' is highlighted in advance[29]. The particular flexibility of injunctions, which had their origins in what would now be termed private law disputes, were easily adapted as a means of reviewing administrative authorities who encroached upon property rights[30]. Considerably restrictive court practices evolved, however, so as to prevent the ordinary citizen from seeking injunctions against administrative actions or inactions without the Attorney General's fiat in many circumstances[31]. It is likewise important to note by way of background that declaratory judgments were heavily opposed by the judiciary for a long period of time immediately prior to the relevant timeframe. In the 1877 case of *Hampton v Holman*, for instance, the then Master of the Rolls resolutely affirmed that 'where the Court is asked to do nothing more than to declare future rights, it is clear that the Court will not make any declarations as to future rights'; despite arguments in favour of relaxing that rule having been put to him by counsel[32].

3. The Ahistorical Context

The foregoing account on the shaping of constitutional and procedural structures within which administrative law developed prior to the relevant timeframe typifies the inescapably haphazard nature of its history in the UK, a quality which is equally discernible from the relevant timeframe itself. Disentangling the

[28] ibid.
[29] H. Woolf and others (eds.) cit. at 23, 875.
[30] S. Galeotti cit. at 9, 31.
[31] J. Evans cit. at 12, 430-433.
[32] *Hampton v Holman* (1877) 5 Ch D 183, 187.

vast store of 'uncoordinated judicial activity'[33] which might be said to have constituted a body (in this sense analogous, perhaps, to the body of Frankenstein's monster) of administrative law within the relevant timeframe is thus, as will soon become clear, a difficult and necessarily selective task. Before embarking upon that task, however, one more preliminary issue must be addressed. An ahistorical impression of administrative law in the UK as it was within the relevant timeframe abounds in various contexts due to the regrettable influence of Professor Albert Venn Dicey's pernicious claim that none did or should exist[34].

Dicey's claim was fuelled by a 'fallacious comparison' with the specialised administrative courts of France which, he mistakenly alleged, conferred 'a whole body of special rights, privileges, or prerogatives' on government officials and was thus incompatible with his conception of the rule of law[35]. This was because Dicey's conception of the rule of law was premised, in part, on the idea that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals'[36]. Law reports of the time provide abundant evidence, however, demonstrating that the English judiciary had developed 'a system of judicial supervision of public administration closely paralleling the jurisdiction of the French Conseil d'État, itself a powerful and independent tribunal, albeit constitutionally part of the administrative structure' by cleverly adapting the common law and equitable remedies available to them[37], as explained in the previous section of this report and explored further in the sections which follow this one. That is to say nothing of the many other critiques which have been levelled at Dicey's thesis, such as its failure to address the extensive immunities from 'ordinary law'

[33] G. Drewry, *Judicial Review: The Historical Background*, in M. Supperstone, J. Goudie and P. Walker (eds.), *Judicial Review,* 5th ed. (2014) 13.

[34] A. Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (1885) at ch 5. Note that Dicey also published a second (1886) and third (1889) edition of his text prior to the relevant timeframe; a fourth (1893), fifth (1897), sixth (1902) and seventh (1908) edition during the relevant timeframe; and his final, eighth (1915) edition was published shortly after the relevant timeframe.

[35] W. Wade and C. Forsyth cit. at 8, 20.

[36] A. Dicey cit. at 34, 177-178.

[37] S. Sedley cit. at 4, 64.

enjoyed by various public officials[38]. It is widely believed that Dicey's 'xenophobic antipathy to France and to civil law systems, which he regarded as autocratic and Napoleonic' blinded him to the historically undeniable existence of English administrative law during his lifetime[39]. There are some scholars, however, who credit Dicey for having indirectly influenced the shifting of the UK constitution in a 'civil administrative direction' by stimulating others to correct his revisionist and neglectful accounts of the administrative landscape in its institutional, remedial and theoretical guises[40].

At least two related consequences which are significant to the present study flowed from Dicey's denialism in respect of administrative law in the UK. The first is that Dicey's heritage is said to have engrained a culture of disengagement with the subject of administrative law by generations of lawyers and judges influenced by his ahistorical doctrines. It is claimed by some writers, for example, that his influence was responsible for a rise in judicial deference in respect of judicial supervision over administrative actions in the ensuing decades[41]. Secondly, Dicey's glorification of the English model is thought to have considerably affected the level of insularity which prevailed in the wake of his scholarship. That is to say, Dicey's method inculcated a culture of superiority in the UK by presenting different jurisdictions 'not as actual or potential sources of influence, but as anti-models with which to demonstrate the peculiarity of … his analytical scheme of the English law of the constitution'[42]. The temporary prominence of Dicey's denialism thus resulted in an unwarranted distinction between the UK and other European legal systems, which appears to have impeded any significant reference to those systems in the UK courts as they each grappled with much the same issues of administrative law.

---

[38] H. Arthurs, *Rethinking Administrative Law: A Slightly Dicey Business*, 17 Osgoode Hall Law Journal 1 (1979) 6.

[39] S. Sedley cit. at 4, 270.

[40] J. Allison, *The Spirits of the Constitution*, in N. Bamforth and P. Leyland (eds.), *Accountability in the Contemporary Constitution* (2013) 36-45.

[41] G. Drewry cit. at 33, 18. Drewry refers to commentators who depict *Local Government Board v Arlidge* [1915] AC 120 as being symptomatic of the alleged increase in judicial deference resulting from Dicey. This point will be briefly revisited below.

[42] J. Allison cit. at 2, 9.

4. The Reach of Judicial Review

The messy nature of UK administrative law history adverted to above makes it possible to analyse courts during the relevant timeframe with reference to a variety of possible considerations, such as:

> …the classes of factual situations in which their jurisdiction may [have been] invoked, the purposes for which that jurisdiction must or may [have been] invoked, the forms of proceedings in which it [was] invoked, the nature, characteristics and effects of the remedies and sanctions they may [have awarded], and the conditions that [had to be] satisfied before any form of judicial relief or particular remedies and sanctions [were] obtainable[43].

To avoid an 'intolerably prolix and repetitive' analysis[44], however, this paper eschews the temptation to deal with all possible viewpoints exhaustively and instead dwells on two specific perspectives which encompass a good range of pertinent material. The reach of judicial review during the relevant timeframe is the first of these perspectives and forms the focus of this section, while the types of judicial review available during the relevant timeframe is the second perspective and is dealt with hereafter. The reach of judicial review is an expression intended to refer to the legal gateways through which individuals could request judicial intervention in respect of administrative actions, as well as both the credentials required of individuals likely to be granted such requests and the characteristics of administrative authorities which judges did and did not recognise as being subjectable to review. By virtue of the remedy-based system which had developed by the relevant timeframe, the reach of review was inherently limited by the purposes for which each judicial remedy had developed, in addition to the enduring issues of standing and amenability. These issues will now be considered with regard to

[43] J. Evans cit. at 12, 21-22. See also: S. De Smith, *Wrongs and Remedies in Administrative Law*, 15 Modern Law Review 189 (1952) 189-190.
[44] J. Evans cit. at 12, 22.

each of the main remedies in turn, followed by a short critical overview of their collective coherence.

4.1 Prohibition and Certiorari

The writs of prohibition and certiorari developed independently of each other and although they had come to be very similar in scope by the relevant timeframe, their separate origins did result in some notable distinctions. Prohibition, the oldest of the prerogative writs, was devised primarily in order to prospectively limit the jurisdiction of ecclesiastical courts[45], but came to be used as a common method of prospectively reviewing administrative authorities[46]. By the relevant timeframe, the purpose of the writ was understood to be for the protection of 'the prerogative of the Crown and the due course of the administration of justice'; which was effectuated 'by prohibiting [an] inferior Court from proceeding in matters as to which it [wa]s apparent that it ha[d] no jurisdiction'[47]. Indeed, the Court of Appeal confirmed that prohibition was demandable as of right, in contrast to the entirely discretionary nature of both certiorari and mandamus, where lack of jurisdiction was apparent from the face of the proceedings[48]. Prohibition remained discretionary, however, in cases where want of jurisdiction was 'latent' rather than 'patent'[49]. Other judges put the same point a different way, by referring to an apparent distinction between 'total' and 'partial' want of jurisdiction[50]. Certiorari, on the hand, had its origins as a royal demand for information by way of certification[51]. By the relevant timeframe, it had become a means of removing an order already made by an inferior court into the King's or Queen's Bench, where it could be quashed for want of jurisdiction. This definition highlights a further distinction, namely that while

---

[45] For an example from the relevant timeframe, see: *R v Tristram and Another* [1902] 1 KB 818.
[46] J. Baker cit. at 19, 166.
[47] *Farquharson v Morgan* [1894] 1 QB 552, 556.
[48] ibid.
[49] *Farquharson v Morgan* [1894] 1 QB 552, 557.
[50] *Farquharson v Morgan* [1894] 1 QB 552, 564, citing *Jones v Owen* (1845) 5 D & L 669.
[51] J. Baker cit. at 19, 170-171.

prohibition would lie against the decision of a court with its own special jurisdiction, such as an ecclesiastical court, certiorari would only lie against an inferior court administering the same temporal law as judges of the King's or Queen's Bench[52]. However the most obvious difference between the two writs was of course the appropriate time at which they might be sought. Prohibition was better suited to reviewing activities at an earlier stage than certiorari, given its preventative purpose, whereas the quashing effect of certiorari was more likely to be sought at a later stage either in isolation from[53]; as an alternative to[54], or in conjunction with[55] prohibition.

The rules about whom could avail of these two writs were also very similar but marginally distinguishable. Two contrasting views had developed by the relevant timeframe as regards the standing requirements for prohibition. Some judges distinguished between the availability of prohibition to individuals who were personally unaffected by the matter about which review was sought and its availability to the party aggrieved by the alleged want of jurisdiction on which an application for review was made[56]. Only in the latter case would locus standi cease to be a matter of discretion for the court and issue *ex debito justitiae*.[57] Other judges regarded it as their general duty to guard against excesses of jurisdiction and would thus accept requests for review from anyone at all, whether they were directly affected by the matter at hand or a total stranger to it[58]. During the relevant timeframe this difference of views appears to have been determined in favour of the former approach by the case of *Farquharson v Morgan*, wherein the Court of Appeal indicated that if there existed judicial discretion about whether to award prohibition – as a result of latent, rather than patent, want of jurisdiction – matters such as laches or misconduct on the part of

[52] The accuracy of this point was confirmed in *R v Chancellor of St Edmundsbury and Ipswich Diocese, ex p White* [1948] 1 KB 195.
[53] *R v Carter and Another* [1907] 1 KB 298.
[54] *Gozney v Bristol Trade and Provident Society* [1909] 1 KB 901.
[55] *R v His Honour Judge Snagge and Others* [1909] 1 KB 644.
[56] *Forster v Forster and Berridge* (1863) 122 ER 430, 435.
[57] ibid.
[58] *Worthington v Jeffries* (1875) LR 10 CP 379, 382.

the applicant could influence a court's decision whether to grant prohibition[59].

There seems to have been less tension between competing judicial views as regards the standing requirements for certiorari, with the weight of judicial opinion falling firmly in favour of an approach requiring some sort of interest in the proceedings about which review was sought in all circumstances. The leading case in this respect is *R v Nicholson*, in which it was held that certiorari could be refused where an applicant failed to show they had 'a peculiar grievance of their own beyond some inconvenience suffered by them in common with the rest of the public'[60]. In addition to allowing certiorari to be refused where no particularised grievance could be established, the court also held that 'no sufficient ground for the issue of the writ' would exist where an applicant had only a 'small' interest in the matter at hand[61]. The theoretical difference between locus standi for prohibition and certiorari thus appears to have been that where a patent excess or abuse of jurisdiction could be established, prohibition would be issued as of right whereas certiorari would only ever lie if the applicant had some personal interest in the determination of the issue[62]. That having been said, subsequent cases within the relevant timeframe suggest that judges interpreted the latter requirement liberally. Thus in the case of *Cobbold,* for example, certiorari was granted to applicants who were 'only rivals in trade' with the individual to whom an alehouse licence had been granted[63]. Lord Alverstone CJ held that 'it would be too strong to say that [the rival brewers] had not a sufficient interest in the matter to enable them to apply'[64]. The degree to which apparently restrictive judicial theories were reflected in ostensibly liberal judicial practices as regards the locus standi requirements for these remedies is therefore open to some doubt.

Certain statutes in force during the relevant timeframe provided that the proper mode of challenging a new authority

---

[59] *Farquharson v Morgan* [1894] 1 QB 552, 559.
[60] *R v Nicholson* (1899) 2 QB 455, 471.
[61] *R v Nicholson* (1899) 2 QB 455, 472.
[62] S .Galeotti cit. at 9, 198.
[63] *R v Groom and Others, ex p Cobbold and Others* (1901) 2 KB 157, 161.
[64] *R v Groom and Others, ex p Cobbold and Others* (1901) 2 KB 157, 162.

established by the statute was by way of certiorari. This automatically brought those bodies within the reach of judicial review; a power which, in the case of financial auditors appointed by a Local Government Board, the courts were willing to construe particularly broadly in 1906. Thus in the case of *Roberts*, the Court of Appeal construed its jurisdiction under the Public Health Act 1875 to review 'erroneous' audit decisions as encompassing a power to review errors of both law and fact, bringing the judicial role in such proceedings closer to that of an appeal about the merits of the impugned decision[65]. On the contrary, however, a range of statutes from this time also included provisions of various sorts that were included for the specific purpose of excluding judicial review by the ordinary courts[66]. The judicial construction of such provisions during the relevant timeframe was less activist, in terms of minimising their impact in the interests of preserving judicial oversight, than it would become in later decades. For example, subordinate legislation in the form of the Register of Patent Agents Rules 1889 made by the Board of Trade under authority provided by the Patents, Designs and Trade Marks Act 1888 was treated by the House of Lords 'as if' made in pursuance of that primary Act 'for all purposes of construction or obligation or otherwise'[67]. This is a clear example of secondary legislation rendered immune from judicial review due to the protection afforded by the cloak of parliamentary sovereignty, as Paul Craig has pointed out[68].

A further reduction in the amenability of certain authorities to review developed through the common law at the beginning of the relevant timeframe. The functions of licensing justices in particular, who had been conferred powers to grant and renew beerhouse licenses upon the reinstatement of that regime in 1869, were characterised as 'administrative' rather than 'judicial'

[65] *R v Carson Roberts* [1908] 1 KB 407, relying on *R v Haslehurst* (1884) 13 QBD 253.

[66] P. Craig cit. at 22, ch 28.

[67] *Institute of Patent Agents and Others v Lockwood* [1894] AC 347, 361. Paul Craig notes that this decision is difficult to reconcile with the later authority of *R v Minister of Health, ex p Yaffe* [1931] AC 494, but given that it falls outside the relevant timeframe that tension is not explored in any further depth herein. See cit. at 22, 876-877.

[68] P. Craig cit. at 22, 876.

functions in the 1898 case of *Sharman*[69]. This had the very significant effect of rendering their decisions beyond the reach of judicial review – which the courts had decided would only attach to judicial or quasi-judicial functions[70]. There followed several years within the relevant timeframe wherein the licensing justices enjoyed immunity from the reach of prohibition and certiorari as a result, which caused increased resort to mandamus in their place[71]. This immunity was eventually brought to an end, however, by the 1906 Court of Appeal decision in *Woodhouse*[72]. Indeed, *Woodhouse* was part of a broader judicial trend towards enlarging 'the sphere of judicial and quasi-judicial activities, as a means of enlarging the scope of the writs of prohibition and certiorari' in cases not involving licensing justices[73]. Thus, by way of illustration, an appeal had decided that the term judicial could in fact refer to two meanings: 'to the discharge of duties exercisable by a judge or by justices in court, or to administrative duties which need not be performed in court, but in respect of which it is necessary to bring to bear a judicial mind – that is, a mind to determine what is fair and just in respect of the matters under consideration'[74]. It was relatively clear by this point, therefore, that the reach of certiorari and prohibition would not be determined with reference to the character of whichever authority

---

[69] *R v Sharman and Others, ex p Denton* [1898] 1 QB 578, 580.

[70] W. Wade and C. Forsyth cit. at 8, 407-408. Wade and Forsyth explain that the term 'quasi-judicial' was used to describe administrative powers which had to be exercised judicially, and thus in conformity with the demands of natural justice (including the right to be heard by an unbiased decision-maker, and so on). Robson heavily criticised 'the picture conjured up of a quasi-judicial court presided over by a quasi-judge administering quasi-law in quasi-disputes. The quasi-parties give their quasi-evidence; the tribunal finds the quasi-facts and considers the quasi-precedents and quasi-principles. It then applies the quasi-law in a quasi-judicial decision which is promulgated in a quasi-official document and given quasi-enforcement. The members of the tribunal, having concluded their quasi-judicial business, then go out and drink quasi-beer before taking lunch consisting of quasi-chicken croquettes. They then go home to their quasi-wives'. See: W. Robson, *Justice and Administrative Law: A Study of the British Constitution* (1951) at 495-496.

[71] S. Anderson cit. at 15, 501.

[72] *R v Woodhouse and Others* [1906] 2 KB 501.

[73] S. Galeotti cit. at 9, 36.

[74] *Royal Aquarium and Summer and Winter Garden Party Ltd v Parkinson* [1892] 1 QB 431, 452.

was involved but rather with reference to the character of the impugned act or decision[75]. The high watermark in this regard would come in the form of a House of Lords decision shortly after the relevant timeframe wherein Lord Loreburn LC famously ruled that a duty to 'act in good faith and listen fairly to both sides' attached 'upon every one who decides anything'[76]. More will be said about the context of that case in the section of this paper concerning procedural review. For present purposes it is enough to note that it was a fairly stiff, if transitory, corrective to the more reticent judicial developments preceding it.

Tom Cornford's claim that 'neither certiorari nor prohibition seems ever to have been sought against the Crown itself nor against any Crown Servant exercising a power vested in the Crown prior to 1947' is borne out by a thorough search of the relevant law reports[77]. It is therefore necessary to work from the assumption that the Crown itself was considered immune from prohibition and certiorari for the same reasons it was immune from mandamus, which will be considered in the sub-section hereafter[78]. Ministers of the Crown exercising statutory powers, however, appear to have been subject in principle (and in the absence of statutory ouster clauses) to the reach of both prohibition and certiorari[79].

4.2 Mandamus

Originally, the writ of mandamus was used to restore individuals to offices and liberties which had been unjustly taken from them[80]. By the eighteenth century it had become something more than a writ of restitution given that it was then capable of being deployed for the purpose of compelling the performance of 'a wide range of public or quasi-public duties, performance of

[75] H. Woolf and others (eds.) cit. at 23, 865.
[76] *Board of Education v Rice and Others* [1911] AC 179, 182.
[77] T. Cornford, *Legal Remedies Against the Crown and its Officers Before and After M,* in M. Sunkin and S. Payne (eds.), *The Nature of the Crown: A Legal and Political Analysis* (1999) at 242. Cornford's focus on 1947 is because that year saw the passage of the Crown Proceedings Act.
[78] ibid, citing *Chabot v Lord Morpeth* (1850) 15 QB 446.
[79] *R v Minister of Health, ex p Yaffe* [1931] AC 494; cf *Institute of Patent Agents and Others v Lockwood* [1894] AC 347.
[80] S. De Smith, *The Prerogative Writs*, 11 Cambridge Law Journal 40 (1951) at 50.

which had been wrongfully refused'[81]. It had developed into a tool of the King's or Queen's Bench by the relevant time frame, where it could be used to compel the discharge of duties incumbent upon both judicial and administrative bodies[82]. Although case law on the writ had grown considerably in number by the mid-nineteenth century, it features much less prominently in the law reports for the relevant timeframe on account of its diminished significance by then. The reasons for that diminishment relate to the reforms of local government which resulted in less dissatisfaction than had pertained in connection with the disorderly system they replaced; to the introduction of various statutory appeals which fulfilled the remedial role the writ had previously attended; and to the decline of freehold offices which had given quasi-proprietary rights to their holders that were enforceable by mandamus[83]. The remedy had also assumed a purely public character which meant that it would not be granted to enforce the private rights of company shareholders, for example, where the proper remedy was adjudged to be an injunction[84].

As mentioned above, the writ of mandamus was very much at the discretion of the courts during the relevant timeframe. The relevant tests for standing which applied thus shared some of the features explained above with respect to certiorari and prohibition (in cases of latent jurisdiction) in that some form of private right or interest had to be affected, though the duty owed to the applicant had to be of a public nature[85]. Early reports within the relevant timeframe show that judges found it 'difficult to draw the line', but held that mandamus would 'lie on the application of a person interested' in compelling officials to perform a public duty they had refused to perform[86]. In later reports, however, Wright and Bruce JJ took so seriously the requirement that an applicant for mandamus should hold a 'legal specific right' that they agreed to discharge a rule for mandamus primarily because of this technical

[81] S. De Smith cit. at 80, 51.
[82] ibid.
[83] H. Woolf and others (eds.) cit. at 23, 872.
[84] *Davies v Gas and Light Coke Company* [1909] 1 Ch 708.
[85] *R v Secretary of State for War* [1891] 2 QB 326, 335.
[86] *R v Commissioners for Special Purposes of the Income Tax* (1888) 21 QBD 313, 322; 317.

objection[87]. The Lewisham District Board of Works, which had a statutory duty to put into force their powers relating to public health and local government, was thus refused the mandamus it had sought in order to compel the guardians of the poor of Lewisham Union to enforce the Vaccination Acts which applied in their district. Wright J emphasised that the court 'would be far exceeding its proper functions if it were to assume jurisdiction to enforce the performance by public bodies of all their statutory duties without requiring clear evidence that the person who sought its interference had a legal right to insist upon such performance'[88]. However one finds the case of *Cotham* reported the following year, in which mandamus was granted in conjunction with certiorari to the vicar of a parish whose only interest in the matter was that he resided in the place to which a liquor license had been transferred[89]. Likewise, over a decade later, mandamus was granted to a group of individuals for the enforcement of a statutory provision which they had lobbied Parliament to pass into legislation[90]. The court acknowledged that there was inconsistency between *Lewisham* and *Cotham* but determined that it was unnecessary for it to endorse the approach taken in either case, choosing instead to simply decide the case before it in favour of those who sought 'to enforce a clause which was obtained on their own petition'[91]. This would not deter future courts from mechanically citing *Lewisham* with approval on many occasions in later years as an unprincipled basis for restricting access to mandamus[92]. Reports from the relevant timeframe, however, suggest that locus standi generally presented no greater practical barrier to applicants for mandamus than it seems to have done in respect of certiorari.

It was settled principle that while mandamus would issue to a broad range of public authorities, the Crown was not within

[87] *R v Guardians of the Lewisham Union* [1897] 1 QB 498.
[88] *R v Guardians of the Lewisham Union* [1897] 1 QB 498, 500. See also: *R v Assessment Committee of the City of London Union* [1907] 2 KB 764.
[89] *R v Cotham* [1898] 1 QB 802.
[90] *R v Manchester Corporation* [1911] 1 KB 560.
[91] *R v Manchester Corporation* [1911] 1 KB 560, 563.
[92] W. Wade and C. Forsyth cit. at 8, 588, citing as examples *R v Commissioners of Customs and Excise, ex p Cook* [1970] 1 WLR 450 and *R v Hereford Corporation, ex p Harrower* [1970] 1 WLR 1424.

its reach. These propositions were confirmed in the key case of *R v Secretary of State for War* during the relevant timeframe, wherein an army officer sought mandamus in respect of what he viewed as his entitlements under a royal warrant[93]. The court was clear that mandamus would lie against servants of the Crown as individuals where they had been 'constituted by statute [as] agents to do particular acts', but resolute in its ruling that it was 'beyond question that a mandamus cannot be directed to the Crown or to any servant of the Crown simply acting in his capacity as servant'[94]. Royal warrants being matters of prerogative, and therefore a matter of guarded government discretion, the court refused to recognise mandamus as a tool for their enforcement[95]. This administrative law position differed from the private law position under the law of torts whereby, as Cornford explains, in tort 'a Crown servant was liable in his personal capacity (e.g. as Lord Halifax) as opposed to his official capacity (e.g. as Secretary of State)', whereas 'a Crown servant could be made the subject of mandamus in his official capacity (e.g. as Secretary of State) where the duty sought to be enforced was imposed upon him in that capacity by statute'[96]. The distinction was rationalised by the theory that to grant mandamus against the Crown would be tantamount to the court granting it against itself as another notional part of the Crown[97]. Illogical though this may seem, it was an inexorable consequence of the unitary concept of the Crown that pertained in the UK at the time. The durability of the common law position encapsulated by *R v Secretary of State for War* is well illustrated by the fact that the position was, to the regret of some commentators[98], unaltered by the Crown Proceedings Act 1947 which for most other purposes made the Crown analogous to a private person.

---

[93] *R v Secretary of State for War* [1891] 2 QB 326.
[94] *R v Secretary of State for War* [1891] 2 QB 326, 334.
[95] *R v Secretary of State for War* [1891] 2 QB 326, 336.
[96] T. Cornford cit. at 77, 241.
[97] T. Cornford cit. at 77, 242.
[98] W. Wade and C. Forsyth cit. at 8, 532.

4.3 Injunction

As explained earlier, the prerogative writs were not the only means by which administrative actions could be reviewed in UK courts during the relevant timeframe. The equitable remedy of an injunction, and its equitable partner: the declaration, could also be claimed in ordinary civil proceedings against administrative authorities. Injunctions could be prohibitory and thus restrain an authority from committing an unlawful deed, or mandatory (though much less frequently worded in this way) and thus compel an authority to fulfil a public duty. The conceptual overlap between injunctions and the writs of prohibition and mandamus are to this extent quite clear. However the procedure whereby the equitable remedies were claimed in ordinary civil proceedings was different from the procedure for seeking prerogative writs from the Crown Side of the King's or Queen's Bench Division. Thus, although injunctions and declarations might have had similar effects to one or some of the prerogative writs, they could not be claimed in the same set of proceedings as prerogative writs in their own right or as additional or alternative relief[99]. Despite these procedural distinctions, it was possible by the relevant timeframe for any division of the High Court to dispense both common law and equitable remedies, as a result of the amalgamation of court structures discussed in the historical background section of this paper above; whereas beforehand equitable jurisdiction had been restricted to the Chancery benches.

That having been said, the rationalisation of court structures did not eliminate certain jurisdictional differences between suits for equitable relief and those for the prerogative writs[100]. In particular, the rules about whom could apply for equitable relief and against whom the remedies would be granted differed somewhat. The important case of *Boyce* made it clear that private individuals would only be entitled to sue for an injunction in one of the following circumstances:

---

[99] M. Westgate, *Declarations, Injunctions and Money and Restitutionary Remedies*, in M. Supperstone, J. Goudie and P. Walker (eds.), *Judicial Review,* 5th ed. (2014) at 616.

[100] *North London Railway Company v Great Northern Railway Company* (1883) 11 QBD 30.

> …first, where the interference with the public right [was] such as that some private right of his [was] at the same time interfered with (e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right [was] interfered with, but the plaintiff, in respect of his public right, suffer[ed] special damage peculiar to himself from the interference with the public right[101].

These exceptions provided only a narrow gateway for individuals to sue on their own part as a means of restraining interferences with general public rights by administrative authorities. Indeed, the *Boyce* formula meant that mandatory injunctions could never be obtained by an individual, only prohibitory ones. The reasoning behind the restrictive approach in *Boyce* has been criticised because of its origins in the law of public nuisance, which is said to have been inapposite given that in the private law context there was no comparable separation between questions of locus standi and questions on the merits of a case[102].

Nonetheless, if neither of these narrow exceptions were fulfilled an injunction of either negative or positive effect could be sought by the Attorney General in one of two ways. In the first instance, the Attorney General could in theory act of his own motion, *ex proprio motu*, by either filing his own action or intervening in existing proceedings by virtue of his role as guardian of the public interest[103]. In almost all cases, however, the Attorney General was joined in proceedings at the instance of a 'relator' (i.e. an informant). In such 'relator actions', private individuals would effectively request the Attorney General's

---

[101] *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114.

[102] P. Craig cit. at 22, 762.

[103] Within the relevant timeframe the closest case in point appears to be *Lord Stanley of Alderley v Wild and Son* [1900] 1 QB 256, wherein the Attorney General intervened in order to file an action against one of the parties praying for a declaration of the rights of the Crown in the matter and seeking an injunction against them to protect Crown property.

consent to use his name to take their case against the perpetrator of a public wrong of some kind. The Attorney thus acted as a jurisdictional filtering mechanism, and one which the courts were firmly unwilling to interfere with. In a 'classic and often cited judgment'[104], Lord Halsbury LC described the Attorney's role in the following terms:

> If there is excess of power claimed by a particular public body, and it is a matter that concerns the public, it seems to me that it is for the Attorney-General and not for the Courts to determine whether he ought to initiate litigation in that respect or not… [Furthermore,] the initiation of the litigation, and the determination of the question whether it is a proper case for the Attorney-General to proceed in, is a matter entirely beyond the jurisdiction of this or any other Court. It is a question which the law of this country has made to reside exclusively in the Attorney-General[105].

The courts were unwilling to entertain motions from the Attorney General, however, where the public rights he sought to have enforced were not 'rights of the community in general' but 'rights of a limited portion of His Majesty's subjects'[106]. If an Attorney did commence litigation of the former variety, moreover, the judiciary was tenacious as regards its jurisdiction to determine the outcome. That is to say, it was 'for the Attorney-General to determine whether he should commence litigation, but it [was] for the Court to determine what the result of that litigation [would] be'[107]. As such, it was not uncommon for courts to refuse relief sought at the instance of the Attorney General and thus take a

[104] J. Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (1964) at 288.
[105] *London County Council v Attorney General and Others* [1902] AC 165, 168-169.
[106] *Attorney General (on the Relation of the Spalding Union Rural District Council) and the Spalding Rural District Council v Garner and Another* [1907] 2 KB 480, 486.
[107] *Attorney General v Birmingham, Tame and Rea District Drainage Board* [1910] 1 Ch 48, 61.

different view as to the legal position supported by the UK government's most senior legal official of the day[108].

In terms of which litigants the Attorney General was willing to support in relator actions during the relevant timeframe, it is clear from the reports that his fiat was granted not only to a considerable number of private individuals and groups, but also that it was given to a very broad and numerous range of administrative authorities. An example of the first instance is the *Manchester Corporation* case wherein the Attorney General successfully argued on the relation of a group of Manchester ratepayers that the Manchester Corporation had no power to spend the ratepayers' money by carrying on a goods and parcels service beyond the tramways on which the Corporation had been empowered to do so[109]. A second example of this sort is the *Mersey Railway Company* decision, which enabled the Corporation of Birkenhead (consisting of shareholders in the Mersey Railway Company) to injunct Mersey Railway at the instance of the Attorney General for carrying on business as omnibus proprietors without any express legal power to do so[110]. On the other hand, in so far as relator actions taken at the request of administrative authorities is concerned, a good example is the *Copeland* case wherein an injunction against the owner of private land who had obstructed a pipe maintained by the highway authority for Bromley Rural District Council was sought by the latter by way of a relator action[111]. Indeed it is perhaps of some significance that the courts had become so accustomed to hearing the complaints of public authorities about the infringement of public rights by way of the relator system that they in fact took issue with attempts by such authorities to sue in their own right. Thus, in *Tozer*, the Court of Appeal held that

> where there is a public wrong, and where the local authority who have certain special rights to sue in

---

[108] For an interesting example, where an interlocutory injunction which had been granted was dissolved after consideration by a differently constituted Court of Appeal, see: *Attorney General (on the Relation of the Monmouthshire County Council and the Same Council v Scott* [1905] 2 KB 160.

[109] *Attorney General v Manchester Corporatio*n [1906] 1 Ch 643.

[110] *Attorney General v Mersey Railway Company* [1906] 1 Ch 811.

[111] *Attorney General and Bromley Rural District Council v Copeland* [1901] 2 KB 101.

> their own name for certain special remedies, but have not done so, and are trying to put in suit a public wrong, they must do it in the recognised way, namely, at the suit of the Attorney-General[112].

The locus standi of administrative authorities to seek injunctions for the protection of public rights by way of judicial review was therefore subject to the same theoretical restrictions as ordinary citizens. Certain administrative organs of the state did, however, benefit from being ruled beyond the jurisdictional reach of injunctive relief. Parliament, in recognition of its sovereignty, was one such organ and, as such, an action would 'not lie against the Serjeant-at-Arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House directing him to do so; nor [would any] Court grant an injunction to restrain that officer from using necessary force to carry out the order of the House'[113]. Moreover, as with the prerogative writs, while crown agents could be subject to injunctions the Crown itself could not[114]. Indeed, the *general* 'immunity of public servants for acts done by their official subordinates unless a special mandate, or an adoption of the act purporting to be done on their behalf, is proved' was confirmed during the relevant timeframe[115].

4.4 Declaration

Uncoercive declaratory judgments were remedial latecomers to the UK court system. They seem to have their origins in the Court of Chancery, which would entertain claims for equitable relief through a procedure known as the petition of right[116]. This involved a petition by the ordinary citizen to the Crown, normally via the Attorney General, which the Crown then voluntarily (and, it would seem, invariably) referred to a court of

---

[112] *Devonport Corporation v Tozer* [1903] 1 Ch 759, 762. See also: *Tottenham Urban District Council v Williamson and Sons Ltd* [1896] 2 QB 353.
[113] *Bradlaugh v Gossett* (1884) 12 QBD 217.
[114] *Raleigh v Goschen* [1898] 1 Ch 73. Note that the reasoning of Romer J in this case would later be relied upon heavily by Lord Woolf in his seminal judgment on crown liability in *M v Home Office* [1994] AC 377.
[115] *Bainbridge and Another v Postmaster-General and Another* [1906] 1 KB 178.
[116] J. Evans cit. at 12, 476-478.

law for determination[117]. It was in this important respect that declaratory remedies differed from the prerogative writs and injunctions: they were obtainable against the Crown[118]. A declaratory judgment was simply a statement of the law, with no accompanying form of coercive sanction against the impugned party. It appears, however, that for most of the nineteenth century UK judges were loath to grant purely declaratory judgments 'without doing or directing anything else relating to the right'[119]. By the relevant timeframe, the substantive and procedural availability of purely declaratory judgments had changed quite significantly, but judicial resistance to their use had persisted. Thus, after the amalgamation of the courts of common law and equity in the 1870s had transferred jurisdiction to award declaratory relief to all divisions of the High Court, that statutory power was interpreted so restrictively by the courts that it was essentially robbed of any practical effect[120]. Even after the Rule Committee for the High Court explicitly amended court rules to rectify this position – stating that no actions or proceedings would be open to objection simply because a purely declaratory judgment was sought[121] – the judiciary repeatedly maintained that its jurisdiction should be exercised with 'great care and jealousy'[122] and 'extreme caution'[123]. Moreover, it appears that the remedy could only be sought by an individual without joining the Attorney General, as with injunctions, where the *Boyce* criteria discussed above were satisfied (though this does not seem to have been confirmed authoritatively until 1942)[124].

By the tail end of the relevant timeframe, however, the judiciary was gearing up for a decisive change in its approach to declaratory judgments. The Liberal Party government of the day secured the passage of a Finance Act in 1910 which empowered the Commissioners of Inland Revenue to demand certain

---

[117] W. Wade and C. Forsyth cit. at 8, 696-697.
[118] Like injunctions, however, declarations were not available in respect of parliamentary decisions: *Bradlaugh v Gossett* (1884) 12 QBD 217.
[119] *Clough v Ratcliffe* (1847) 63 ER 1016, 1023.
[120] See, for example: *Hampton v Holman* (1877) 5 Ch D 183, 187.
[121] RSC 1883, Order 25, r 5.
[122] *Austin v Collins* (1886) 54 LT 903, 905.
[123] *Faber v Gosworth Urban District Council* (1903) 88 LT 549, 550.
[124] *London Passenger Transport Board v Moscrop* [1942] AC 332, 345.

information from landowners and to penalise subjects who failed to comply with their demands. The Act did not contain any provisions empowering the Commissioners to require a statement from owner-occupiers that would reveal the annual value of their land. Nonetheless, a requirement of this kind was included in a notice delivered to a considerable number of UK subjects by the Commissioners. Unhappy with this ostensibly unlawful demand, a plaintiff by the name of *Dyson* commenced an action against the Attorney General as representing the Crown in September 1910 claiming, inter alia, a declaration that he was under no obligation to comply with the notice[125]. In the following year, the Court of Appeal affirmed the High Court's jurisdiction to judge the matter in spite of arguments from the Attorney General to the effect that such a claim was inappropriate because, he submitted, the proper procedure was to present a defence against any penalty imposed by prosecution and, in addition, that to allow the claim would open the floodgates to 'innumerable actions for declarations as to the meaning of numerous Acts, adding greatly to the labours of the law officers'[126]. The High Court subsequently ruled in favour of *Dyson*[127]. Hailed as 'turning-point'[128] and a 'breakthrough'[129], the Court of Appeal's judgment marked a new beginning for the declaratory judgment after it had endured many years of dubious utility. The importance of the judgment was threefold: it enabled citizens to initiate actions for judicial relief in the absence of a cause of action; it obviated recourse to the puzzling technicalities involved in seeking certiorari, and it provided access to justice where no other means of judicially reviewing administrative authorities was possible[130].

4.5 Summary

The main remedies which operated as gateways to judicial review of administrative actions during the relevant timeframe arguably lacked collective coherence on account of their disparate historical ancestries. As the Law Commission would point out in

[125] *Dyson v Attorney General* [1911] 1 KB 410.
[126] *Dyson v Attorney General* [1911] 1 KB 410, 413.
[127] *Dyson v Attorney General* [1912] 1 Ch 158.
[128] J. Evans cit. at 12, 479.
[129] P. Craig cit. at 22, 805.
[130] S. Anderson cit. at 15, 505.

later years, the scope and procedural particularities of one remedy may have suited one case except in one respect; but another remedy which was not deficient in that respect may well have been unsatisfactory from other points of view; and, adding to these difficulties, an applicant may not have been able to apply for both remedies in one proceeding[131]. Thus, for example, an applicant seeking a prohibition or certiorari would have had to establish that the authority they sought to challenge was acting judicially, or at least quasi-judicially, whereas no such interpretative restriction on the availability of review would arise on an application for a mandamus, injunction or declaration. Likewise, if an applicant wanted to apply for a prohibition to stop some continuing unlawful conduct (other than in cases where want of jurisdiction was patent); a certiorari to quash an unlawful decision, or a mandamus to compel the performance of a public duty, they would have had to satisfy the theoretically restrictive standing requirements calling for a personal interest in the matter to be shown. If, on the other hand, they had sought an injunction or a declaration at the relation of the Attorney General, those arguments could have been avoided. That being said, the *Boyce* tests for standing which centred on an applicant's private right or special damage would have had to be fulfilled if they were refused by the Attorney General. The significance of these hurdles is highlighted by the fact that, if granted, certiorari would quash (i.e. nullify) an impugned decision, whereas if a declaration was given no such effect could be ensured. Thus cases really were lost and won due to the selection of inappropriate remedies[132], which meant prospective applicants had to exercise great care in considering the level of coercion in respect of an administrative authority they wanted to seek by way of judicial review. At the low end of the spectrum, a declaration would clarify an applicant's rights while allowing the authority plenty of scope for deciding how to comply with a court's ruling[133]. Certiorari, too, while nullifying a decision, would normally allow a decision maker freedom to reconsider the matter[134]. Prohibition or a

[131] *Report on Remedies in Administrative Law* (Law Commission No 73, 1976) 15.
[132] S. De Smith cit. at 43, 190.
[133] A. Le Seur, *Justifying Judicial Caution: Jurisdiction, Justiciability and Policy*, in B. Hadfield (ed.), *Judicial Review: A Thematic Approach* (1995) at 232.
[134] ibid.

prohibitory injunction would be more intrusive, preventing the authority from doing something[135]. Mandamus and mandatory injunctions were of course the most coercive: requiring specific action to be done[136]. It is nonetheless important to note that the theoretical rules of justiciability, standing and amenability laid down in some of the cases explored above were subject to the interpretative inclinations and fidelity to precedent of judges in other cases. Given that, overall, the law reports from this timeframe do not display broad consistency in many respects, generalisations of any greater specificity than those set out above would therefore be misleading.

5. The Types of Judicial Review

Due to the conceptual complexity and confusion which surrounds the second perspective through which reported court decisions are analysed in this paper, namely by way of a general overview of the types of judicial review which existed during the relevant timeframe, the following account is, out of necessity, less exhaustive than the foregoing study of remedies. Much of the difficulty in discussing different types of judicial review in the UK in fact stems from the same soil as the collective incoherence of the remedies system, in so far as the historical development of judicial supervision over administrative authorities has been marked by an inherent sense of 'hesitation and self-restraint' borne from the 'rather devious way' in which a series of devices were turned to serve different purposes from their original ones over time[137]. It appears to be largely for this reason that most historical judgments neither clearly label the grounds on which judicial review was conducted nor use perspicuous language to describe the kind of intensity with which a particular sort of administrative act was evaluated. Quite to the contrary, there was and to some extent still is a confusing tendency of both judges and commentators from the English tradition to couch all instances of judicial intervention within the paradigm of ultra vires theory[138]. This tendency is of course closely connected to fundamental debates about the

[135] ibid.
[136] ibid.
[137] S. Galeotti cit. at 9, 187.
[138] S. Galeotti cit. at 9, 188.

legitimacy of judicial power over administrative authorities in the UK[139], but for present purposes it is important only to note by way of background information on the tripartite classification of judicial review used below. In other words, to distinguish between judicial review of 'jurisdiction', 'discretion' and 'procedure' is only one of numerous possible taxonomies; one which has been adopted mainly for the purpose of digestible exposition. The extent to which these categories can be said to have contemporaneously constituted distinct 'heads' or 'grounds' of judicial review is a question deliberately left open on account of the ambiguity of the historical data available[140].

5.1 Review of Jurisdiction

The concept of jurisdiction simply refers to the authority of a particular decision-maker to decide something[141]. While some jurists prefer to separate talk of *jurisdiction* in respect of judicial actions from talk of *vires* in respect of administrative and subordinate legislative actions, each term refers to the same general idea[142]. By the relevant timeframe, UK courts had developed an important distinction between jurisdictional and non-jurisdictional errors of law and fact[143]. The key difference between them was that jurisdictional errors were essentially unreviewable (unless there was an error of law on the face of the record). In other words, if a matter was decided within the jurisdiction of a particular authority, be it judicial or administrative, it was unamenable to judicial review by the High Court in all but exceptional circumstances. If, per contra, a non-jurisdictional error could be established it would provide an avenue for judicial intervention. The whole theory worked from

---

139 For an unparalleled introduction to this provocative debate, see: C. Forsyth (ed.), *Judicial Review and the Constitution* (2000).

140 For a penetrating thesis about how such foundational legal constructs develop, see: P. Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (2015) at 13-24.

141 J. Evans cit. at 12, 110.

142 J. Evans cit. at 12, 106.

143 For fuller accounts and illustrations of the complex jurisdictional debates outlined in this section, see: J. Evans cit. at 12, ch 3; P. Craig cit. at 22, chs 16-17; W. Wade and C. Forsyth cit. at 8, ch 8; M. Elliott and J. Varuhas, *Administrative Law: Text and Materials*, 5th ed. (2017) ch 2.

the assumption that administrative authorities were only ever given power subject to certain conditions. Typically, these conditions would include a requirement to determine whether the statute which conferred power upon the authority permitted it to proceed in the way it proposed to act. Jurists from the relevant timeframe were divided, however, over how to decide whether an authority had decided such preliminary questions in error. One camp argued that the determining factor was the nature of the facts which fell to be determined by way of an inquiry preliminary to the merits of the decision, rather than the truth or falsity of those facts. They also argued that if an authority asked itself the correct preliminary questions at the commencement of an inquiry then its decisions were conclusively within jurisdiction and would therefore be unimpeachable by any court, regardless of whether the authority's decision on the merits was based on completely untenable legal principles or factual mistakes. The second camp differed from the first primarily by its preference for a broader interpretation of the preliminary questions and 'collateral facts' that related to questions of jurisdiction, which accordingly widened the scope of judicial review they viewed as legitimate.

Reports from the relevant timeframe reveal that different judges belonged to different camps, and it is difficult to discern whether either camp was significantly larger than the other for any sustained period of time (though the latter approach, which was more conducive to judicial review, would gain the support of a majority in later years). A strong example of a judgment exhibiting loyalty to the first camp is that of Buckley J sitting on the King's Bench in the *Livingstone* case[144]. The plaintiff was an officer of the Corporation of Westminster, which resolved to abolish his office while providing him with due compensation under powers conferred by the London Government Act 1899. One of the preliminary questions to be determined by the Council was the value of Mr Livingstone's salary and emoluments, so that his compensation could be calculated accordingly. The Council initially granted the amount of compensation Mr Livingstone claimed he was entitled to, but after an audit disallowing part of the compensatory sum on the ground that it did not correctly

[144] *Livingstone v The Mayor, Aldermen and Councillors of the City of Westminster* [1904] 2 KB 109.

reflect his emoluments, the Council rescinded their initial grant and reduced the plaintiff's allowance. When the plaintiff sought to judicially review this decision, Buckley J determined that because the Council had asked itself the correct preliminary question, namely 'what was the amount of the salary and emoluments of the office abolished?', its substantive decision about the value of Mr Livingstone's compensation fell within the Council's jurisdiction[145]. As a result, Buckley J held that the court was 'not competent to review their decision'[146], subject only to the important moral proviso that the Council had acted 'fairly and honestly'[147]. He summarised this restrictive position memorably as follows:

> An analogy, although not a perfect one, may be found in cases where the jurisdiction of a magistrate arises only if a particular fact be found to exist – say, for instance, jurisdiction under the game laws. The magistrate may convict if the bird be a partridge, but not if it be a thrush. It is for the magistrate to decide whether it was a partridge or not. If jurisdiction arises if an offence charged be true in fact, it is for the person whose jurisdiction is invoked to determine the fact[148].

A telling case involving judges exhibiting loyalty to the approach of the second, less restrictive, camp of jurisdiction theorists is that of Channell, Bray and Sutton JJ in the *Bradford* case[149]. A surveyor of the Newton Abbot Rural District Council had been authorised by the justices of the Newton Abbot petty sessional division to take materials from a five acre plot of land. The Highway Act 1835 under which this authorisation had been made provided that the justices could authorise highway

---

[145] *Livingstone v The Mayor, Aldermen and Councillors of the City of Westminster* [1904] 2 KB 109, 118.
[146] ibid.
[147] *Livingstone v The Mayor, Aldermen and Councillors of the City of Westminster* [1904] 2 KB 109, 119.
[148] *Livingstone v The Mayor, Aldermen and Councillors of the City of Westminster* [1904] 2 KB 109, 118-119.
[149] *R v Bradford* [1908] 1 KB 365.

surveyors to gather materials and so on as required for the purpose of repairing the highways, so long as such lands were not gardens, yards, avenues, lawns, parks, paddocks or enclosed plantations. The authorisation at the heart of the *Bradford* case permitted a surveyor to take materials from a place known as Grange Quarry, which formed part of a permanent pasture field containing 'fruit and other ornamental trees'[150]. The resident of this land, Mrs Hare, sought certiorari to quash the justices' decision because, among other things, it was made in respect of land which was a park. The justices had determined that the land was not a park and, moreover, submitted that whether particular land is a park or not was 'a question of fact which [had to be] finally decided by some tribunal or other, and it was probably intended by the Act that the local justices, who presumably would be well acquainted with the spot, should be that tribunal, rather than another Court which was not so acquainted'[151]. However Channel J was wholly unpersuaded by their submission, holding that:

> …the question whether a place is a park or not is a matter which is preliminary to the exercise of the justices' jurisdiction, and one which it is not for the justices to finally determine. And if the place is a park in fact, they cannot give themselves jurisdiction by finding that it is not a park. That being so, the question remains whether the land in which the quarry is situated is in fact a park or not, and from the physical description that has been given of it I think we are bound to come to the conclusion that it is a park[152].

The facts of the *Bradford* case clearly illustrate how it would not be possible for an authority to activate its own jurisdiction by way of a factual error when reviewed by judges belonging to the second camp of jurisdiction theorists. The concept of jurisdiction thus seems to have enabled a results-based procedure at times;

[150] *R v Bradford* [1908] 1 KB 365, 366.
[151] *R v Bradford* [1908] 1 KB 365, 367-368.
[152] *R v Bradford* [1908] 1 KB 365, 372.

whereby a judge of the High Court could choose to intervene in a particular case by determining that an issue was non-jurisdictional, or decline to intervene by defining an issue as jurisdictional. The uncertainty this must have caused UK subjects does much to discredit those courts with hindsight, though they were perhaps doing their best to strike a conceptual balance between judicial control and administrative autonomy within the confines of a complex jurisprudential heritage[153]. Moreover, it is quite possible that many judges believed they were drawing genuine analytical divisions rather than devising instrumental constructs[154].

5.2 Review of Discretion

The concept of discretion in UK law has historically been used to refer to the power of an administrative authority to choose between different options while subject to certain judicially enforceable common law constraints. Like most other aspects of UK law during the relevant timeframe, these constraints were neither fixed nor particularly systematic. Nonetheless, it is possible to identify tentatively at least five kinds of common law constraint on the exercise of administrative discretion from the reports which, although they overlap to some degree, might be expressed in modern parlance as follows: a presumption against delegation; a presumption against fettering; a rule against improper purposes; a requirement of relevancy; and a requirement of reasonableness and (in a rather loose sense) proportionality.

Each constraint can be introduced by reference to illustrative judicial precedents. With respect to the presumption against delegation, the case of *High v Billings* is apposite[155]. The case concerned a delegation of power by the Hackney District Board of Works to one of its surveyors. The Board had authorised the surveyor to grant applications for house drainage, which he duly did. When, however, an application was granted to lay a drain under several properties, the owner of one of them objected to it as a nuisance and claimed that the Board had not properly

[153] P. Craig cit. at 140, 34-35.
[154] P. Craig cit. at 22, 472.
[155] *High v Billings* (1903) LT 550.

exercised its discretion. It was claimed that by delegating its discretion to the surveyor on a very general basis the Board had failed to consider each drainage pipe application on its own merits and thereby acted contrary to the common law presumption against delegation. Lord Alverstone CJ thus ruled that the Board could not 'delegate generally their jurisdiction without judgment upon the orders that ought to have been made'[156]. Simply stated, the presumption was that where legislation empowered a particular decision-maker to exercise discretion, the decision-maker was not normally permitted to pass that power to another.

The presumption against fettering was raised in the *Stepney* decision[157]. A Council for the Metropolitan Borough of Stepney had calculated compensation for an individual by the name of Mr Jutsom, whose vestry office had been abolished under powers conferred upon the Council by statute. The Council calculated Mr Jutsom's compensation in accordance with a regular practice of the Treasury when compensating redundant civil servants. The Treasury's practice in respect of individuals who did not devote their whole time to the duties of their office – as was the case in respect of Mr Jutsom, who had practiced as a solicitor in addition to his vestry office duties – was to deduct a quarter from the compensatory figure which would otherwise have been payable. Mr Jutsom sought a writ of mandamus from the King's Bench to compel the Council to exercise its discretion with reference to the particular facts of his case, rather than by the application of a rigid non-statutory rule. A mandamus was granted by the court because the Council had fettered its discretion in this way. Darling J worded his opinion in these unequivocal terms:

> I do not think that the council really did consider the matter at all for themselves…They acted upon what the Treasury told them was their practice. I do not think that they acted, therefore, upon any real judgment of their own. They borrowed a measure from the Treasury, and they tried to measure what they were to give as compensation with that,

[156] *High v Billings* (1903) LT 550, 552.
[157] *R v The Mayor, Aldermen and Councillors of Stepney* [1902] 1 KB 317.

> without applying their own judgment to what they were to give at all[158].

Denman furnishes a clear demonstration of the rule against improper purposes[159]. The Westminster Corporation had been empowered by statute to compulsorily purchase land for the purpose of widening streets. The Corporation purported to use this power in order to obtain property in a prime London location from the Denman company, with the intention of selling it to a syndicate of property developers. Buckley J was persuaded to grant injunctions restraining the Corporation from doing this, however, on the ground that it would not be exercising its statutory power for the purpose it was given[160].

The requirement of relevancy had two constraining common law dimensions: a requirement on legal decision-makers to take all relevant considerations into account when exercising their discretion, and a correlate requirement to leave all irrelevant considerations out of account. In a case about an individual by the name of Mr Robinson, for instance, the latter requirement to leave all irrelevant considerations out of account is apparent from the reasoning of the judges[161]. Thus, granting a liquor license to Mr Robinson with reference to the irrelevant fact that he normally superintended for twelve hours per day the premises which were being considered for licensing, taking his meals there and so on, was immaterial. The relevant statutory requirement was that he had to actually *reside* on the premises, which he did not. Lawrance and Channell JJ therefore agreed to quash the relevant authority's decision to grant a license in Mr Robinson's favour by certiorari and ordered by mandamus that his application be reheard (while cognisant that it remained likely to be refused)[162].

Finally, administrative discretion during the relevant timeframe was subject to a relatively novel standard of reasonableness and (in a rather loose sense) proportionality[163]. Its

---

158 *R v The Mayor, Aldermen and Councillors of Stepney* [1902] 1 KB 317, 323-324.
159 *J L Denman & Co Ltd v Westminster Corporation* [1906] 1 Ch 464.
160 *J L Denman & Co Ltd v Westminster Corporation* [1906] 1 Ch 464, 476.
161 *R v Justices of Manchester* [1899] 1 QB 571.
162 *R v Justices of Manchester* [1899] 1 QB 571, 574-576.
163 For useful information on the context of these cases, see S. Anderson cit. at 15, 512-521.

principal promulgators seem to have been Lord Halsbury LC, Lord Russell CJ and Lord Macnaughten in the three celebrated cases of *Sharp v Wakefield*, *Kruse v Johnson*, and *North Western Railway*. In the first case, Lord Halsbury LC said this:

> "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion … according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself[164].

In the second case, in respect of by-laws, Lord Russell CJ considered a number of authorities which informed his view that a court could intervene on grounds of unreasonableness if it could be shown that a by-law was 'manifestly unjust, capricious, inequitable, or partial in its operation'[165]. Moreover, in describing the limits of what was reasonable and therefore lawful in the exercise of the power to make by-laws, Lord Russell referred to 'such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men'[166] – a test in which, as Stephen Sedley has perceptively identified, 'it is not entirely fanciful to see the embryo of a doctrine of proportionality'[167]. In the third case, Lord Macnaughten confidently ruled that:

> It is well settled that a public body invested with statutory powers … must take care not to exceed or

[164] *Sharp v Wakefield* [1891] AC 173, 179.
[165] *Kruse v Johnson* [1898] 2 QB 91, 94-95.
[166] *Kruse v Johnson* [1898] 2 QB 91, 99-100.
[167] S. Sedley cit. at 4, 68. For a persuasive argument to the effect that the UK has had a concept akin to proportionality, though less structured than its continental counterparts, from the late sixteenth century onwards, see: P. Craig, *Proportionality and Judicial Review: A UK Historical Perspective*, in S. Vogenauer and S. Weatherill (eds.), *General Principles of Law, European and Comparative Perspectives* (2017).

> abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably[168].

Moreover, shortly after the relevant timeframe Lord Macnaughten invalidated a decision of the New South Wales Public Service Board regarding the value of a retirement gratuity on account of his contention that the Board's discretion had to be exercised 'reasonably, fairly, and justly'[169]. There can be no doubt, therefore, that some courts were willing to vigorously apply normative moral standards defined by the common law to the conduct of administrative authorities during the relevant timeframe, ostensibly undeterred by the fact those standards lacked any specific legislative basis.

5.3 Review of Procedure

The notion that adjudicative procedures should conform to a standard of 'natural justice' during the relevant timeframe was given effect in the UK primarily through the application of two important judicial principles: that parties to a judicial determination should be given adequate notice and a fair hearing (audi alteram partem) and that a judge should be disinterested and unbiased (nemo judex in causa sua).

At the beginning of the relevant timeframe, the right to a fair hearing with adequate notice was applied in the case of *Hopkins*, in which the Court of Appeal ruled that where a building had been erected contrary to the by-laws of the Smethwick Local Board of Health, the Board could not exercise its statutory power to demolish that building without giving the owner notice and an opportunity to be heard[170]. Likewise, a school master who was going to be dismissed by a board of vicars was able to have his dismissal provisionally injuncted because this 'elementary principle of justice' had been neglected[171]. Mr Fisher had not been informed of the charges against him or provided with an

---

[168] *Mayor of Westminster v London and North Western Railway Company* [1905] AC 426, 430.
[169] *Williams v Giddy* [1911] AC 381, 385.
[170] *Hopkins and Another v Smethwick Local Board of Health* (1890) 24 QBD 712, 715.
[171] *Fisher v Jackson* [1891] 2 Ch 84, 94.

opportunity of answering them[172]. At the end of the relevant timeframe, moreover, Lord Loreburn LC delivered a sweeping statement of the principle in the often cited *Board of Education v Rice* case which was briefly referred to earlier[173]. It was in this case that he said any official determining matters of law 'must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything'[174]. Significant though this judicial attitude to the reach of the principle was, it should be noted that it was heavily watered down a few years later in the case of *Arlidge*; wherein it was held inapplicable to statutory inquiries, which were a newly constituted form of administrative procedure[175]. Some commentators credit the creeping in of Diceyan influence by this time for the increase in judicial deference which the change in *Arlidge* came to represent[176].

The principle that no man should be a judge in his own cause arose in judicial review cases of two main sorts, which reflect the modern-day framework for understanding it to a fair extent[177]. The first sort of case would typically concern a decision-maker who could be shown to have a pecuniary interest in the outcome of decision. The case of *Gaisford* is a good example[178]. Mr Gaisford, who was both a magistrate and a ratepayer in the relevant parish, suggested in his capacity as a ratepayer at a parish meeting about highway matters that legal proceedings should be taken against the applicant in respect of materials the latter had deposited on a highway. After a summons was issued to the applicant, he attended a hearing where the very magistrate who had moved to initiate the proceedings against him, Mr Gaisford, was sitting on the court responsible for determining his case. The Queen's Bench therefore granted certiorari to quash the magistrate's order for the applicant's deposited materials to be removed and sold, because it was

---

172 ibid.
173 *Board of Education v Rice* [1911] AC 179. The first instance decision is reported at [1909] 2 KB 1045, and the Court of Appeal decision at [1910] 2 KB 165.
174 *Board of Education v Rice* [1911] AC 179, 182.
175 *Local Government Board v Arlidge* [1915] AC 120.
176 G. Drewry cit. at 33, 18.
177 P. Craig cit. at 22, ch 14.
178 *R v Gaisford* [1892] 1 QB 381.

> well-known law that the same person shall not act both as accuser and judge; and also that a man shall not act as a judge in a case in the decision of which he has a pecuniary interest, unless relieved by statute; the fact that a man has even the slightest pecuniary interest operates to disqualify him from adjudicating upon a case[179].

The second sort of case would generally involve a decision-maker who could be shown to have some other bias or predilection towards the outcome of their decision as a result of institutional affiliations. The test applied in such cases was whether the circumstances gave rise to a 'real likelihood of bias'[180]. The Court of Appeal held that this test was satisfied in the *Justices of Sunderland* case, for example. The justices involved were also members of a borough council; a council which had agreed, in essence, to orchestrate the transfer of a liquor license in force in respect of a hotel it owned. The justices, having participated in this agreement, had subsequently heard and granted a licensing application made by the very company which had agreed to pay the council a sum of money if its liquor license was successfully transferred. Having considered 'whether, under the circumstances, there was a real likelihood that these justices, by reason of the part which they took in the negotiations for the agreement, would have a bias in favour of the application for a license', the King's Bench concluded that there was indeed such a likelihood and therefore quashed it by issuing a writ of certiorari[181].

5.4 Summary

The foregoing analysis makes it quite plain that the types of review which an applicant could seek to have applied to administrative decisions during the relevant timeframe were judicial creations. It is equally clear that they were conceptually limited to neither legislative intent nor private interests, given that they also included certain rules grounded in abstract notions of

[179] *R v Gaisford* [1892] 1 QB 381, 384.
[180] *R v Justices of Sunderland* [1901] 2 KB 357, 364.
[181] *R v Justices of Sunderland* [1901] 2 KB 357, 372.

justice. This much underlines the point that courts have historically played a very significant role in the development of substantive administrative law in the UK. Were it not for a certain level of judicial audacity and moral leadership, as is evidenced in some of the reports discussed above, it is entirely possible that administrative power in the UK might have been exercised in pursuance of rather different conceptual goals.

6. The Frequency of Judicial Review

It was possible in the course of the research underpinning this report to undertake some quantitative analysis on the frequency of administrative law cases heard by UK courts during the relevant timeframe. This quantitative analysis was, however, necessarily crude in nature and must be heavily caveated due to the following significant methodological limitations.

First, annual figures were aggregated from six series of law reports which were identified as being likely to contain relevant reports over the period of time under study. In the absence of an 'official' series of law reports in the UK, the most authoritative privately published reports available were examined[182]. It is possible that certain cases were reported by more than one of these publishers[183], but due to limited time and resources it was not possible to sift out any redundant results of this kind. It is also possible that cases are omitted which did not feature in any of these particular series and, indeed, cases which were not reported anywhere at all. Paul Craig has noted in a different context that such omissions might exist because it may have been felt at the time that a case raised no novel points of law and failed to qualify for reporting as a result, despite being important for the present purpose of accurately depicting the incidence of judicial review[184].

[182] Namely four series of the Law Reports by the Incorporated Council of Law Reporting for England and Wales (the Appeal Cases series, the King's/Queen's Bench Division series, the Chancery Division series, and the Probate/Family series), together with the All England Law Reports Reprint series and the All England Law Reports Reprint Extension series.

[183] The risk of duplication is happily limited in this context to that which might exist between the four series by the Incorporated Council of Law Reporting for England and Wales, and the two series published by the All England Law Reports.

[184] P. Craig cit. at 140, 28.

Second, the historic law reports discussed above do not themselves attempt to distinguish between administrative and non-administrative law cases. Given that the overall number of cases reported therein between 1890 and 1910 is in the tens of thousands, it was again impractical to conduct a manual sifting exercise. It was therefore necessary to develop several batches of search terms with the aim of returning search results from within the relevant law reports which would exclude non-administrative law cases. A broad, potentially over-inclusive batch of search terms ('Batch A') was refined in several iterations by removing search terms which seemed – on the basis of some necessarily cursory checks – to skew the results by returning predominantly non-administrative law cases. A narrow, potentially under-inclusive batch of search terms ('Batch B') was refined using the same technique. Batch A was broad in the sense that it included, for instance, the names of various bodies which would have been subject to administrative law at the time[185]. It thus included terms likely to return figures for collateral challenges to administrative authorities, although this inevitably increased the risk of some anomalous results[186]. Batch B was narrow in the sense that it was restricted, for the most part, to the names of administrative law remedies and the grounds for judicial review recognised at the time[187].

As expected, Batch A returned a much larger set of results than Batch B. Also as expected, it was clear that Batch A contained a number of anomalous results and could only be taken to reflect a rather inflated depiction of the incidence of administrative law cases. Likewise, Batch B seemed to reflect a deflated depiction. In the absence of sufficient time and resources to manually sift the results at this third stage of the quantitative research methodology, it was decided that the most practical solution was to take an average of the number of results returned by both batches of search terms and to rely on that number as the *best possible estimate* of administrative law cases reported each year. The word *estimate* in this phrase makes it clear that the quantitative analysis which follows is based on imperfect

[185] For example: commissioners, inspectors, tribunals, boards, inquiries, corporations, and so on.

[186] On collateral challenges, see: P. Craig cit. at 140, 27-28.

[187] For example: certiorari, mandamus, prohibition, natural justice, and so on.

calculations, while the words *best possible* are indicative of the relatively thorough yet time- and resource-limited methodology that lies behind the numbers involved in the calculations.

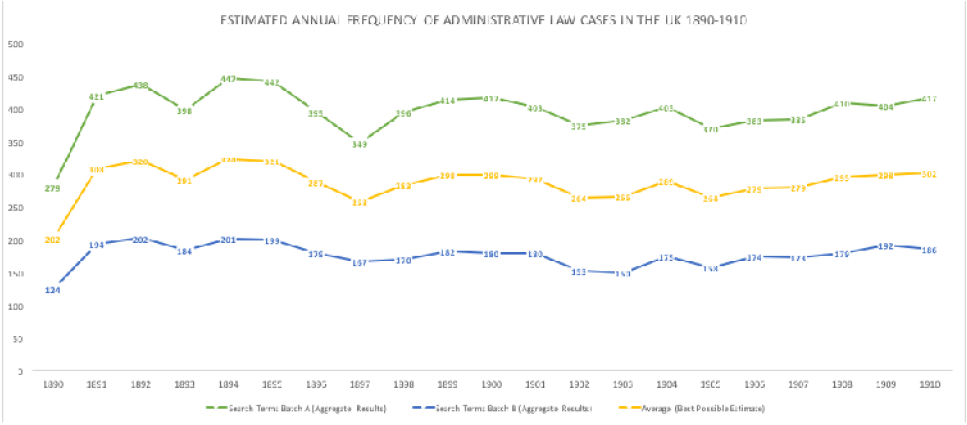


Figure 1

The above graph (*Figure 1*) summarises the findings of this quantitative enquiry. The aggregate search results – that is, the sum of the number of search results returned for each of the six series of law reports identified above – are shown for Batch A in *green* and Batch B in *blue*. The average of these results is represented by the *yellow* line on the graph. *Figure 1* illustrates that although the volume of results returned for each batch of search terms varied considerably, the same general trends in frequency are clearly discernible (which is only partially due to overlaps in the relevant search terms). This reinforces the reliability of the average results to some extent, and the brief commentary below focuses on them accordingly. For ease of reference, the average results – representing the best possible estimate of the annual frequency of administrative law cases in the UK between 1890 and 1910 – are isolated in a graph of their own (*Figure* 2) below:

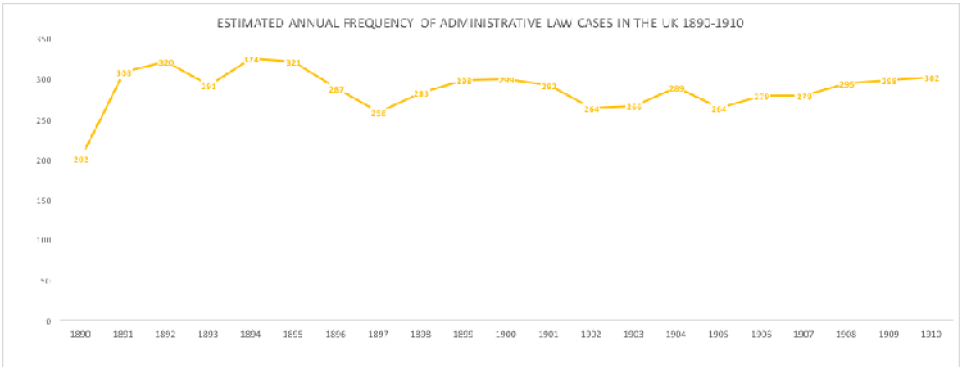


Figure 2

The most striking feature of this data is its demonstration of the generally stable incidence of administrative law cases throughout most of the 20-year period studied. Apart from the fairly significant initial jump in case numbers between 1890 and 1891, the graph does not tell a story of gradually increasing frequency in administrative law cases but rather one of relative stability.

A related point of interest arises from the data, namely its comparative similarity to modern-day data on the frequency of administrative law cases in the UK. When drawing a comparison between this historical time period and the present day, however, certain contextual factors should be borne in mind. Foremost among these factors is the considerable growth in population numbers that has taken place within the UK, which may reasonably account for a relative increase in administrative law case numbers[188]. Moreover, modern figures should be screened so as to remove the number of applications for leave to apply for judicial review, given that historical figures relating to the UK landscape prior to 1933 deal solely with the law reports available for substantive judicial review hearings (which were subject to a very different procedure that placed the onus on respondents to show cause as to why a provisionally granted remedy should not be made final)[189]. The requirement of leave to apply for judicial review which was introduced in 1933[190] has resulted in much

[188] P. Craig cit. at 140, 28.
[189] A. Le Seur and M. Sunkin, *Applications for Judicial Review: The Requirement for Leave*, Public Law 102 (1992).
[190] Administration of Justice (Miscellaneous Provisions) Act 1933.

fewer substantive hearings of the sort represented in the graph above. For example, while in 2011 there was over 11,000 applications for leave (or 'permission' as it now called in England and Wales[191]) to apply for judicial review, only about 1,200 of those cases were granted permission to proceed to a substantive hearing; of which fewer than 400 actually reached the hearing stage on account of out-of-court settlements[192]. Taking these factors properly into account, the overall average of 286 administrative law cases per year illustrated by this graph at the very least corroborates Paul Craig's claim that it is not 'self-evident' that judicial review was less used in the past than it is now[193]. Indeed, the numbers appear to be markedly similar.

One final observation remains to be made, based on a quantitative analysis of the law reports adverted to above using a separate and distinct set of search terms. This set of search terms was devised specifically in order to discover the extent to which Dicey and his controversial legal scholarship on constitutional law was referred to by UK courts between 1890 and 1910. A graph is not necessary to illustrate the frequency of results on an annual basis as the overall number of results is so limited, totalling a 20-year aggregate of 91. The vast majority of these results, moreover, were of two anomalous types. First, many of the results returned concerned references by the courts to Dicey's book on private international law[194]. The courts certainly treated this work with respect, commenting for example that a particular matter of construction appeared 'to be well summed up in Mr. Dicey's work on Conflict of Laws'[195], but never with the level of deferential favour which his earlier constitutional law scholarship would later attract among judges down the decades. Second, a fairly large proportion of results concerned Dicey's personal appearance in cases as senior counsel[196]. As was the case in respect of his private

[191] Civil Procedure Rules, Pt 54.4.
[192] H. Woolf and others (eds.) cit. at 23, 29.
[193] P. Craig cit. at 140, 28.
[194] A. Dicey, *A Digest of the Law of England with reference to the Conflict of Laws* (1896); A. Dicey, *A Digest of the Law of England with reference to the Conflict of Laws*, 2nd ed. (1908).
[195] *Harding v Commissioners of Stamps for Queensland* [1898] AC 769, 774.
[196] Dicey did not appear as junior counsel in any cases within this date range given that he took silk at the very beginning of 1890.

international law scholarship, the weight of Dicey's representations as senior counsel do not appear to have attracted particular preferment from the judiciary of this era. In the charitable tax allowance case of *Pemsel*, for example, among Dicey's (jointly prepared) submissions was the procedural contention that mandamus ought not to lie against the respondents as Crown servants; his argument being that the proper remedy lay by way of petition of right[197]. Lord Herschell dismissed that argument, however, on the basis that mandamus was not sought in order to compel the payment of money to which the applicant was allegedly entitled, which would be recoverable by petition of right, but to compel the issuance of an allowance and certificate which was needed in order to maintain a petition of right[198].

Perhaps most notably, Dicey's revered work on the constitution[199] appears to have been cited and expressly considered only once during this time period. In the case of *Wise v Dunning*[200], which determined that jurisdiction existed to bind over a public speaker who indirectly incited breaches of the peace, counsel for the appellant drew the court's attention to Dicey's constitutional law book in an attempt to further the argument that no jurisdiction existed in the circumstances of the case[201]. Although Dicey did indeed claim that there was inconsistency between certain judicial authorities, Lord Alverstone CJ ruled that having 'closely examined' them for himself he was unable to agree with Dicey's opinion (though his ruling was prefaced by generally respectful and complimentary language about the 'very learned lawyer and writer')[202]. This singular and ultimately discredited reference, together with the largely anomalous references discussed above, suggests that during the relevant timeframe the development of judicial standards of administrative law in the UK – quite apart from other areas such as private international law –

---

[197] *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 536.
[198] *Commissioners for Special Purposes of the Income Tax v Pemsel* [1891] AC 531, 569.
[199] A. Dicey cit. at 34.
[200] *Wise v Dunning* [1902] 1 KB 167.
[201] *Wise v Dunning* [1902] 1 KB 167, 172.
[202] *Wise v Dunning* [1902] 1 KB 167, 174.

was in fact very infrequently, it at all, explicitly influenced by Diceyan jurisprudence.

7. Conclusion

While an attempt to recapitulate the full findings of this report in any detail would be lengthy and repetitious, it is worthwhile to note some general observations which emerge from its coverage of the context, reach, types and frequency of judicial review between 1890 and 1910. The first of these observations is that whereas the remedies for judicial review were clearly characterised by bespoke rules and procedures that made them relatively distinct and intelligible, the types of review that could be argued in UK courts were rather hazily defined and applied; sometimes with reference to a specific doctrine, at other times under the broad rhetoric of ultra vires theory. In addition, the tendency of courts to formulate jurisprudential constructs which enabled them to decide cases according to their own preferences rather than with reference to clear principles is discernible in a number of areas. The judicial choice involved in determining whether a matter was administrative or judicial for the purposes of granting access to the writs of prohibition and certiorari highlights this point as much as the judicial choice involved in deciding whether to classify matters as either jurisdictional or non-jurisdictional. The apparent lack of structure, certainty and consistency engendered by these constructs, however, does not mean that there was no body of substantive law at all that could be properly termed administrative. The law reports are replete with examples of judicial attempts to define and refine general principles of law, in some instances more indeterminate than others, for the purposes of both facilitating and controlling administrative authorities. In this regard, the law reports manifestly confirm the historically 'Janus-like' nature of judicial review in the UK[203]. In other words, they do not support the idea that judges were committed to *restraining* administrative actions with reference to independently formed moral precepts and nothing else. Although it is true that this was undoubtedly their motivation at times (which the cases on unreasonableness and

[203] P. Craig cit. at 140, 62-65.

natural justice amply demonstrate), judicial constructs were also devised and modified in order to *effectuate* the administrative arrangements contested before them. The rule against improper purposes well exemplifies this point. Legal theories centred on Diceyan foundations (and indeed other unitary schools of thought) which fail to acknowledge this duality of purpose should be treated with caution. The empirical evidence provided by historical law reports, disorganised and heterogeneous though it may be, is a heavy counterweight to many of their claims.

THE EU SOCIAL INTEGRATION CLAUSE IN A LEGAL PERSPECTIVE

*Maria Eugenia Bartoloni**

Abstract

This contribution aims at analyzing how the "EU social integration clause", encapsulated in Article 9 TFEU, works in infusing social values into other policies. Even at first reading, it is apparent that it is not a new competence but rather an attempt at regrouping and coordinating the exercise of a number of other autonomous policies, which therefore maintain their own nature and scope. The fact remains that, while the EU must take into account social objectives in the conduct of the other policies, it is more doubtful that it could adopt normative acts inspired by purely social aims, not adequately supported by the specific aims assigned by the ad hoc legal basis. In particular, this paper intends to assesses the interaction between economic objectives and social aims enshrined in the pertinent normative acts. This purpose is fulfilled by using twofold criteria: first of all, the test balance used by the EU legislator; second, the one used by the ECJ. The outcome of this dual examination should permit to better define the nature and the scope of the social clause.

TABLE OF CONTENTS

* Associate Professor of EU Law, University of Campania "Vanvitelli"

1. Introduction

As a significant step forward regarding the organization of interests in previous versions of the Treaties, the Lisbon Treaty provides a fresh new emphasis on social needs. The most significant changes though lie not so much in the sphere of the EU's regulatory powers which, as will be seen below, remain almost unchanged[1] within the social sector more generally as in the different approach in which social values are recognized and expressed in the broader context of the objectives and priorities that shape the EU[2].

A glance at the opening provisions of the Treaty on European Union (TEU) shows that the values and goals that traditionally belong to the EU, and which lie at the heart of the integration process, are pervaded by an unprecedented social dimension, which was largely absent from the previous text of the Treaty of European Community (TEC). The increasing weight given to social values and objectives becomes readily apparent when the pre-existing version is compared with the current Arts 2 and 3 of the TEU, and is even more marked in comparison with the corresponding provisions relating to the sphere of market integration and to what could be called the hard core of the European economic constitution[3].

Art 2 introduces a strong social connotation into the fabric of EU values where it states that it is based – first and foremost – on the values of respect for human dignity, freedom, democracy, equality and protection of human rights, and where it also acknowledges the inclusion of pluralism, non-discrimination, tolerance, justice, solidarity and gender equality that are common

[1] See the last paragraph of the present contribution.

[2] M. Dawson & B. de Witte, *Welfare policy and social inclusion*, in A. Arnull & D. Chalmers (eds.), *The Oxford Handbook of European Union law*, 964-990 (2015); B. Cantillon, H. Verschueren & P. Ploscar (eds.), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (2012); M. Daly & P. Copeland, *Poverty and Social Policy in Europe 2020: Ungovernable and Ungoverned*, 42.3 Policy and Politics 351 (2014); E. Guild, S. Carrera & K. Eisele (eds.), *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU* (2013); U. Neergaard, R. Nielsen & L. Roseberry (eds.), *Integrating Welfare Functions into EU Law: From Rome to Lisbon* (2009); F. Pennings, *European Social Security Law* (5th edn, 2010); D. Schiek, U. Liebert & H. Schneider (eds.), *European Economic and Social Constitutionalism after the Treaty of Lisbon* (2011).

[3] A. Williams, *The Ethos of Europe. Values, Law and Justice in the EU*, 283 (2010).

to all Member States. Art 3, para 3, advances the EU's objectives with the formula – much debated for its ordoliberal origin[4], but clear in its principled political inspiration[5] – of 'a highly competitive social market economy, aiming at full employment and social progress', and that 'shall combat social exclusion and discrimination, and shall promote social justice and protection.'

At the same time, in the opening provisions of the new TEU, the reference to the 'open market economy with free competition', which strongly characterised the principles of the European economic constitution[6] and was found in the text of the earlier treaty, has been suppressed and symbolically relegated to Protocol 27 annexed to the Treaties. The idea – formally expunged from the heart of the values, objectives and general principles of the EU – survives in Art 119 of the TFEU, which opens Title VIII on economic and monetary policy. This would also seem to confirm the weakening and downgrading of the idea of an 'open market economy with free competition' from a general principle to a more narrow principle related to a specific sector, that is, the sphere of legislative competence and action to which it specifically refers. However important this sphere might be, it could no longer claim to be central or even dominant in the interpretation of the European (economic) constitution.

This overall constitutional rebalancing stems from, and indeed is specifically reinforced by, the definitive acquisition of the Charter of Nice – and, in particular, of the rich catalogue of fundamental social rights and principles enshrined therein – along with the European Union's primary law. The moment when fundamental social rights were constitutionalised in the EU signalled the most substantial revision of the overall supranational legal order, which would finally allow a certain balance to be made, no longer systematically favourable to the free market. It is

[4] Cf. Ch. Joerges & F. Rödl, "*Social Market Economy" as Europe's Social Model?*, in L. Magnusson & B. Stråth (eds.), *A European Social Citizenship? Preconditions for Future Policies from Historical Perspectives*, 125 (2004).

[5] Which tends to rebalance "the internal asymmetries between market integration at supranational level and social protection at national level". See M. Monti, *A New Strategy for the Single Market at the Service of Europe's Economy and Society. Report to the President of the European Commission*, 71 (2010).

[6] Cf. e.g., J. Baquero Cruz, *Between Competition and Free Movement. The Economic Constitutional Law of the European Communities* (2002).

not unreasonable to suppose then how the general provisions of the new treaties might open up a strong potential to reverse the relationship between social Europe and economic Europe. The interpreter, and more specifically the EU Court of Justice (ECJ) in the first place, stands before a framework of values, objectives and principles which have been significantly modified by the Treaties, extending beyond the functional and economic dimension of European integration, and recognising a co-essential social *finalité* of the EU. In this new axiological platform shaped by the opening provisions of the Treaties, the market ceases to act as supreme within the EU and competition shifts from being a protected value to a tool of the 'social market economy'[7].

In this shortly defined context, particular relevance is given to the clause contained within Art 9 of the Treaty on the Functioning of the EU (TFEU), which states that '[i]n defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'[8]. This is the so-called *Horizontal Social Clause* which, inserted in Title II of the TFEU among the provisions of general application, requires that the objectives of social policy be considered within the framework of other EU policies and actions. The clause thus tends to settle the tension between liberalism and solidarism that has been at the centre of the debate on the nature of European integration since its origins. The liberalist philosophy tends to see market integration as the predominant if not the only factor of integration, and has the obvious effect of isolating free-competition from the influence of EU social policy. The solidarist philosophy tends rather to suggest that social policy is not only a distinct policy of the EU, but also constitutes an imperative that should permeate the aims of any other policy.

---

[7] D. Damjanovic, *The EU Market Rules as Social Market Rules: Why the EU Can Be a Social Market Economy*, 50 Comm. Mkt. L. Rev. 1685 (2013).

[8] The importance of the *Horizontal Social Clause* and its strict relationship with the objective of the "social market economy" is highlighted in the communication of the European Commission, *Towards a Single Market Act. For a highly competitive social market economy*, COM (2010) 608 final, 27 October 2010.

In line with the changes introduced by the Lisbon Treaty (see above), the clause thus presents a clear, strong political significance when it introduces the need to balance economic and market goals with social objectives[9]. In this sense, the clause reflects the need to repair the breach – also reflected in a series of ECJ rulings[10] – between market interests and social protection[11].

Not so simple, however, is its significance in a strictly legal perspective since the clause raises many issues. First, it is unclear whether the institutions and actors called upon to implement EU policies and actions have a 'legal duty' (to take account of social objectives) which may be disputed judicially or what kind of control EU judges may exercise (para II). Secondly, assuming that Art 9 TFEU does not constitute an *ad hoc* legal basis for the realization of its objectives, it is not clear whether the clause, in indicating the need to integrate social objectives within other EU policies, determines an extension of purpose congruent with each material legal basis, or whether it is intended to disregard the principle of conferral (para III). There is also the matter of examining how EU legislature actually integrates social needs with other competences (para IV) and how the ECJ has reconciled social objectives with economic integration and what kind of

[9] P. Vielle, *How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming*, in N. Bruun, K. Lorcher & I. Schornann (eds.), *The Lisbon Treaty and Social Europe*, 105 (2012).

[10] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767; Case C-438/05 *International Transport, Workers' Federation and Finnish Seamen's Union v Viking Line APB* [2007] ECR I-10779. See D. Leczykiewicz, *Conceptualising Conflict between the Economic and the Social in EU Law after Viking and Laval*, in M. Freedland & J. Prassl (eds.), *Viking, Laval and Beyond*, 307-322 (2014); S Giubboni, *Social Rights and Market Freedom in the European Constitution. A Labour Law Perspective*, 7–40 (2006); C. Barnard, *EU Social Policy: From Employment Law to Labour Market Reform*, in P. Craig & G. de Búrca (eds.), *The Evolution of EU Law*, 641 (2nd edn, 2011).

[11] See European Commission, *A strategy for smart, sustainable and inclusive growth*, COM (2010) 2020, 3 March 2010, which, as is well known, contains the future strategy to transform the EU into a smart, sustainable and inclusive economy characterized by high levels of employment, productivity and social cohesion. See M. Ferrera, *Mapping the Components of the Current Institutional Patchwork*, in E. Marlier & D. Natali (eds.), *Europe 2020. Towards a More Social EU?*, 45 (2010). See, also, European Economic and Social Committee, *Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU*, (Opinion) (2012/C 24/06), 26 October 2011.

status has been given to the purposes indicated by Art 9 (paras V and VI). This analysis will therefore concentrate on the clause from a strictly legal perspective by examining the key issues that it raises. In the light of our findings, an attempt will be made to provide a brief reflection on the function that Art 9 carries out in relation to the context of the competences outlined by the Treaties (para. VII).

2. Constraints falling upon EU institutions and Member States

In defining and implementing its policies and activities, the EU 'shall take into account' the social needs set out in the clause. As mentioned, however, the rule does not clarify the extent of 'commitment' required[12]. In its recent *Pillbox* judgment[13] the ECJ, in stating that Art 9 'require[s] it to ensure' the objectives set down[14], appears to suggest that the EU is subject to an 'obligation' and that this amounts to an 'obligation of result'. It is thus reasonable to conclude that the expression used by the ECJ is not limited to guiding the conduct of the EU, but has the added function of binding it to the achievement of social objectives[15]. From this perspective, the scope of integrating the needs of Art 9 into the context of other policies translates into a general obligation to evaluate the possible negative impact that such a measure can produce as compared to the achievement of standards of social rights protection.

This constraint should lead, in turn, to a duty on the part of the institutions to balance the need for protection of social values with competing interests, both in policy-making and policy

[12] The position of the *Horizontal Social Clause* in provisions of general application seems to argue for its strictly legal and not simply political nature. See, on this point, J.C. Piris, *The Lisbon Treaty: a legal and political analysis*, 310 (2010), who stresses the binding nature of HSC also for the European Union Court of Justice. About the binding nature of HSC see also F. Lecomte, *Embedding employment rights in Europe*, 11 Colum. J. Eur. L. 20 (2011).

[13] See infra, Case C-477/14 *Pillbox v Secretary of State for Health* ECLI:EU:C:2016:324.

[14] ibid para 116. Specifically, it should guarantee "a high level of protection of human health in the definition and implementation of all Union policies and activities".

[15] See European Parliament Resolution (2012/C 380 E/08), 8 June 2011.

implementation[16]. As for the definition phase, the ruling should imply a substantial *ex ante* examination involving a systematic assessment of the impact of the measures to be taken on the achievement of social goals. The outcome of such an examination would likely occur, within the reasoned grounds of the decision, in the exposition of how social considerations have been integrated and balanced with interests of a different nature[17]. Similar conclusions should be drawn at the time of preparation of the implementing measures of the EU's policies.

Even more problematic might be the subsequent monitoring of compliance with the obligation laid down by Art 9. The main difficulty lies not so much at policy level or with an impact assessment of the Commission's proposals[18], but rather the

[16] See European Parliament Resolutions (2012/C 188 e/09), 17 February 2011; (2012/C 70 E/04), 20 October 2012.

[17] The characteristic horizontal, or better cross, effect of this clause derives from the concept of mainstreaming as it has been developed by the EU Commission with regard to the principle of equality between men and women and the fight against discrimination. As is well known, 'to mainstream' means to integrate something or someone in a context which is considered the general and dominant paradigm. In the EU documents mainstreaming means to act in order that the principle of non-discrimination and the promotion of equal opportunities become a general and paradigmatic way in the process of policy-making. Similarly, the social mainstreaming clause under Art 9 TFEU has a cross nature because through an integrated approach it aims to make the protection of social objectives a general paradigm in the public action, ensuring that these goals are guaranteed not only through specific measures, but also through their systematic incorporation in all public policies.

[18] See European Parliament Resolutions (2012/C 188 e/09), 17 February 2011, http://www.europarl.europa.eu/sides/getDoc.do?pubRef=//EP//TEXT+TA+P7-TA-2011-0068+0+DOC+XML+V0//IT. See, also, European Economic and Social Committee, *Strengthening EU cohesion and EU social policy coordination through the new horizontal social clause in Article 9 TFEU,* cit. at 11, 29; European Economic and Social Committee, *The open method of coordination and the social clause in the context of Europe 2020*, (Opinion) (2011/C 44/04) of 15 July 2010. The Belgian Presidency of the European Union in 2010 underlined the importance of this clause as a tool for increasing the focus on the European social dimension through a structured dialogue on the social impact of policies and actions within and outside the EU, identifying the Impact Assessment as a valid tool for implementing the HSC (Belgian Presidency of the European Union, *The horizontal social clause and social mainstreaming in the EU. The Horizontal Social Clause as a call for intensified cooperation and exchange of knowledge through the Commission's Impact Assessment*, (26-27 October 2010, Background Paper) www.socialsecurity.fgov.be/eu/docs/agenda/26-27_10_10_sia_en.pdf.

possibility to seek judicial review concerning an act that might fail to take due account of, or even undermine the interests of Art 9[19]. In this case, the ECJ would be called upon to assess the adequacy, in terms of social protection, of measures which, requiring 'political, economic and social choices' and towards which the legislator is called upon to undertake 'complex assessments', would leave room for 'broad discretion'[20]. It is reasonable to wonder, then, just what kind of test the ECJ might adopt when the legislator, in view of the wide discretion available, has to balance social needs with other interests[21].

Since Art 9 imposes an obligation to integrate social objectives in the EU as a whole, a significant role should also be assigned to Member States when implementing existing EU measures[22]. In this case, failure to abide by the obligation arising from Art 9 should, in principle, justify any claim against infringement. Again, however, such an action could prove problematic. The biggest challenge could lie in the difficulty of reviewing a failure, in breach of the obligation in Art 9, to integrate and reconcile the social objectives identified at EU level[23].

3. Legal basis

Article 9 is difficult to place within a theoretical framework also as regards its legal scope. In establishing a series of social objectives, which should guide the EU's activities and policies as a whole, it is open to diametrically opposed interpretations.

One line of argument is that since '[i]n defining and implementing its policies and activities, the Union shall take into

---

[19] M.D. Ferrara, *Social Justice Through Social and Economic Mainstreaming: the Role of the Horizontal Social Clause of TFEU,* Social Justice Conference: the institutions that make social justice, London School of Economics, 1-2 August 2014.

[20] Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances* ECLI:EU:C:2015:823 para 76.

[21] On this profile see, infra, para V.

[22] See P. Vielle, *How the Horizontal Social Clause Can Be Made to Work: The Lessons of Gender Mainstreaming*, cit. at 9. The interpretation that extends the binding scope of Art 9 TFEU and its objectives also towards the Member States is founded on the principle of sincere cooperation.

[23] This would mean upholding the failed or correct transposition of a directive that already addressed the balancing of interests.

account' the various objectives set down in Art 9, it might be reasonable to suppose that one of the functions of Art 9 TFEU is to assign different objectives to each policy and activity, which go beyond those specifically established by each legal basis. From this perspective, in extending the range of objectives pursued by each policy beyond what is indicated by the specific legal basis, Art 9 would have the effect of eliminating or at least mitigating the functional link which, by virtue of the principle of conferral, exists between powers and purposes. In this light, the generally univocal correspondence that each legal basis establishes between powers of action and objectives, either explicitly or implicitly, would give way to an overall conception of the various competences conferred so as to 'rebuild the Union as an entity of general competence ... in the context of spheres of competences conferred'[24]. From this perspective, the actual competence of the Union in the context of various concrete policies would have to be derived from a joint reading of the objectives of Article 9 (and other general clauses) and the powers assigned by each specific legal basis considered overall and balanced one against the other. The limitations of such an approach are obvious: an integrated approach to the system of the Union's objectives – assuming that they are not clearly assigned to each competence, but rather help to determine the overall picture of the objectives that the Union must pursue through all of its competences taken together – would make it extremely difficult, if not impossible, to identify the relevant legal basis for each individual measure taken, and would inevitably run counter to the principle of conferral, which continues to be a key feature of the legal system of the EU.

A second line of argument suggests a more cautious approach. Rather than widening the scope of other policies, the function of Art 9 TFEU is to suggest a series of objectives to guide the overall action of the Union, merely providing a framework in which individual policies should be conducted. From this point of view, Art 9 would then be a non-competence-specific and non-power-conferring statement; rather it would be an attempt to substantially increase overall policy coherence of the Union. On

[24] This very effective expression can be attributed to E. Cannizzaro, *Gerarchia e competenza nel sistema delle fonti dell'Unione europea*, 8 Il Diritto dell'Unione europea 651 (2005).

this basis, since Art 9 does not confer competence, it would not be a suitable means to broaden the objectives pursued by each material policy beyond what is indicated by the specific legal basis. It follows that the social policy objectives would have the limited function of guiding the development and implementation of policies of a material nature, but could not be considered an integral part of them.

This reading does seem to be in line with Art 7 TFEU, which opens Title II on provisions of general application. In establishing that '[t]he Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers', the rule would appear to indicate that the integration of social objectives within the exercise of other policies is simply to make the various policies consistent, without entailing any change in the scope of each material competence[25].

4. Legislative practice

Even a cursory examination of regulatory practice shows that EU legislature, after the introduction of Art 9 into the Treaties, has used the *Horizontal Social Clause* cautiously. Up until now, four acts alone have made explicit reference to the clause[26]. In these cases, the intention of the EU legislator to include and integrate social considerations in the exercise of the powers it enjoys becomes apparent. The omitted mention of the clause should however not imply, in principle, the legislator's intention to exclude social considerations through a mutual balance from the purposes pursued by the measure. In this case, however, it is not always clear whether the inclusion of social values in the context of the act derives from Art 9 or from other sources.

[25] For the approach adopted by the Court of Justice see infra paras V and VII.

[26] The references to HSC were more frequent when the introduction of this clause was only in gestation. For example, see Commission, *Reforming Europe for the 21st century*, (Communication) COM (2007) 412 final, and *Opportunities, Access and Solidarity: towards a new social vision for 21st century Europe*, (Communication) COM (2007) 726 final. Surprisingly, the Commission does not mention the HSC in the recent Communication, *Strengthening the social dimension of the Economic and Monetary Union*, COM (2013) 690 final.

This difficulty emerges, for example, with regard to Directive 2014/40/EU on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products[27]. The Directive, based on Arts 53, para 1, 62 and 114 TFEU concerning, respectively, the right of establishment and approximation of laws, significantly modifies regulations on the manufacture, presentation and sale of tobacco and related products within the European market. The legislation is designed to ensure that such products are placed on the market under uniform conditions, ensuring, at the same time a high level of health protection. Nor is it clear whether this additional concern for health protection[28], which must be duly taken into account and reconciled with the needs of the market[29], derives from the *Horizontal Social Clause* or from Art 114 TFEU. The latter provision – to which the Directive expressly refers – requires a high level of

[27] Directive 2014/40/EU of the European Parliament and of the Council of 3 April 2014 on the approximation of the laws, regulations and administrative provisions of the Member States concerning the manufacture, presentation and sale of tobacco and related products and repealing Directive 2001/37/EC [2014] OJ L127/1 (Tobacco Directive). In the same vein see, e.g., the acts on the approximation of laws on regulations regarding food products (infra n No 48).

[28] See Art 1 of the directive which points out that the objective is "to approximate the laws, regulations and administrative provisions of the Member States … in order to facilitate the smooth functioning of the internal market for tobacco and related products, taking as a base a high level of protection of human health".

[29] See also further references to the interest of "health" in the directive. Recital 13 refers to the "obligation placed on the Union to ensure a high level of protection for human health"; recital 36, with reference to tobacco products states that "A high level of public health protection should be taken into account when regulating these products"; recital 43 states that "it is necessary to approximate the national provisions on advertising and sponsorship of those products having cross-border effects, taking as a base a high level of protection of human health".
Similar considerations count, e.g., for Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 on a European network of employment services (EURES), workers' access to mobility services and the further integration of labour markets, and amending Regulations (EU) No 492/2011 and (EU) No 1296/2013 [2016] OJ L107/1. Based on Art 46 TFEU (freedom of movement for workers), the regulation establishes a framework for cooperation in order to ease the freedom of movement of workers within the Union also aimed at "achieving a high level of quality employment" (Art 1, letter c).

protection such that the harmonisation measure affects 'health, safety, environmental and consumer protection'[30].

The Art 9 clause, however, is currently cited in very few legal acts. Among these is Regulation (EU) No. 1304/2013 of the European Parliament and the Council of 17 December 2013 on the European Social Fund[31], which, in defining the tasks of the European Social Fund (ESF), the scope of its support as well as the specific provisions and types of eligible expenditure, must take into account '[i]n accordance with Art 9 TFEU, ... requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health'[32]. The reference to Art 9 does not, however, appear to be particularly significant. The various interests that the regulation aims to promote, and which partly coincide with those mentioned in the clause, do not actually derive from the obligation arising from this clause[33], but from the legal basis employed which 'shall aim to render the employment of workers easier within the Union'[34]. Significant in this regard is the recital 2 of the regulation, which, in indicating that the ESF 'should improve employment opportunities, strengthen social inclusion, fight poverty, promote education, skills and life-long learning and develop active, comprehensive and sustainable inclusion policies', clearly indicates that these are objectives that correspond to 'the tasks

[30] Art 114, para 3, TFEU.

[31] Regulation (EU) 1304/2013 of the European Parliament and of the Council of 17 December 2013 on the European Social Fund and repealing Council Regulation (EC) No 1081/2006 [2013] OJ L347/20 (European Social Fund Directive).

[32] ibid Recital no 2.

[33] Based on Art 164 TFEU, the regulation "shall promote high levels of employment and job quality, improve access to the labour market, support the geographical and occupational mobility of workers and facilitate their adaptation to industrial change and to changes in production systems needed for sustainable developments, encourage a high level of education and training for all and support the transition between education and employment for young people, combat poverty, enhance social inclusion, and promote gender equality, non-discrimination and equal opportunities, thereby contributing to the priorities of the Union as regards strengthening economic, social and territorial cohesion" (Art 2).

[34] Art 162 TFEU.

entrusted to the ESF by Article 162 of the Treaty on the Functioning of the European Union'.

Another act that invokes the clause is the Council Decision (EU) 2015/1848 of 5 October 2015 on guidelines for the employment policies of the Member States for 2015[35]. Based on Article 148 TFEU, the decision lays down guidelines which should be taken into account by Member States in their policies on employment on the understanding that it is national policies on employment that help to define the policy of the Union on the area in question through mutual cooperation. As is clear from Decision 2015/1848, these guidelines not only regard '[b]oosting demand for labour', '[e]nhancing labour supply, skills and competences', and '[e]nhancing the functioning of labour markets'[36], but should also accord with the 'requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education and training'[37] aimed at '[f]ostering social inclusion, combatting poverty and promoting equal opportunities'[38]. Unlike the previous case, here the reference to the clause appears to take on more significance: the objective of promoting employment must be achieved not only through market and economic means, but also through instruments of social protection, on the basis therefore, of an approach that integrates and reconciles different needs. In other words, the guidelines clearly indicate, consistent with Article 9, that the promotion of employment is a goal whose achievement requires the reconciliation of both economic demands and social needs.

Even more significant for our purposes, are Regulations 472 and 473 of 2013[39] which, along with other measures, in order to

[35] [2015] OJ L268/28.
[36] ibid Guidelines Nos 5, 6, 7.
[37] ibid Recital No 2.
[38] ibid Guideline No 8.
[39] Regulation (EU) 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L140/1 (Economic and Budgetary Surveillance Regulation); Regulation (EU) 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction

reassure the markets, curb speculation and restore stability to the Euro, combined to redefine the governance of the EMU in the aftermath of the 2008 economic crisis[40]. Founded on Articles 136 and 121, para 6 TFEU, the two regulations (so-called Two Pack) are intended, respectively, to step up economic and budgetary surveillance of Member States within the Eurozone facing difficulties and risks to their stability or requesting or receiving financial assistance, and to establish common provisions between Member States of the Eurozone for the monitoring and assessment of draft budgets and for the correction of excessive deficits. Both regulations expressly refer to Art 9 TFEU[41].

As for Regulation 472/2013, among other provisions, this establishes that any State intending to access financial assistance measures from Member States or third-party States or on the basis of other financial instruments should draw up 'in agreement with the Commission, acting in liaison with the ECB and, where appropriate, with the IMF, a draft macroeconomic adjustment program'[42]. This draft – aimed 'at rapidly re-establishing a sound and sustainable economic and financial situation and restoring the Member State's capacity to finance itself fully on the financial markets' – not only relies on a constantly reviewed assessment of the sustainability of the government debt[43], but also takes into account 'the practices and institutions for wage formation and the national reform programme of the Member State concerned in the context of the Union's strategy for growth and jobs'[44].

---

of excessive deficit of the Member States in the euro area, [2013] OJ L140/11 (Draft Budgetary Plans Regulation).

[40] See Fritz W. Scharpf, *Monetary Union, Fiscal Crisis and the Preemption of Democracy*, 11 MPIfG Discussion Papers (2011).

[41] See Recitals Nos 2 and 8.

[42] Art 7 para 1 of the Regulation.

[43] Art 7 para 1 states: "The draft macroeconomic adjustment programme shall be based on the assessment of the sustainability of the government debt referred to in Article 6, which shall be updated to incorporate the impact of the draft corrective measures negotiated with the Member State concerned, and shall take due account of any recommendation addressed to that Member State under Articles 121, 126, 136 or 148 TFEU and of its actions to comply with any such recommendation, while aiming at broadening, strengthening and deepening the required policy measures".

[44] Art 7 para 1.

And this is not all: in preparing its drafts concerning the macro-economic adjustment program, the 'Member State shall seek the views of social partners as well as relevant civil society organisations ..., with a view to contributing to building consensus over its content'[45]. Given these overall directions, it is reasonable to suppose that the Article 9 clause comes into play precisely wherever it requires the Member State (and the Commission) to found the draft program based on an extensive evaluation that takes into account and balances the various interests at stake: sustainability of the government debt, on the one hand; preserving national systems of collective bargaining, on the other[46].

Regulation 473/2013, for its part, establishes a framework to strengthen the monitoring of budgetary policies in the Eurozone and to ensure the consistency of national budgets with economic policy guidelines[47]. The actions taken on the basis of the regulation, however, have some limitations: in accordance with Article 152 TFEU, they must recognize and promote the role of the social partners, respect current national systems and practices in the determination of wages and avoid undermining the right to negotiate, conclude or enforce collective agreements or take collective action in accordance with law and national practices[48]. Again, it seems reasonable to suppose that the enhancement of the need to ensure respect for social values derives from Art 9. This Article, also in the context of Regulation 473/2013, strengthens social rights vis-à-vis conflicting budgetary interests with a view to protecting national social policies.

5. ECJ case law: the clause and objectives of general interest

As with regulatory acts, references to Article 9 TFEU in European case law are few and far between. The ECJ has invoked

[45] Art 8.

[46] See D. Chalmers, G. Davies & G. Monti, *European Union Law*, 745 (3rd edn, 2014): "The guarantees provided in EU law are greater than under the ESM. The programme must respect national system of collective bargaining. The Member State must also seek the views of social partner as well as civil society organisations in drafting this programme".

[47] See Art 1 para 1.

[48] See Art 1 para 2.

and 'employed' the *Horizontal Social Clause* in only four judgments in order to balance the goal of 'a high level of protection of human health' with other interests at stake. Although references in case law are limited, they do offer significant clues as to the legal scope of the clause. It is thus worth referring to these four cases, albeit briefly, retracing the ECJ's arguments.

In all four preliminary rulings the ECJ had to determine whether approximation norms regarding nutrition and health claims made on foods, in particular concerning the use and marketing of natural mineral waters, on the one hand[49], and the manufacture, presentation and sale of tobacco and related products, on the other[50], violated certain provisions of the Charter of Fundamental Rights. It should be noted that none of the acts subject to review makes any reference to Article 9.

In particular, in the first judgment (*Deutsches Weintor*)[51], the Court was asked to verify the validity of Art 4, para 3, first clause of Regulation (EC) No. 1924/2006[52] – which prohibits, without exception, the producer or distributor of alcoholic beverages from making 'health claims'[53] – in the light of Art 15, para 1 and Art 16 of the Charter. Such provisions ensures that everyone has the right to work and to pursue a profession, and to conduct business. The Court was therefore called upon to ascertain whether such individual rights and freedoms had been unlawfully restricted by the legislation concerned.

With concise and linear argument, the Court first stated that 'the compatibility of the prohibition ... must be assessed in the light not only of the freedom to choose an occupation and the freedom to conduct a business, but also of the protection of

[49] Regulation (EC) 1924/2006 of the European Parliament and of the Council of 20 December 2006 on nutrition and health claims made on foods [2006] OJ L404/9 (Nutrition and Health Claims Regulation); Directive 2009/54/EC of the European Parliament and of the Council of 18 June 2009 on the exploitation and marketing of natural mineral waters [2009] OJ L164/45 (Natural Mineral Waters Directive).

[50] Tobacco Directive.

[51] Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* ECLI:EU:C:2012:526.

[52] Nutrition and Health Claims Directive.

[53] 'Beverages containing more than 1,2% by volume of alcohol shall not bear health claims'. In this case what was controversial was the wording 'easily digestible'.

health'[54]. Consequently, such an assessment must be carried out 'in accordance with the need to reconcile the requirements of the protection of those various fundamental rights protected by the Union legal order, and striking a fair balance between them'[55].

On the one hand, freedom to pursue a profession or conduct a business are not absolute rights but must be considered in relation to their 'social function'. They can therefore be restricted 'provided that those restrictions in fact correspond to objectives of general interest pursued by the European Union and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights'[56]. On the other, the protection of human health 'constitutes, as follows also from Article 9 TFEU, an objective of general interest justifying, where appropriate, a restriction of a fundamental freedom'[57].

Thus, in describing the protection of health – and with it the other interests protected by Article 9 – as 'objectives of general interest', the Court resorted to a conceptual method commonly used in its case-law whenever it might be necessary to reconcile conflicting interests. Traditionally, the objectives of general interest are those values/parameters that measure the degree of protection of fundamental rights. Although it would be wrong to speak of an elaboration of an independent notion of general interest of the Union[58], with this statement the Court referred to those interests that are inherently ingrained within the nature and functions of the Union and that, as such, are capable of justifying the restriction of individual fundamental rights and freedoms[59].

One issue that traditionally lies behind this method concerns the discretion enjoyed by the legislator when, in adopting a certain discipline, he is called upon to balance fundamental rights with the objectives of general interest. Clearly,

---

[54] Para 46.
[55] Para 47.
[56] Para 54.
[57] Para 49.
[58] On this topic, see C. Boutayeb, *Une recherche sur la place et les fonctions de l'intérêt général en droit communautaire*, 39.4 RTDE 587 (2003).
[59] Case 44/79 *Hauer* [1979] ECR 3727; Case 5/88 *Wachauf* [1989] ECR 2609; Joined Cases C-143/88 and C-92/89 *Zuckerfabrik* [1991] ECR I-415; Case C-44/89 *von Deetzen* [1991] ECR I-5119.

the greater or lesser extent of the discretion conferred on the legislator will consequently determine the scope of judicial review reserved to the ECJ. In its *Deutsches Weintor* ruling the Court confined itself to stating that the contested legislation 'must be regarded as complying with the requirement that is intended to reconcile the various fundamental rights in this instance and to strike a fair balance between them'[60]. Indeed, '[f]ar from prohibiting the production and marketing of alcoholic beverages, the legislation at issue merely controls, in a very clearly defined area, the associated labelling and advertising'[61].

Some more detail on this point is provided by the subsequent judgment in the *Société Neptune Distribution* case[62]. Here, too, the Court was called upon to establish the compliance of certain provisions of Directive 2009/54 and Regulation No. 1924/2006[63] with the freedom of expression and information (Article 11 of the Charter) and the freedom to conduct business (Article 16 of the Charter), in particular those which prohibit certain claims on packaging, labelling and advertising of natural mineral waters[64].

After pointing out that fundamental rights can be restricted when they are incompatible with objectives of general interest, the Court reaffirmed that '[i]n those circumstances, the determination of the validity of the contested provisions must be carried out in accordance with the need to reconcile' the protection of individual liberties invoked with a high level of health protection[65]. The Court, however, added that '[w]ith regard to judicial review of the conditions of the implementation of the principle of proportionality, the EU legislature must be allowed a broad discretion in an area such as that involved in the present case, which entails political, economic and social choices on its part, and in which it is called upon to undertake complex assessments'[66].

---

[60] Para 59.
[61] Para 57.
[62] Case C-157/14 *Société Neptune Distribution v Ministre de l'Économie et des Finances* ECLI:EU:C:2015:823.
[63] Natural Mineral Waters Directive and Nutrition and Health Claims Regulation.
[64] See Art 9 paras 1 and 2 of Natural Mineral Waters Directive, in addition to annex III and annex to Nutrition and Health Claims Regulation.
[65] Para 75.
[66] Para 76.

This premise sufficed for the Court to conclude that 'the actual content of the freedom of expression and information of the person carrying on the business is not affected by those provisions'[67], and that 'far from prohibiting the production and marketing of natural mineral waters, the legislation at issue in the main proceedings merely controls, in a very clearly defined area, the associated labelling and advertising. Thus, it does not affect in any way the actual content of the freedom to conduct a business'[68].

The Court, therefore, not only confirmed that where human health is at stake the protection of individual rights must be weighed against this and if necessary yield, but also provided a further indication. It recognised that where the assessments to be made are complex, such broad discretion has the effect of producing little control over the necessity and appropriateness of the measure adopted as it relates to the objective of general interest pursued. In concluding that the essential content of the freedoms in question is not affected, the ECJ clearly showed that it was unwilling to demonstrate the effective need that binds the measures taken to the fulfilment of the general interest or the impossibility of replacing such measures with alternative but equally effective instruments that might be less detrimental to fundamental rights.

In the subsequent *Pillbox* and *Philip Morris* cases[69], the Court was asked to rule on the alleged conflict of certain provisions of Directive 2014/40/EU with the EU Charter of Fundamental Rights and the principle of proportionality[70]. Again, the directive, adopted to completely redefine the rules of harmonisation on tobacco products, overcame hindrances to its validity posed by the two cases. The dispute concerned the ban on certain labels on tobacco products; the ban on placing tobacco products with certain flavourings on the market; the requirements for warnings concerning health hazards to appear on packaging; the ban on promoting electronic cigarettes. The arguments relating to these

[67] Para 70.

[68] Para 71.

[69] Case C-477/14 *Pillbox 38* ECLI:EU:C:2016:324; Case-547/14 *Philip Morris* ECLI:EU:C:2016:325.

[70] Tobacco Directive. On the content of the Directive and incidents accompanying legislative process see T.K. Hervey & J.V. Hale, *European Union Health Law*, 393 (2015).

regulations concerned the violation of the principle of proportionality; incompatibility with the freedom of expression and information (Article 11 of the Charter)[71], the freedom to conduct a business (Article 16 of the Charter) and the right to property (Article 17 of the Charter)[72].

According to the Court, restrictions on fundamental rights and freedoms that the directive actually causes appeared appropriate and necessary in relation to the legitimate objectives pursued. Some of the arguments put forward to reach these conclusions were unprecedented. After pointing out that the protection of public health, in accordance with Article 9, is a general interest objective recognized by the EU[73], the Court did not limit itself to reiterating that the legislature's task is to strike a 'fair balance'[74] between the different needs at stake, despite the likely negative impact on the profits of tobacco companies. It turned to a fresh argument, reasoning that in determining this balance, the discretionary power available to the legislature 'varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question'[75]. Thereby, the Court introduced a new criterion: the evaluation of the discretionary margin reserved to the legislature. This criterion, in turn, is based on two parameters: the scope of the general interest objective; the nature of the activity affecting the individual right or freedom. In this case the first parameter concerned the interest of 'health protection in an area characterised by the proven harmfulness of tobacco consumption'[76]. The second related to the exercise of individual freedoms 'to spread information in the pursuit of commercial interests ...'[77].

Once the Court identified the scope and nature of the competing interests in this manner, it concluded that the protection of human health 'outweighs the interests put forward by the claimants in the main proceedings'[78]. Indeed, as is clear

[71] *Philip Morris* para 146.
[72] *Pillbox 38* para 152.
[73] *Philip Morris* para 152; *Pillbox 38* para 116.
[74] *Philip Morris* para 154.
[75] ibid para 155.
[76] ibid para 156.
[77] ibid para 155.
[78] ibid para 156.

from certain articles, and in particular Article 9 TFEU, 'a high level of human health protection must be ensured in the definition and implementation of all the European Union's policies and activities'[79].

Through the dual parameter deriving from the objective of general interest and the nature of the activity affecting individual rights, the ECJ accepted the balance operated by the legislature. It basically means that individual freedoms may yield, and in doing so are subject to a restriction, as a result of the higher importance, in accordance with Article 9, of the protection of health compared with the exercise of freedom to pursue commercial interests[80]. The impression, difficult to dispel, is that setting health protection above other interests may further reduce judicial control, already ineffective as it is, over the necessity and appropriateness of the restrictive measure adopted in relation to the general interest objective being pursued[81].

6. … and what about overriding reasons?

The rulings that have been examined summarily attribute to the interest relating to health protection (and indirectly to all other interests identified in Article 9) the status of 'general interest objectives', that is, interests liable to restrict the enjoyment of fundamental individual rights and freedoms with which they come into conflict. The rulings also recognize a particular relevance to such interests where the individual rights at stake have a purely economic nature[82].

---

[79] ibid para 157.

[80] ibid para 190, where the Court states that the legislature "weighed up, on the one hand, the economic consequences of that prohibition and, on the other, the requirement to ensure, in accordance with the second sentence of Article 35 of the Charter and Arts 9 TFEU, 114(3) TFEU and 168(1) TFEU, a high level of human health protection with regard to a product which is characterised by properties that are carcinogenic, mutagenic and toxic to reproduction". See also Case C-358/14 *Polland v European Parliament and Council* ECLI:EU:C:2016:323, para 102, and the Opinion of AG Kokott delivered on 23 December 2015 (ECLI:EU:C:2015:848) on the same case, para 130.

[81] In similar terms, see P. Koutrakos, *Reviewing Harmonization: the Tobacco Products Directive Judgments*, 3 Eur. L. Rev. 305 (2016).

[82] It is worth asking oneself whether the conclusion to consider the interest of health of 'greater importance' would be applied if the other interests referred to

That said, defining social objectives as 'public interest objectives' is justified in relation to the individual nature of the rights with which these objectives may enter into conflict within a certain discipline. If so, it is reasonable to suppose that the various social objectives may become 'overriding reasons' where they come up against so-called fundamental freedoms. An overriding reason applies when a national measure, though detrimental to the freedom guaranteed by the Treaty, is justified as it pursues a general interest according to that nation's legal system.

In this view, *objectives of general interest* and *overriding reasons* are frequently two sides of the same coin: both tend to limit individual rights or the four fundamental freedoms in order to protect an interest worthy of protection according to the EU, in the first case, or national law, in the second. Consequently, when such an interest is recognized and protected in both legal systems it may represent either an 'objective of general interest' or an 'overriding reason', depending on the function it performs.

Based on this premise, the social objectives of the clause, which apply to Member States in the application of EU law, may be configured as 'overriding reasons' where they justify government measures restricting fundamental freedoms. Although the Court did not, at the time, refer to the objectives of the clause as 'overriding reasons', this line of argument was held by Advocate General Villalón in his opinion regarding the *Santos Palhota* case[83].

In this case, doubts were raised by the national court as to the compatibility of national legislation to monitor the intra-Community movement of workers with Treaty rules on the free movement of services[84]. It is well know that case-law, on the one hand, has accepted a broad notion of 'restriction' to the freedom to

---

in Art 9 were at stake. A definite solution is not easy. The Court would appear to derive this 'greater importance' not only from the fact that it is recognised by primary law, but also by the required standard that must be high. If so, only the objectives related to employment, education and training could gain greater importance, once established that they require a high degree of protection.

[83] Case C-515/08 *Santos Palhota and Others* ECLI:EU:C:2010:245, Opinion of AG Cruz Villalón.

[84] Basically, doubts were raised as regards the legitimacy of the employer's obligation to present the Belgian authorities with a prior declaration of posting, or to keep available copies of documents such as an individual account or payslip.

provide services – ranging from the actual prohibition of an activity to the mere loss of advantage to the latter[85] – while on the other it has provided a restrictive interpretation of the conditions justifying the use of national restrictive measures, based on overriding reasons of general interest[86].

According to the Advocate General, the restrictive approach of the Court regarding the interpretation of the conditions that justify the invocation of 'overriding reasons' should be softened because of the clause. The 'overriding reasons' based on the need to protect the interests identified in Art 9 – like, for example, the social protection of workers – appear, according to the Advocate General, to outweigh other 'overriding reasons'. In the words of the Advocate General, the existence of the clause means that:

"when working conditions constitute an overriding reason relating to the public interest justifying a derogation from the freedom to provide services, they must no longer be interpreted strictly. In so far as the protection of workers is a matter which warrants protection under the Treaties themselves, it is not a simple derogation from a freedom, still less an unwritten exception inferred from case-law. To the extent that the new primary law framework provides for a mandatory high level of social protection, it authorises the Member States, for the purpose of safeguarding a certain level of social protection, to restrict a freedom, and to do so without European Union law's regarding it as something exceptional and, therefore, as warranting a strict interpretation. That view, which is founded on the new provisions

[85] This fundamental freedom requires not only the elimination of all discrimination on grounds of nationality against providers of cross-border services, but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a service provider established in another Member State, where he lawfully provides similar services (see, e.g., Case C-76/90 *Säger* [1991] ECR I-4221, para 12; Case C-398/95 *SETTG* [1997] ECR I-3091, para 16; Case C-244/04 *Commission v Germany* [2006] ECR I-885, para 30; and Case C-219/08 *Commission v Belgium* [2009] ECR I-0000, para 13).

[86] See, e.g., Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

of the Treaties cited above, is expressed in practical terms by applying the principle of proportionality"[87].

The social objectives of the clause thus confer a special significance not only to the *objectives of general interest*, as expressly recognized by the ECJ in the *Philip Morris* case[88], but also to the *mandatory requirements* that States are entitled to rely on in order to restrict freedom of movement that may infringe a substantial State interest. Indeed, from this perspective, where requirements regarding the protection of social values are in opposition to the interests of the market, the clause should be appreciated to the full, in accordance with the spirit that inspired its inclusion in the Treaties.

7. Concluding remarks

At this point it is not easy to draw definitive conclusions on the legal scope of the clause, hampered by poor legislation and equally limited case law. Indeed, current EU acts referring explicitly to the clause or implicitly to the social interests that it protects are few and far between. Case law too has shown a preference for moderate 'use', for the moment, focused mainly on the interest of health protection. This interest, in the absence of the clause, in all probability would be enhanced through alternative routes in case law, provided that different provisions of the Treaties, whether of general[89] or specific scope[90], recognize its importance.

---

[87] Case C-515/08 *Santos Palhota and Others*, cit. at 83, para 53.

[88] Case-547/14 *Philip Morris*, cit. at 69.

[89] See Art 36 TFEU where, among the exceptions that Member States may invoke to maintain or introduce measures restricting free movement of goods, is one that refers to 'protection of health'; see, also, *supra*, Art. 114 TFEU.

[90] See Art 168 TFEU which, as regards public health, establishes in para 1, that a 'high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities'; Art 169, para 1, which states that '[i]n order to promote the interests of consumers and to ensure a high level of consumer protection, the Union shall contribute to protecting the health ... of consumers'; Art 191, para 1, TFEU, regarding the environment establishes that 'Union policy on the environment shall contribute to pursuit of the following objectives: ... protecting human health.'

The fact remains that the indications that may be generally drawn do contribute significantly – if not to clarify the overall legal dimension of the clause – at least to reveal its most relevant aspects. Two aspects in particular are worth focusing on.

First, since the clause was invoked when acts concerning different sectors were adopted, the question arises as to whether the function[91] that it has to play is the same in all cases, or may vary depending on the regulatory context at work. A cursory analysis of the acts analysed shows that while its policy function is undisputed, its legal effects may be cause for concern. This is clear in relation to Regulation (EU) No. 1304/2013 regarding the European Social Fund, where the clause appears to carry out a merely *promotional* function[92]. As noted earlier, the social objectives that the regulation aims to promote, and which are partly overlapping with those of Art 9, correspond to 'the tasks entrusted to the ESF by Article 162 of the Treaty on the Functioning of the European Union'[93]. A similar conclusion may be drawn in relation to Council Decision (EU) 2015/1848 on guidelines for Member States' employment policies for 2015[94]. Among the approved guidelines to guide the choices of Member States in matters of employment, is one related to '[f]ostering social inclusion, combating poverty and promoting equal opportunities' in accordance with Art 9[95]. However, as the objectives translate into a mere guideline, the clause seems to play a merely *guiding* role in the act in question.

Instead, an autonomous function going beyond pure policy is carried out by the clause where, as in regulations 472 and 473 of 2011[96], it provides for a greater emphasis to be placed on the need to ensure respect for social values within the framework of an overall balance of conflicting interests. In these cases, and far from producing effects at policy level only, the clause seems to fulfil a

[91] Hereinafter the term *function* will be used in an atechnical and generic manner in order to indicate the role played by the clause in the various contexts in which it is used.
[92] European Social Fund Directive.
[93] ibid recital 2.
[94] n 35.
[95] ibid guideline 8.
[96] *Economic and Budgetary Surveillance Regulation and Draft Budgetary Plans Regulation*, cit. at 39.

prescriptive function. Similarly, a function of this kind is carried out by the clause even when it limits the enjoyment of positions related to economic interests or implies restrictions on the fundamental freedoms of the market. Its *regulatory* function is evident in relation, for example, to the acts of harmonisation in which EU legislature, in restricting the promotion or marketing of certain products for reasons of health, attempts to reconcile the two opposing economic and social dimensions. In this respect, the first significant signs of openness are visible on the part of the ECJ's case law opting for a more balanced assessment of the contentious matters while also taking into account the regulatory value of the clause. Thus, while in most cases the value of the clause lies at a policy level, in other cases it plays a merely regulatory/prescriptive function. What cannot be overlooked within this perspective is the strong potential that social values may fulfil in regulating the market in the future.

Another issue that deserves clarification concerns the possible effects that the clause produces or may produce on the distribution of competences between the Union and Member States. Protection interests under Art 9 are inherent in the fields of competence defined as *supporting* or *complementary* competences, which leave the regulatory powers of the Member States virtually untouched, reserving a mere coordination function for the Union[97]. Based on this premise, it is reasonable to suppose that the obligation for EU legislature to graft social values identified in the clause onto the fabric of other policies may, in some cases, amount

[97] It regards those competences which, variously named, still retain a markedly national character. The actions taken by the Union are simply of a coordinating nature, complementing and reinforcing those of the Member States, though this does not mean that the acts adopted by the institutions lead to harmonisation of national laws or regulations, or that the competence of the Union replaces the competences of the Member States in the relevant sectors. Employment policies and a part of social policies fall within those policies for which the EU has a coordinating role (see, in particular, Art 5, paras 2-3 TFEU, Arts 145-150 TFEU included in Title IX concerning 'Employment', Arts 151-161 TFEU regarding 'Social Policy'). Education/training and the protection and improvement of human health fall within the so-called support competences in which the EU restricts itself 'to carry[ing] out actions to support, coordinate or supplement the actions of the Member States' (see Art 6, letters a), e) TFEU; see, also, Arts 165-166 TFEU included in Title XII concerning 'Education, Vocational Training, Youth and sport' and Art 168 TFEU regarding 'Public Health').

to a genuine exercise of competence, determining the corresponding expropriation of the regulatory powers of the Member States.

This hypothesis seems to hold true, for example, where the EU's measures entail harmonisation of national regulations governing the marketing of products that may have a negative impact on health, as in the context of Directive 2014/40 regarding harmonisation rules on tobacco products[98]. The problem that arises relates to the fact that Art 168, para 5, TFEU (regarding 'public health') states specifically 'excluding any harmonisation' in the specific matter of the 'protection of public health regarding tobacco'. The regulation allows for incentive measures only on the part of the EU, in compliance with what is expected for the exercise of supporting, coordinating or complementary competences (Art 2, para 5, TFEU), which leads back to health policy and, in general, the protection of human health (Art 6 TFEU).

The making of an act for the approximation of legislations in this field thus poses the problem of coordination between the general rules on harmonisation (first and foremost, Art 114 TFEU)[99] and the aforementioned Art 168, para 5 TFEU. The contradiction could be resolved by giving preference to the latter provision in view of its speciality (*ratione materiae*), thus excluding the eligibility of acts of harmonisation. The opposite is the case in the solution that has emerged in EU case law, also reiterated in the judgments given in the *Philip Morris* and *Pillbox* cases[100]. The Court recognized the legitimacy of the acts approximating the laws also in the specific matter of tobacco products.

The basis for the position taken by the ECJ lies in the affirmation that it is legitimate to adopt an act of regulatory harmonisation where the conditions for recourse to Art 114 TFEU

[98] See, for example, the Court's points in the judgment of 5 October 2000 Case C-376/98 *Germany v European Parliament and Council* ECLI:EU:C:2000:544 para 76 concerning legislative harmonisation of Member States in relation to advertising of tobacco products: '[t]he national measures affected are to a large extent inspired by public health policy objectives'.

[99] This issue could also arise with the other general provisions on harmonisation in Arts 51, para 3, and 62 TFEU, cited as a legal basis along with Art 114 TFEU in Tobacco Directive.

[100] n 69.

are met (i.e. when the act contributes to the objective of eliminating the existing or potential obstacles to the functioning of the internal market), despite the presence of health objectives. Thus, an act such as Directive 2014/40, which simultaneously pursues 'two objectives in that it seeks to facilitate the smooth functioning of the internal market for tobacco and related products, while ensuring a high level of protection of human health', may be based on Art 114 TFEU[101].

Far from being neutral, this conclusion determines some very significant consequences. First, if the function of health protection is not simply to outline the framework underlying the regulation of tobacco products, but, like the smooth functioning of the internal market, is an equally predominant goal of the Directive, the clause would appear to extend the scope of other substantive policies, as well as those outlined in the Treaty. Seen from this perspective, Art 9 would be a clause conferring powers, contrary to earlier readings[102].

Second, the expansion of the sphere of application of other substantive policies would, in turn, have the effect of determining, as mentioned, a creeping erosion of the competence which the Member States retain in matters of health protection. Holding that the adoption of an act of harmonisation is justified by the mere occurrence of a need for legislative approximation, irrespective of the fact that 'public health protection is a decisive factor in the choices to be made' means[103] in some way allowing the circumvention of the prohibition laid down by Art 168, para 5, TFEU.

To wind up, it is not unreasonable to suppose that besides disclosing a strong potential to reverse the relationship between economic Europe and social Europe through, in particular, its political but also regulatory dimension, the clause has the effect, at least in certain cases, of an expropriation of the competences that Member States continue to maintain in the social sector more generally. The need to extend the Union's action beyond the purely functional or economic aspects would therefore appear to assign the clause a limiting role as well: that of justifying

101 *Philip Morris* para 220.
102 V., *supra*, para III.
103 *Philip Morris* para 60.

intervention that is poorly compliant with the principle of conferred powers. And it is in this direction that the Court seems to be cautiously heading, giving 'greater importance' to social rather than economic objectives.

RESHAPING THE EUROPEANISATION: A NEW ROMANIAN TRANSPOSITION OF THE OLD EUROPEAN DIRECTIVES ON REMEDIES IN PUBLIC PROCUREMENT

*Demis M. Sparios**

Abstract

This article looks at the new transposition of the old European Directives on remedies in public procurement, performed by the Romanian legislature in 2016. The article emphasises the novelties and the clarifications brought by the new Law and describes the remedies and appeals available to the tenderers or to other persons allegedly aggrieved by acts issued by the contracting authority within the public procurement procedures or with regard to the conclusion or the execution of the contract. The remedies and appeals are better structured and regulated within the new Law than in the old one and the delineations between them are clearer. The new Law keeps in place the administrative-jurisdictional way of challenging the acts of the contracting authority (one of the specificities of the Romanian system, although administrative bodies of review in this field exist also, under different shapes, in another 13 EU Member States), but makes clearer some of the old provisions with regard to the proceedings. The claimant may choose the judicial avenue for the complaint instead of the administrative-jurisdictional one, which is optional and free of charge according to the Romanian Constitution. The judicial complaint and the judicial actions regarding the damages, annulment, nullity, rescission and cancellation of the contract, as well as the interim measures, are looked at in the article. An absolute novelty brought by the new Law and which will be also looked at in the article is the provision of specific means for the unification of administrative and judicial practice in this field. In the end, the article contains a section of brief conclusions.

* Judge, Brasov Court of Appeals (Romania); PhD Candidate at 'Babes-Bolyai' University Cluj-Napoca (Romania) and University of Turin (Italy) - Joint PhD.

TABLE OF CONTENTS

1. Introduction

The concept of Europeanisation is no longer a novelty in the EU legal environment. This concept is most often associated with the transposition of the European directives in the national legal order of the member states. Among the most important EU directives in place are the ones regulating the field of public procurement, both in terms of substantive and procedural law.

Recently, in the context of mandatory transposition of the new EU directives on public contracts[1] in the national law, the Romanian legislature took the opportunity to also enact a new law on remedies in this field - Law No 101/2016[2].

[1] Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance; Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts Text with EEA relevance; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC Text with EEA relevance (all published in the *Official Journal of the European Union* No L 94/28.03.2014).

[2] Law No 101/2016 was published in the *Romanian Official Gazette* No 393 on the 23rd of May 2016 and entered into force on the 26th of May 2016. Subsequently, the Law has been substantially amended and supplemented, in December 2017, only about a year and a half after its entrance into force, by Emergency

This enactment was not only opportune, but also necessary, having regard to the fact that the previous law on public contracts[3], which also regulated the remedies in a distinct chapter, has been repealed as a result of the transposition of the 2014 Directives. Moreover, due to successive amendments and unconstitutionality decisions, the previous remedies section of the law was in a real need of an update.

Consequently, now Romania has four different laws in the field of public contracts: one with regard to classic procurement, one for the utilities procurement, one for the concessions and the said law on remedies.

The new remedies law[4] performs a new transposition of the old EU Directives on remedies[5]; this new transposition replaces the old one, embedded in EGO 34/2006, and also includes the additional improvements brought in the case-law developed by the ECJ[6] and the Romanian Constitutional Court in this field.

The Law accomplishes a complete transposition of what in the doctrine are called the pillars[7] of remedy mechanisms, set out by the old, but still up-to-date Remedies Directives. In this context, it must be noted that recently the European Commission (EC,

---

Government Ordinance (EGO, hereinafter) No 107/2017 (published in the *Romanian Official Gazette* No 1022 of 22 December 2017).

[3] Emergency Government Ordinance (EGO, hereinafter) no 34/2006. For a detailed assessment of these old procedural provisions, see D. Dragos, B. Neamtu, R. Veliscu, *Remedies in Public Procurement in Romania*, in S. Treumer, F. Lichére (eds), *Enforcement of the EU Public Procurement Rules* (2011), 159.

[4] Hereinafter referred to as "the Law".

[5] Council Directive 89/665/EEC of 21 December 1989 (on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts) and Council Directive 92/13/EEC of 25 February 1992 (coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors), both amended by Directive 2007/66/EC of the European Parliament and of the Council and by Directive 2014/23/EU of the European Parliament and of the Council.

[6] ECJ will be the abbreviation used when referring to the European Court of Justice, as a generic name designating the Court of Justice of the European Communities, later turned into the Court of Justice of the European Union.

[7] See S. Torricelli, *Uniformité et particularisme dans les transpositions nationales du droit européen des procédures de recours*, in L. Folliot-Lalliot, S. Torricelli (eds.), *Contrôles et contentieux des contrats publics – Oversight and Challenges of Public Contracts* (2018), 476.

hereinafter) concluded that the Remedies Directives, in particular the amendments introduced by Directive 2007/66/EC, largely meet their objectives in an effective and efficient way although it has not been possible to quantify the concrete extent of their cost/benefits. The EC also considered that even if specific concerns are reported in some Member States, they usually stem from national measures and not from the Remedies Directives themselves, but in general qualitative terms the benefits of the Remedies Directives outweigh their costs and they remain relevant and continue to bring EU added value.[8] In the doctrine, though, there were expressed also opinions in the sense that, on the contrary, the Remedies Directives are in acute need of clarifications[9].

In terms of transposition, the Law provides for effective mechanisms that ensure the access of the aggrieved person to an independent administrative body and to the judicial courts in order to seek protection of their rights and legitimate interests. Therewith, the Law ensures the celerity of the procedures in front of the administrative-jurisdictional body and of the courts, by setting out short time limits. The Law also provides for effective *interim measures* that may be taken by the administrative body and by the courts. The right to damages is also regulated, by the Law, as an effective right of the aggrieved persons. The Law also contain provisions with regard to standstill period and ineffectiveness.

In the following sections, the provisions of the Law will be looked at in detail, and also references shall be made to the case-law of the national courts and of the National Council for Solving Complaints, in order to emphasize how the provisions of the Law have been perceived in practice.

---

[8] For these conclusions and the reasoning behind them see the Report No COM/2017/028 final from the Commission to the European Parliament and the Council on the effectiveness of Directive 89/665/EEC and Directive 92/13/EEC, as modified by Directive 2007/66/EC, concerning review procedures in the area of public procurement, published at http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2017:28:FIN (last accessed 19 July 2017).

[9] See, e.g., for a very interesting and detailed reasoning of such an opinion: A. Sanchez-Graells, *If it ain't broke, don't fix it? EU requirements of administrative oversight and judicial protection for public contracts*", in L. Folliot-Lalliot, S. Torricelli (eds.), cit. at 7, 495-534.

2. Scope of the Law and Types of Remedies

The Law applies to the remedies in relation to the award of public procurement contracts, sectorial (utilities) contracts and concessions. It regulates the prior notification addressed to the contracting authority (administrative appeal), the administrative-jurisdictional review (addressed to the administrative review body) and the judicial procedures of solving complaints, but also the organization and the rules governing the functioning of the administrative review body, as well as the rules for unifying the jurisprudence.

As a general rule, any person - regardless of their nationality (meaning even non-EU nationals) - allegedly harmed in their right or legitimate interest by an act of the contracting authority or by the fact that their application has not been solved within legal deadlines, may request the annulment of the act, the recognition of their rights or legitimate interests, or the obligation of the contracting authority to issue an act or to take remedy measures.

The concept of „person allegedly harmed" comprises any economic operator having or having had an *interest* in obtaining a public contract and who has been, or risks being harmed by an alleged infringement[10]. This provision has to be read in conjunction with the previous one, so that only the persons aggrieved in their rights or interests have standing in front of the jurisdictional bodies.

EGO No 107/2017 amended the text of the Law, among others, by adding the definition of "the person having or having had an interest in obtaining a public contract". According to this definition, a person is considered as having or having had an interest in the procedure when they have not been yet definitively excluded from that procedure.

In a recent judgment, the Brasov Court of Appeals - Chamber of Administrative and Tax Litigation[11] maintained that a complainant who did not submit a tender in the award procedure and neither did challenge the technical and financial specifications cannot be considered a person aggrieved by the act of the

[10] This provision has, basically, the same wording as Article 1 paragraph 3 of both Council Directive 89/665/EEC and Council Directive 92/13/EEC.
[11] Judgment No 230/07.03.2017.

contracting authority which declared the winning tender admissible. The facts in this case were somehow similar to those in case C-230/02 (Grossman Air Service), where the European Court of Justice rendered its Judgment[12] on 12th of February 2004 (ECLI:EU:C:2004:93), maintaining that Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989, as amended by Council Directive 92/50/EEC of 18 June 1992, "must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract was awarded".

According to the Law, the aggrieved persons have access to three types of remedies in order to defend their rights and/or legitimate interests: (i) a complaint, that may be lodged either with an administrative review body or with the court, which means that the complainant has the right of going "forum shopping"; (ii) a court action which may seek the award of damages, as well as the performance, annulment, rescission and cancellation of the contract; (iii) a special court action seeking the declaration of absolute nullity of the contract.

Before resorting to any of the above-mentioned redress mechanisms, the allegedly harmed person has the obligation of lodging a *prior notification* with the contracting authority. The Law also provides for *interim measures* consisting of suspension of the award procedure or of the performance of the contract.

It has to be mentioned that the Law is applicable only to the requests, complaints and petitions filed after its entry into force, which means cases pending at the time of its entry into force follow the old rules[13].

---

[12] For more on this Judgment, see C.H. Bovis, *EU Public Procurement Law*, 2nd Ed. (2012), 222-223.

[13] In this respect, see D.M. Sparios, *Aplicarea în timp a Legii nr.101/2016 privind remediile și căile de atac în achizițiile publice* ("Temporal Applicability of Law No 101/2016 on Remedies and Appeals in Public Procurement"), published on the legal website "Juridice.ro", on the 2nd of June 2016.

3. The Administrative Appeal (Prior Notification)

Before going in front of the court or of the review body, the aggrieved persons must exhaust the administrative remedies by filing a notification to the contracting authority[14]. This prior notification is a precondition for the admissibility of a complaint in front of the review body or of the court[15] and it must be lodged with the contracting authority within 10 or, respectively, 5 days, depending on the value of the contract – below or above the EU thresholds.

The national courts[16] have been stressed that an answer to a request of clarifications filed by the complainant, who also stated that in case of rejection of their tender it shall represent a prior notification, cannot be considered to be a prior notification, because it does not meet the legal requirements.

The duty of the harmed person to lodge a prior notification is a novelty brought in the Romanian domestic legislation by the new Law, even though it has been envisaged in the remedies Directive[17] since 1989. Thus, by regulating the prior notification, the new Law accomplishes a better transposition of the Directive. The objective of these new provisions is to increase the responsibility of the contracting authorities with regard to their obligation of observing the principles of the public contracts' award procedures and to allow these authorities to remedy any possible infringements without the intervention of the courts. In practice, though, the contracting authorities often seem to not have understood this objective and, thus, treat the prior notification as a mere formality, by not answering to it, or giving evasive responses.

According to the Law, the contracting authority has to deliver an answer to the prior notification in 3 days from its receipt, but if the intention of the authority is to take measures of remedy, this must be mentioned in the delivered answer and then

---

[14] Article 6 paragraph 1 of the Law No 101/2016.

[15] Alba Iulia Court of Appeals - Judgment No 7 on 16th of January 2017; Iasi Court of Appeal – Judgment No 852 on 27th of September 2016; Pitesti Court of Appeals – Judgment No 1383/R on the 7th of October 2016.

[16] For instance: Pitesti Court of Appeals – Judgment No 1483/R on the 1st of November 2016.

[17] This possibility is set out in Article 1 paragraph 3, final part of Directive 89/665/EEC.

the authority will have another time limit of 7 days to implement the measures.

The effect of prior notifications is the suspension *ope legis* of the right to conclude the contract. This suspension will not cease before the fulfilment of a time limit of 10 days (when the estimated value of the contract is above or equals the thresholds for the mandatory publication of the notice in OJEU) or 5 days (when the estimated value is below the thresholds), and the review body may again suspend the procedure further. If the contract is divided into lots, the suspension of the right to conclude the contract regards only the lots subjected by the notification. If the contract is concluded within the duration of the suspension, the sanction shall be the *ineffectiveness* of that contract.

4. The Complaint

As already mentioned above, the allegedly harmed person may go forum shopping, having the right to choose between two competent review bodies: an administrative body with administrative-jurisdictional prerogatives, i.e. the National Council for Solving Complaints (the Council, hereinafter) and judicial bodies, namely the courts.

4.1. The Administrative-Jurisdictional Complaint

The administrative-jurisdictional procedure is carried out in front of the Council. This administrative body[18], with quasi-judicial prerogatives, solves the complaints in panels of 3 specialists in law, economics or in a technical field, but at least the president or a member of each panel should have a degree in law.

Three kinds of situations give legal standing in front of the Council.

The first one is where the person is allegedly harmed by the answer received from the contracting authority to the prior notification. A second kind of situation is where the person is allegedly aggrieved by the fact of not receiving any answer, and the third one is where the person is allegedly harmed by the remedial measures adopted by the contracting authority.

[18] For details about the Council and its members, see § 4.2 below.

The subject matter of the complaint may be the request of the annulment of an act issued by the contracting authority, as well as the obligation of the authority to issue an act, or to adopt remedial measures. The complainant may also request the recognition of the alleged right or legitimate interest.

The time limit for lodging the complaint is 10 or 5 days, depending on the estimated value of the contract (10 days if the value equals or exceeds the thresholds for mandatory publication of the contract notice in OJEU and 5 days if the value is lower than the thresholds).

The complainant must serve the complaint to the contracting authority as well, so that the latter has (again) the possibility to adopt remedial measures. These measures have to be acknowledged to the complainant in maximum a working day of their adoption. If the contracting authority does not adopt remedial measures or the measures adopted are not accepted by the complainant, the procedure is carried on.

The proceedings carried out in front of the Council shall respect the principles of lawfulness, swiftness, adversarial proceedings, right to defence, impartiality and administrative-jurisdictional independence. In order to ensure a unified practice, the Law provides for that all complaints lodged within the same awarding procedure shall be solved by a unique panel in the stage before the date for opening of tenders, and another unique panel in the stage after this date.

It has been maintained in the judicial practice[19] that the right of the parties to submit written conclusions does not imply that on this avenue may be raised new critics on lawfulness, other than those already shown in the complaint. It has been reasoned further that to accept this possibility means to accept the opportunity of raising new grounds on unlawfulness after the deadline for lodging the complaint has expired, which is not acceptable.

The complaints to the Council are more numerous than those addressed to the courts: the administrative-jurisdictional way is preferred by tenderers because of their swiftness - there is a time limit for the Council to solve the complaint within 20 days from the receipt of the file (with the possibility of extension with

[19] Oradea Court of Appeals – Judgment No 2213/CA on 26th of October 2016

another 10 days), whereas court proceedings last longer. The failure of the panel members to observe the time limit set out for solving complaints shall be considered a disciplinary offence. The complainants also prefer to address the Council because the administrative-jurisdictional proceedings are free of charge, whilst if they address the courts they have to pay a court fee. It must be also said here that, although the Council is a relatively young institution, the preference of the complainants in addressing this administrative-jurisdictional body indisputably indicates a constantly increasing confidence of the public in the professionalism of the councillors.

Provided that the Council decides the amendment or the removal of certain technical specifications of the award documentation, the contracting authority shall annul the awarding procedure only if no other remedial measure is available or if the measure would affect the principles of the law on public procurement, sectoral procurement or concessions. If the Council allows the complaint and orders remedial measures, it shall establish also the time limit for the implementation of those measures, incumbent on the contracting authority. This time limit may not be shorter than the one set out for challenging the Council's decision.

The Council may not, upon its own initiative, annul or investigate the lawfulness of acts other than the ones challenged. If the Council detects the existence of such acts, it shall notify the National Agency for Public Procurement (ANAP, hereinafter) or the Court of Auditors and transmit them all the relevant data and documents. Therewith, the Council must also notify the contracting authority about the presumed law infringement.

In its practice[20], the Council maintained that a request to decide that the complainant's tender fulfils all qualification requirements is inadmissible, and the Council cannot replace the Evaluation Committee in its prerogatives.

When the Council allows the complaint and considers that remedial measures cannot be adopted, it shall decide the annulment of the award procedure. The Law expressly provides

[20] Decision of the Council No 1318/C8/1393 on the 29th of June 2016. The decision remained final, as a result of dismissal of the appeal by Bacau Court of Appeals.

that the Council may not decide the award of the contract to a certain economic operator and that it has the obligation to provide a clear and unequivocal reasoning of its decisions.

The reasoned decision shall be served on the parties within 3 days from rendering and published on the internet page of the Council[21] and in the Official Bulletin, without any reference to the identification data of the parties. If the Council ordered remedial measures, the decision shall be delivered also to ANAP, by electronic means. The decision shall be published by the contracting authority in SEAP, within 5 days from the service, without any reference to the information declared confidential by the economic operator in their tender.

The decisions of the Council are mandatory for the parties and they may be corrected, clarified or completed at the parties' request. The contract concluded disregarding the decision is stricken with absolute nullity.

When one of the parties is not satisfied with the decision of the Council, they have the right to appeal this decision for reasons regarding the lack of lawfulness and of thoroughness, within 10 days from the receipt of that decision. In the judicial practice[22] it has been maintained that if the appeal is not filed within the above-mentioned time limit, it shall be annulled as being tardy.

The appeal filed against the decision of the Council is called petition. Within this avenue of appeal, the framework established in front of the Council cannot be changed and neither can be the parties nor the subject matter of the litigation. The Law expressly provides that the Council does not have *locus standi* in front of the court. In its petition, the petitioner cannot raise any other critics over the contracting authority's act than those already shown in the complaint before the Council.

It must be stressed that, although the ECJ, interpreting the provisions of Article 2(8) of Directive 89/665, maintained that these provisions do not require the Member States to provide, also for contracting authorities, a right to seek judicial review of the decisions of non-judicial bodies responsible for review procedures concerning the award of public contracts, but also they do not prevent the Member States from providing, in their legal systems,

[21] www.cnsc.ro.

[22] Craiova Court of Appeals – Judgment No 2720 on 28th of September 2016.

such a review procedure in favour of contracting authorities[23], the Law provides for the right of the contracting authority to challenge the decision of the Council. Moreover, the Law provides for an exemption of the contracting authority from the duty to pay the court fee (Art 36 par. 3 of the Law).

The competent courts to adjudicate on the petition are the courts of appeals – chambers for administrative and fiscal litigation - under whose territorial jurisdiction the premises of the contracting authority are located, in panels specialised in public procurement, composed of three judges. There is an exception that regards the proceedings subjecting the award procedures for services and/or works related to the infrastructure in national interest. In this case, the competence to adjudicate on the petition belongs exclusively to the Bucharest Court of Appeals - chamber for administrative and fiscal litigation.

The petition must be submitted directly to the competent Court and notified to the Council, the latter having the obligation to send the file of the case to the Court within 3 days from the receipt of the petition. The petitioner has the duty of also serving the petition to the other parties involved in the proceedings followed before the Council and of submitting the proof of this service, before the first hearing.

The submission of the statement of defence is mandatory and it must be lodged with the Court and served to the petitioner, by the defendant, within 5 days from the receipt of petition. The failure to submit the statement of defence shall entail loss of the right to propose evidence and to raise exceptions, save the public interest exceptions. It is not possible to propose new evidence, except for the new documents. The latter may be submitted, under the sanction of losing that right, at the same time with petition or statement of defence, at the latest.

The petition shall be settled on an emergency basis and with priority, within 45 days from the legal seizure of the Court. If the Court admits the petition, it shall amend the decision of the Council and decide, as applicable: (i) the annulment of the act issued by the contracting authority, partially or totally: (ii) the compelling of the contracting authority to issue an act; (iii) the

[23] See, in this respect, the Judgment of 21 October 2010, delivered by the Court in case C-570/08.

fulfilment of a duty by the contracting authority, including the cancelation of any technical, economic or financial specifications from the contract notice, from the award documentation or from any other documents issued in relation with the award procedure; (iv) any other measures necessary to remedy the infringements of the law on public procurement, sectoral procurement or concessions.

If the Council has settled the complaint on an exception, and the Court allowed the petition, the latter shall rescind the decision of the Council and retry the case on its merits.

Where the Court allows the petition, it modifies the decision of the Council and finds that the act of the contracting authority infringed the law on public procurement, sectoral procurement or concessions and that the contract has been concluded before the service of the Council's decision, the Court shall proceed upon the rules applicable to the cases of contract nullity[24] .

Whenever the Council analysed only a part of the reasons of the complaint, and the Court considers the petition sustainable, the latter shall retry the case on its merits, analysing also the reasons disregarded by the Council.

The Court may also dismiss the petition, on merits or on exceptions.

The petitioner may waive its petition, according to the provisions of the Civil procedure code. In this respect, the judicial practice[25] has maintained that the claimant, in this procedure, may waive its petition, according to the provisions of Article 406 paragraph 1 of the Civil procedure code, and the court, in this case, shall take note of the waiver.

In all circumstances, the judgment of the Court shall be delivered immediately but, in justified circumstances, the delivery may be postponed for 5 days. The judgment of the Court is final, meaning that it cannot be challenged neither by appeal, nor by extraordinary avenues of appeal, such as „the challenge for annulment" or „the revision".

[24] These rules will be looked at in another section.

[25] Iasi Court of Appeals, Judgment No 949 of 12th of October 2016.

The said extraordinary avenues of appeal are provided for in the Civil Procedure Code[26]. Law No 101/2016 provides that it must be read in conjunction with the provisions of the Civil Procedure Code, as well as with the provisions of the Civil Code[27] and of the Law on administrative litigation[28], to the extent that those provisions are not contradictory.

The judgment delivered on the petition cannot be subject to those avenues of appeal because the petition is a *sui generis* avenue of appeal subjecting the decision issued by the Council. In this regard, Craiova Court of Appeals maintained in a Judgment[29] that the petition represents a specific avenue of appeal, available only with regard to the public procurement procedures and, therefore, the judgment rendered by the competent Court with regard to such a petition cannot be subject to the extraordinary avenue of appeal called „challenge for annulment", because it was not delivered in a regular appeal, as Article 503 paragraph 2 of the Civil Procedure Code requires.

As regards this extraordinary avenue of appeal, the difference in treatment between the administrative-jurisdictional procedure and the judicial procedure of the complaint might represent a problem because within the latter the challenge for annulment is admissible against the judgment of the court with regard to the appeal filed against the sentence rendered by the tribunal on the judicial complaint (as we shall see in section 4.3).

This means that those who choose the administrative-jurisdictional avenue may be in a less advantaged position than those choosing the judicial way, in respect to the exceptional avenues of appeal available to them.

[26] The Romanian new Civil Procedure Code has been approved by Law No 134/2010 and entered into force on the 15th of February 2013.

[27] Approved by Law No 287/2009 and entered into force on the 1st of October 2011.

[28] Law No 554/2004, published in the Romanian Official Gazette No 1154 on the 7th of December 2004, and entered into force on the 5th of January 2005, successively amended and complemented since.

[29] Judgment No 2640/19.09.2016.

4.2. The Council and the Statute of the Councillors

Romania is one of the 14 Member States[30] that have given the prerogative of reviewing the procurement procedures to an administrative body.

According to the Law, the Council has legal personality and in its activity is only subject to the law. As regards its decisions, the Council is independent and free of any subordination to other public authority or institution. The Council shall be managed by the President, who shall be elected from the members with a seniority of at least nine years in the field of law, for a period of three years[31], by secret ballot in the plenum of the Council, with an absolute majority of the members' votes. The President represents the Council, fulfils the role of principal authorising officer and has the obligation to present an annual activity report to the Parliament by no later than 31 March for the previous year. The Parliament may only evaluate the administrative and organizational activity of the Council.

According to the Law, the Council has the right to initiate legislative projects in its area of activity, and also to endorse the legislative projects initiated by other public authorities or institutions.

The Council has 36 members (councillors, hereinafter) and at least half of them shall be Bachelor of Law, with a seniority of at least 9 years in the legal field. The selection of the councillors shall be subject of a competitive procedure, their professional competence and good reputation being verified. The period of being councillor shall be considered seniority in the relevant specialty.

The councillors are forbidden: to carry out commercial activities; to possess the capacity of associate or member of the management or control bodies within civil or commercial societies; to be members of economic interest groups; to be enrolled in political parties or to participate in activities of political nature; to occupy/carry out any public or private position/activity, except for teaching positions or activities,

[30] The other 13 States are: Bulgaria, Cyprus, the Czech Republic, Germany, Denmark, Estonia, Spain, Croatia, Hungary, Malta, Poland, Slovenia and Slovakia (see, in this respect, the Report No COM/2017/028 final from the Commission to the European Parliament and the Council, cit. at 4).

[31] With the possibility of renewing their mandate one single time.

scientific research, literary and artistic creation; to carry out any other professional or consultancy activities.

Withal, the councillors shall not be entitled to participate in the settlement of a complaint if they find themselves in one of the following situations: they, their spouse, ascendants or descendants have any interest in the settlement of the complaint; any of the parties is their spouse, relative or affine up to fourth degree; they are or were involved in a criminal trial against any of the parties up to 5 years before the settlement of the case; they have spoken out publicly with regard to the complaint they are solving; it is found that they have received from any of the parties goods, premises of goods or other material advantages. The disregard of these incompatibilities shall be sanctioned with the nullity of the decision taken by the panel comprising the incompatible councillor. The nullity shall be found by the court of appeals that adjudicates on the petition against that decision.

The fact that most of the incompatibilities of the councillors, mentioned above, are similar with those applicable to judges according to their statute[32], together with the independence guarantees of the councillors with regard to their activity of solving complaints, provided for by the Law, justifies the conclusion that the councillors' statute is very close to that of the judges.

4.3. The Judicial Complaint

If the complainant chooses the judicial avenue, they shall lodge the complaint with the tribunal under whose territorial jurisdiction the premises of the contracting authority are located.

The complaint shall be adjudicated by the chamber for administrative and fiscal litigation of the tribunal, in panels specialised in public procurement (composed of one judge), on an emergency basis and with priority, within 45 days from the legal seizure of the tribunal.

Locus standi in front of the tribunal has the person allegedly harmed by the answer received from the contracting authority to the prior notification, or by the fact of not receiving any answer, as

[32] The statute of the judges and prosecutors is Regulated by Law No 303/2004, republished in the Romanian Official Gazette No 826 of 13 September 2005, subsequently amended and supplemented.

well as any other person allegedly harmed by the remedial measures adopted by the contracting authority. Hence, in this regard there is no difference to the administrative-jurisdictional complaint.

In front of the Tribunal, the parties shall be summoned according to the proceedings applicable to urgent litigation, and the defendant must receive a copy of the complaint and of the supporting documents. In the judicial procedure of solving complaints, the provisions of Article 200 of the Civil Procedure Code[33] are not applicable, because of the urgency of the procedure.

The first hearing shall be in 20 days from the registration of the complaint. The subsequent hearings may not exceed 45 days from the seizure of the Tribunal.

The defendant has the duty to file the statement of defence within 3 working days from the receipt of the complaint, under the sanction of losing the right to propose new evidence and to raise exceptions. The statement of defence filed by the defendant shall be immediately delivered to the complainant.

The judgment of the tribunal shall be rendered immediately but, in justified circumstances, the delivery may be postponed for 5 days. The reasoned judgment shall be written no later than 7 days since its return and shall be communicated immediately to the parties.

The party discontented with the Judgment of the Tribunal may appeal it to the hierarchically superior court, namely the Court of Appeals, within 10 days from the receipt. Appeals shall be adjudicated by the Courts of Appeals - chambers for administrative and fiscal litigation, in panels specialised for public procurement litigation. If the appeal is accepted, the appellate court shall retry the case on the merits, at all events.

The judgment rendered by the appellate court may be subject to extraordinary avenues of appeal, such as the challenge for annulment or the revision, this being one of the differences

[33] These provisions establish a written procedure that has to be followed before the first hearing in front of a judicial court takes place. The aim of such a procedure is to ensure that before the first hearing session all the involved parties have been informed about the other party's allegations or defences and that the court has all the necessary data to produce the evidence, if necessary, and adjudicate the case.

between the administrative-jurisdictional procedure and the judicial procedure of the complaint.

Another important difference between the procedures regarding the administrative-jurisdictional complaint, on one hand, and the judicial complaint, on the other hand, regards the taxes that are owed.

Thus, whilst there is no charge for the complaint lodged with the Council, as regards the judicial complaint the Law provides for the duty, incumbent to the complainant, of paying a court fee of EUR 100 (RON 450). This fact makes the judicial complaint a more expensive avenue than the administrative-jurisdictional complaint, this being one of the determinant factors for the complainant to choose, almost at all events, the administrative jurisdiction. The imposition of such court fees, though, complies with the provisions of the Remedies Directives, as they were already interpreted by the ECJ[34].

The national legislature did not impose a tax for the administrative-jurisdictional complaint, because the Romanian Constitution expressly provides, in its Article 21 paragraph 4, that the administrative jurisdictions shall be optional and free of any charge[35].

---

[34] See, e.g., the Judgment of 6 October 2015, rendered by the Court in case C-61/14, *Orizzonte Salute*.

[35] For a short period of time (10th of July 2014 – 25th of May 2016), the complainants who submitted the complaint to the Council had the duty to pay a deposit, called „*good conduct guarantee*", with variable amount depending on the estimated value of the contract at stake. Those provisions were declared partially unconstitutional by the Romanian Constitutional Court (Decisions No 5 of 15th of January 2015 and No 750 of 4th of November 2015), which mainly held that the good conduct guarantee must not be subject to the automatic and unconditional retention by the contracting authority, but must be refunded to the applicant whatever the outcome of the action. The Court of Justice of the European Union has been also seized with preliminary questions regarding the good conduct guarantee, questions referred by two Romanian Courts, namely Bucharest Court of Appeals and Oradea Court of Appeals (joined cases C-439/14 and C-488/14). The Court of Justice answered to the questions in its Judgment of 15th of September 2016 (ECLI:EU:C:2016:688), and maintained that the EU applicable Law does not preclude national legislation, such as that at issue in the main proceedings, which makes the admissibility of any action against an act of the contracting authority subject to the obligation for the applicant to constitute a good conduct guarantee that it provides to the contracting authority, if that guarantee must be refunded to the applicant

The petition filed against the decision of the Council and the appeal filed against the sentence rendered by the Tribunal are also chargeable. The petitioner and the appellant shall be charged with a fee amounting 50% of the fee applicable to the judicial complaint.

5. Judicial Actions

Apart from the complaints, the Law also provides for the possibility of the harmed persons to file judicial claims subjecting the award of damages, as well as the performance, annulment, nullity, rescission and cancellation of the contract.

The Law provides for two types of procedures, one for the actions regarding the award of damages, the performance, annulment, rescission and cancellation of the contract, and the other one regarding the declaration of absolute nullity of the contract.

We will look at these two types of judicial actions in turn, but not before noting that in Article 53 paragraph 1 of the Law is set out a common rule for all the judicial actions, namely that these actions shall be adjudicated by the divisions for administrative and fiscal litigations of the tribunals under whose territorial jurisdiction the premises of the contracting authority are located, in panels specialised for public procurement litigation.

5.1. Actions for Damages, Annulment, Rescission and Cancellation of the Contract

The Law provides that the actions regarding damages for infringements in the award procedure, as well as the actions subjecting the performance, annulment, rescission or cancellation of the contract, shall be adjudicated according to the same rules of procedure applicable to the judicial complaint.

Notwithstanding, in contrast to the judicial complaint, in these procedures the defendant has the right to file a counterclaim, within the same time limit they dispose of for filing the statement of defence.

---

whatever the outcome of the action. In the new legislation on public procurement substantive and procedural law the good conduct guarantee is no more provided.

The judgment of the tribunal shall be rendered immediately but, in justified circumstances, the delivery may be postponed for 5 days. The reasoned judgment shall be written within no later than 7 days since its return and shall be communicated immediately to the parties.

The Judgment rendered by the Tribunal may be appealed in front of the Court of Appeals, within 10 days from the receipt. The appellate court shall rule on the appeal in a panel specialised in public procurement litigation, on an emergency basis and with priority, within 30 days from the legal seizure of the court.

The filing of the appeal suspends the execution of the appealed judgment. If the appeal is accepted, the appellate court shall retry the case on the merits, at all events.

The judicial action filed to the Tribunal is chargeable to court fees of a variable amount, depending on whether the complaint has or has not a pecuniary value. The complaints which do not have a pecuniary value shall be charged with a flat fee of Euro 100 (RON[36] 450), whilst the complaints with pecuniary value shall be charged differently, depending on the estimated value of the contract, with variable fees starting from Euro 2 000 (RON 9 000) - for estimated values below or equal to Euro 100 000 -, until above Euro 10 000 (RON 45 000) – for estimated values above Euro 1 000 000. The effort of determining the pecuniary or non-pecuniary nature of the action is not an issue, having regard that the damages and the value of the contract whose performance, rescission or termination is requested are, at all events, quantified or quantifiable.

As regards the appeal filed against the judgment of the Tribunal, the Law does not provide for specific rules for the calculation of the court fee. Thus, I am of the opinion that the general provisions regarding court fees[37] are applicable. According to these general provisions, if the appealed judgment is criticized on the grounds of infringement or misapplication of the law, the court fee amounts to RON 100 (approx. Euro 23) in case of non-pecuniary actions and to 50% of the contested sum, but not

[36] The Romanian official currency.

[37] These are the provisions of the Emergency Government Ordinance No 80/2013 on the court fees, published in the Romanian Official Gazette No 392 of 29th of June 2013, subsequently amended and complemented.

less than RON 100, in case of pecuniary actions. If the appealed judgment is criticized on other grounds, provided for expressly in the Civil procedure code (mostly for procedural mistakes of the first instance), the court fee shall amount to RON 100, at all events.

The Law provides that the appeals filed by the contracting authorities against the Judgments rendered on judicial complaints are exempted from the duty to pay the court fee. The other parties may request for exemptions, reductions or scheduling of the court fees, in certain conditions, provided by the law regarding the court fees.

The damages for the loss represented by the expenses for drawing up the tender or for participation in the award procedure may be granted to the harmed person only if they provide evidence of the loss, of the infringement of the public procurement law, and of the fact that they would have had a real chance of winning the contract at stake if there was not the said infringement. At the EU level, although the burden of proof with regard to the fact that the economic operator was genuinely a tenderer who had a serious chance of winning the contract is considered by the EC itself[38] as being a real hindrance for the aggrieved persons in obtaining the damages, it was kept in the provisions of the Directives and, thus, taken as such in the legislations of the Member States. Nevertheless, the doctrine[39] puts forward a different theory, namely that damages claims are not perceived as claimable, and so the reluctance of aggrieved bidders to engage in damages claims stems from a doctrinal problem rather than reasons founded in the behaviour of firms. The cited author also maintains that the fact that there are few damages claims could be a result of the difficulty in bringing damages claims, rather than an indicator for the superfluous nature thereof, and also that the doctrinal problem seems to be that damages claims have remained what they were over 20 years ago, as described by the Commission: a mere theoretical possibility.

---

[38] See *Commission staff working document - Annex to the Proposal for a Directive of the European Parliament and of the Council amending Council Directives 89/665/EEC and 92/13/EEC CEE with regard to improving the effectiveness of review procedures concerning the award of public contracts {COM(2006) 195} - Impact assessment report – Remedies in the field of public procurement* (SEC/2006/0557).

[39] See H. Schebesta, *Damages in EU Public Procurement Law* (2016), 29.

The damages caused by an illegal act of the contracting authority or by the fact that the application has not been solved within legal deadlines may be granted only after the annulment of the infringing act or after other remedial measures have been taken by the contracting authority.

The Law expressly provides for the arbitration as a means of alternative dispute resolution with regard to the interpretation, conclusion, performance, modification and termination of the contracts. The arbitration is, in fact, the only mean of alternative dispute resolution provided for by the Law, as a possibility recognized to the parties of a public contract[40]. The Law, however, does not provide for procedural rules with regard to arbitration, therefore the common rules of arbitration, provided for in the Civil Procedure Code, shall be applicable.

5.2. Nullity of the Contract

The declaration of absolute nullity of a public contract or of an additional act may be requested by any interested person, if it was concluded without the observance of the legal requirements provided for in the public procurement, sectoral procurement or concession law.

There are certain reasons for the declaration of absolute nullity and restoring of the previous status, expressly and limitative provided by the Law. These reasons are: (i) the award of the contract by the contracting authority without the observance of the duties to publish the contract notice; (ii) the concluded contract is of other type than public procurement or concession, despite the fact that the works, services or goods wanted by the contracting authority fall under the legislation regarding public procurement, sectoral procurement or concessions of works or services; (iii) the contract/additional act has been concluded in less favourable conditions than those provided for in the technical and/or financial proposals within the winning tender; (iv) the inobservance of the qualification and selection criteria and/or of the factors of evaluation set out in the contract notice which were

[40] For a complete analysis of the available means of ADR in Romania, for the disputes deriving from public procurement procedures, see D.C. Dragoș, D.M. Sparios, *Oversight and Litigation of Public Contracts in Romanian Administrative Law*, in L. Folliot-Lalliot, S. Torricelli (eds.), cit. at 7, 218-221.

taken into consideration in order to establish the winning tender, provided that this leads to the alteration of the result of the procedure, by the means of annulling or dissimulating the competitive advantages; (v) the contract was concluded before the receipt of the decision solving the complaint issued by the Council or by the court, or the inobservance of this decision.

The court may, by exception, take alternative measures if imperative reasons of general interest request the preservation of the effects of the contract. These alternative measures shall be: (i) limitation of the of the effects of the contract by reducing its term of execution; (ii) enforcement of a fine to the contracting authority, amounting between 2% and 15% of the contract value, this amount being inversely proportional with the possibility to limit the effects of the contract. The alternative measures applied by the court must be efficient, proportionate and discouraging.

The Law expressly provides that the awarding of damages does not represent an alternative measure.

If the standstill provisions are not observed, the court shall decide, after considering all the relevant aspects, to declare the absolute nullity of the contract/additional act or, as applicable, to enforce alternative measures.

The standstill period shall not be shorter than:

(i) 11 days from the next day after the transmission of the award decision to the interested bidders, if the estimated value of the public procurement or concession procedure equals or exceeds the thresholds for the mandatory publication of the contract notices in the Official Journal of the European Union;

(ii) 6 days from the next day after the transmission of the award decision to the interested bidders, if the estimated value of the public procurement or concession procedure is below the said thresholds.

When the contracting authority uses means of communications, other than electronic, the standstill periods shall be increased by 5 days.

The observance of standstill periods is optional if the legislation does not provide for the compulsoriness of publishing a contract notice, or if the contract will be concluded with an economic operator that has been the only bidder and there are no other operators involved in the procedure. The standstill period is also optional if the procedure regards the award of a contract

subsequent to a framework agreement or if the award is the result of a dynamic purchasing system.

The action for the declaration of absolute nullity shall be adjudicated by the divisions for administrative and fiscal litigation within the tribunals under whose territorial jurisdiction the premises of the claimant or of the defendant are located, on an emergency basis and with priority.

The Judgment rendered by the Tribunal may be appealed to the Court of Appeals, within 30 days from the receipt. The time limitation of 30 days set out for the appeal in this procedure is the longest of all the time limitations for an appeal, provided for by the Law.

The appellate court shall rule on the appeal in a panel specialised in public procurement litigation, on an emergency basis and with priority, within 30 days from the legal seizure of the court.

The Judgment deciding the admission of the action for the declaration of absolute nullity and for the restoring of the previous status has the force of an enforceable title. This title must be executed by the head of the contracting authority. ANAP must be notified by the contracting authority with regard to the measures taken for the enforcement of the final judgment.

6. Interim Measures

In order to prevent possible further damage to the interests concerned, the Law provides for the possibility of launching *interim measures.*

The Council may decide the suspension of the award procedure, upon the request of the interested person, in well justified circumstances and for the prevention of further imminent damage. The Council must render its decision within 3 days from the receipt of the request.

The claimant shall serve their request also to the contracting authority, by the same means of communication used for communicating with the Council. The contracting authority shall submit, forthwith, their point of view to the Council. The failure of the contracting authority to submit the point of view shall not prevent the settlement of the request.

In solving the request, the Council shall take into account

the probable consequences of the measures for all interests likely to be harmed, as well as the public interest.

The Council renders a resolution[41] upon the request of suspension. This resolution may be appealed, separately, in front of the court to whom also belongs the competence of adjudicating the petition (court of appeals under whose territorial jurisdiction the premises of the contracting authority are located or the Bucharest Court of Appeals, as applicable).

The Court may decide the suspension of the award procedure and/or of the performance of the contract until the adjudication of the petition, in well justified circumstances and in order to prevent further imminent damages. The suspension may be decided by the court upon the request filed by the interested party. The court shall render a resolution on the request of suspension. The resolution is final.

The court shall adjudicate on the request taking into account the probable consequences of the measure for all interests likely to be harmed, as well as the public interest.

In order to have its request adjudicated, the claimant must pay a guarantee whose amount depends on the estimated or the established value of the contract[42].

Thus, the amount of the guarantee shall be:

- 2% of the *estimated* value of the contract but not more than RON 35.000 (approx. Euro 7.777) or 2% of the contract's *established* value but not more than RON 88.000 (approx. Euro 19.555), if the reference value is lower than the thresholds set out for the compulsory publication of the contract notice in the Official Journal of the European Union;

- 2% of the *estimated* value of the contract but not more than RON 220.000 (approx. Euro 48.888) or 2% of the contract's *established* value but not more than RON 880.000 (approx. Euro 195.555), if the reference value equals or exceeds the thresholds set out for the compulsory publication of the contract notice in the

[41] According to the Law, the Council renders, in the exercise of its prerogatives, decisions and resolutions.

[42] The guarantee shall be calculated, therefore, according to the estimated value of the contract if the contract has not yet been concluded and the suspension of the award procedure is requested, and according to the established value of the contract, if this contract has been already concluded and the suspension of its performance is sought.

Official Journal of the European Union.

As maintained in the judicial practice[43], in case of failure to pay the guarantee, the request for suspension shall be dismissed.

In case of an award procedure regarding a framework agreement the amount of the guarantee will be calculated with reference to the estimated value of the biggest subsequent contract to be awarded under that agreement.

If the claimant demands it and the contracting authority agrees, the guarantee may also consist in financial instruments which can be payment instruments or in bringing a guarantor.

Those who paid the guarantee in cash may request the replacement of the paid amount with other goods or with a guarantor.

The guarantee shall be returned, by request, after the Judgment rendered on the petition is final or after the effects of the suspension ceased. The guarantee shall only be returned after 30 days from the final judgment if the contracting authority did not request for the due damages until the end of this limitation period or, as applicable, since the effects of the suspension ceased. The guarantee shall be returned immediately if the contracting authority expressly declares that it does not seek damages from the claimant.

Upon the request to return the guarantee, the court shall adjudicate by the means of a resolution, after summoning the parties. The resolution rendered by the court may be appealed at the hierarchically superior court. The filing of the appeal suspends the execution of the appealed judgment.

In the judicial complaint, the Court may decide the suspension of the award procedure, until the final adjudication on the case. The suspension may be granted only in well justified circumstances and in order to prevent further imminent damages. The Court may adjudicate on the request of suspension by the instrumentality of a reasoned resolution, which may be subject to appeal within 5 days from the receipt. The provisions regarding the payment of a guarantee by the claimant, mentioned above, are applicable.

The suspension of the performance of the contract may be requested also in the procedure followed in front of the tribunal,

[43] Brasov Court of Appeals – Judgment No 864/R on 8th of November 2016.

subjecting requests for damages, performance, annulment, nullity, rescission or cancellation of contracts.

This suspension may also be granted only in well justified circumstances and in order to prevent further imminent damages. All the procedural rules applicable in case of suspension granted within the procedure regarding the judicial complaint are applicable.

In the judicial practice[44] has been maintained that is inadmissible to claim the suspension of the performance of the contract by the avenue of a Court Order, which is an avenue provided for in the Civil procedure code for emergency procedures in order to decide *interim measures*, as long as the Law provides for a specific procedure for the suspension of the performance of the contract and, according to the principle *specialia generalibus derogant*, the specific provisions shall be applicable with priority.

7. Unification of Practice

Apart from the general means for the unification of judicial practice, regulated in the Civil procedure code[45], the Law provides

[44] Oradea Court of Appeals – Judgment No 7 on 9th of March 2017.

[45] The Romanian Civil procedure code regulates two mechanisms for the unification of judicial practice:
(i) the appeal in the interest of the law, which shall be addressed to the High Court of Cassation and Justice by the Prosecutor General of the Prosecutor's Office attached to the High Court of Review and Justice, *ex officio* or based on the request of the Minister of Justice, the management board of the High Court of Review and Justice or the management boards of the Courts of Appeals, as well as the Romanian Ombudsman, in order for the High Court to rule on legal issues settled differently by the courts of law;
(ii) the referral to the High Court of Review and Justice for a preliminary ruling to settle legal issues is another mean for unifying the judicial practice, which may be used by the judicial panels of the High Court of Review and Justice, the Courts of Appeals or the Tribunals, entrusted with the adjudication of a case as a court of last resort, if they find that there is a legal issue whose clarification is paramount for the settlement on the merits of the respective case and about which the High Court of Review and Justice has not issued any decision in a preliminary ruling or in an appeal in the interest of the law and which is not the subject of a pending appeal in the interest of the law.
These two mechanisms for the unification of judicial practice may be used also in public contracts litigation.

for specific mechanisms, especially for the unification of practice at the administrative-jurisdictional level.

The members of the Council shall meet monthly in order to discuss the legal issues which generated conflicting resolution in similar cases, as well as the application and interpretation of newly adopted regulations.

Moreover, the Council shall organise half-yearly meetings of its members with judges within judicial courts, specialists within ANAP or other experts, which may contribute to the unification of the administrative-jurisdictional practice.

The president or the management board of the Council may convoke the Plenum of the Council, in order to adopt a resolution for the unification of the administrative-jurisdictional practice. The resolutions of the Plenum shall be adopted by the absolute majority if its members.

The unitary application of the public procurement, sectoral procurement and concessions law represents a criterion for the professional evaluation of the Council members.

The Plenum may, also, adopt additional mechanisms for the unification of practice within the Council.

ANAP shall inform the Council and the courts whenever it detects the existence of conflicting resolutions in litigation regarding public procurement, sectoral procurement and concessions. In the same time, the Council may notify ANAP whenever detects deficiencies of the legislation regarding the public procurement, sectoral procurement or concessions.

ANAP may also be notified upon the deficiencies of the legislation by the allegedly harmed person. The measures that may be taken by ANAP must not affect the *res judicata* of the Council's decisions and of the courts' judgments.

If the Council finds that there are different approaches in final judgments of the courts in similar cases, it shall inform the Court of Appeals of Bucharest, in order to analyse the opportunity of triggering the procedure in front of the High Court to settle legal issues.

If the conflicting judicial decisions come from the same court, the Council may request a point of view upon the predictability of the interpretation of the legal provisions by that court.

8. Conclusions

The new Romanian Law on remedies and appeals in public contracts litigation has made a better transposition in the domestic legal order of the Directives on remedies and appeals.

This Law brings certain novelties and more clarity.

The main novelty is that remedies and appeals benefit of a regulation in one single, dedicated law, unlike in the old regulation, which only contained provisions regarding the remedies and appeals in one single chapter of the law on public contracts.

Another novelty brought by the new Law is represented by the regulation of the prior notification, set out as a mandatory prerequisite requirement before the seizure of the review bodies, in line with the provisions of Article 1 paragraph 3, final part of Directive 89/665/EEC.

Another important progress over the old law is the detailed regulation of the judicial complaint. In the old law the possibility to lodge the complaint also with the court was merely stated, but the procedure was not regulated, as it is in the new law.

In the new Law, we do not find anymore the good conduct guarantee, which gave rise, under the old law, to numerous discussions and also exceptions of unconstitutionality, references to the Court of Justice of the European Union for preliminary rulings[46] and it has even given the European Commission the reason to begin an investigation over it, in order to analyse the necessity of triggering the infringement procedure[47].

Even though we do not have the good conduct guarantee anymore, it seems that the costs of the procedure have remained high, especially when we talk about the judicial actions with pecuniary value. It should be highlighted the fact that the procedure in front of the Council is free of any tax, because according to the Constitution of Romania (Article 21 paragraph 4) the administrative jurisdictions are optional and free of charge. This makes the procedure of complaint in front of the Council more attractive to the claimants than the judicial one.

---

[46] See Judgment rendered by ECJ in joined cases C-439/14 and 488/14 (ECLI:EU:C:2016:688)

[47] Under the EU Pilot 7189/14/MARK dossier.

Another important novelty brought by the new Law is the explicit reference to the specialised panels of judges that shall adjudicate on the petitions, judicial actions and appeals. In the old law these specialised panels were not mentioned. I am of the opinion that only the explicit reference to these specialised panels is not enough, a more attentive training on this field for judges dealing with this kind of litigation being also necessary.

The prerogatives attributed to the Council with regard to the unification of practice and improvement of legislation represent another novelty brought by the new Law. These prerogatives transform the Council in one of the main actors within this field, having the possibility of influencing even the judicial practice, by the instrumentality of common meetings of its members with judges from the judicial courts and by references to the Bucharest Court of Appeal regarding conflicting judicial decisions.

As regards the surplus of clarity brought by the new law, this resides in a more detailed regulation of remedies and appeals in public contracts litigation and in a better patterning of the provisions.

The structure of the new law allows a better and faster identification of the remedies and avenues of appeal open to the interested persons.

Considering the preceding, we may look at the new law as to a big step forward of the Romanian domestic legal order in the field of remedies and appeals regarding public contracts, even though there are some provisions that already gave rise to contradictions in practice and within the scholarship, contradictions that, however, may be solved using the existing legal mechanisms.