

The Role of the Administrative Jurisdiction in Society and in the Development of the European Union

**Vortrag des Präsidenten des Bundesverwaltungsgerichts Eckart Hien
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Dear Mr. President, Distinguished Colleagues,

first I like to thank my dear friend and colleague Mr. Pekka Hallberg for the invitation to this event. I always enjoy being in Finland since my wife and I had the opportunity to experience Finnish hospitality and kindness on several occasions in connection with the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. I particularly remember the excellent colloquium on the preliminary reference procedure here in Helsinki in May 2002. All the more so as the presidency of the Association has recently been passed on Germany and I can now even more assess the efforts which are necessary to organise such an event. Furthermore, I know that the Finnish and the German administrative jurisdiction have a lot in common and I strongly believe that a close cooperation between our institutions is of mutual benefit.

One thing we have in common is the long tradition of our administrative jurisdictions. If I remember correctly, your Supreme Court was established in 1918. Compared to that the German Federal Administrative Court which came into existence only in 1953 is - admittedly - quite young. However, the beginnings of the German administrative jurisdiction reach back to the 19th century. The first independent Higher Administrative Court was created in the Grand-Duchy of Baden in 1864. The first administrative jurisdiction with a three-levelled hierarchy was established in Prussia between 1872 and 1875. It consisted of partly independent committees on county and regional level and a fully independent Supreme Court. Until 1924 all German states had developed similar systems, only a common supreme instance at the Empire level did not yet exist.

In many of the German states the decision for a dualistic approach with separate administrative and ordinary courts had been preceded by a controversial debate as to the advantages and disadvantages of a specialised administrative jurisdiction. The supporters of a monistic system doubted whether specialised administrative judges - who might even have worked in the administration before - would be sufficiently independent. Moreover, they emphasised the legal and practical difficulties that regularly arise from dualistic court systems, most notably the problems connected with the allocation and demarcation of competences, wrongly filed claims and the impact of decisions taken by the incompetent jurisdiction. But in the end all German states opted for the dualistic approach. The main reasons for their decision were as follows -

and I daresay that the reasons for the establishment of the Finnish administrative jurisdiction were quite similar - :

It was acknowledged that public law litigation had a particular quality which required provisions different from the civil or criminal court procedure. Administrative litigation always involves public interest and public welfare, the realization of which should not be dependent on the procedural skills of the parties. Thus, an inquisitorial procedure was needed which in contrast to civil law authorised the judges to investigate the truth without being bound by the evidence presented by the litigants. In addition to that, in administrative law cases the plaintiff is most regularly a citizen who finds himself confronted with an especially powerful defendant - the state. This constellation required particular procedural provisions for the protection of the individual. Moreover, the founding fathers of the administrative jurisdiction saw that in contrast to civil law litigation, the impact of rulings on the field of public law was often not limited to the case in question but could have far-reaching consequences for administrative action as such. Thus, experienced judges were needed who could assess the effects of a ruling beyond the boundaries of the individual case, were familiar with the functioning of the administration and knew the "tricks" which public authorities sometimes apply to conceal dubious acts. Finally, it was thought that the administration would accept the rulings of a specialised judiciary rather than the decisions of judges trained only in a general way.

In this connection we should always bear in mind that the establishment of our administrative jurisdictions was quite a revolutionary step: For the first time in history people could call upon an independent body to control the legality of administrative actions and to protect their rights against the state. Unfortunately, I do not know what the situation had been like in Finland before your Court was established. In Germany - prior to the creation of administrative courts - there had been only controlling panels which were integral parts of the administration and primarily designed to supervise the efficacy of public institutions. They had not provided independent and effective relief to the individual. Thus the administration was naturally suspicious of that new kind of judicial control exercised by real courts and the success of the young jurisdiction was by far not guaranteed.

Today we know that the venture ended well. When after the Second World War Germany's judicial system had to be re-organised, the decision in favour of a specialised administrative jurisdiction was taken without much controversy and the right to effective judicial protection against the state was explicitly laid down in the German Constitution of 1949. Germany even opted for a pluralistic system with specialised fiscal and social courts alongside the general administrative courts. It is true that at present some of the German states intend to merge these three separate hierarchies into one unitary administrative jurisdiction again in order to cut costs. However, the basic concept of a specialised administrative jurisdiction as such has never been questioned.

Thus, the history of administrative jurisdiction was indeed a story of success in both of our countries. And it is not just by chance that the dualistic system has been proved of value. Our courts have made substantial contributions not only to the development of modern democracy but also to the development of what I like to call a “culture of rule of law”. Over the years the courts have succeeded in creating sufficient credibility and accountability to achieve the confidence of civil society and public authorities alike. Public authorities have accepted their being bound by the law as a matter of course. They accept the courts’ rulings and in the vast majority of cases comply voluntarily without any further enforcement procedure. It is even quite frequent that courts’ decisions bring about general changes in the administrative practice, even though the underlying ruling takes effect only inter partes. According to recent statistics in 90 % of all cases brought before German administrative courts it occurs that public authorities have acted correctly. Public authorities and courts are not competitors any more but co-actors in creating accountability and confidence in the legal order which are vital to social security.

Today, the Finnish as well as the German citizens enjoy the advantages of an administration which - on the whole and despite of occasional deficiencies - is competent, functioning and in accordance with the rule of law - a situation our colleagues in the new democracies may only dream of ! And in this fortunate development the independent judicial control exercised by our jurisdictions has played a major role.

Of course, a monistic jurisdiction may grant effective judicial protection as well. Denmark and the United Kingdom for instance have opted for the monistic approach and no one would question their democratic quality. However, I believe that the dualistic model is - despite of its higher costs - the more favourable alternative, for the reasons which led our founding fathers to the decision for a specialised administrative jurisdiction are today as crucial as they were back in the 19th century.

I would even say, that today specialised administrative judges are more important than ever before because in times of globalisation and accelerated technological progress administrative law is getting more and more complex. New fields of law have been added - just think of the broad field of industrial and environmental law - which had been completely unknown when our jurisdictions were established. Also the classical branches of public law such as public order and security, municipal administrative organisation, traffic or construction law have become much more diversified. In this regard I should also mention that even states with a monistic system often have established specialised chambers or panels which are exclusively concerned with administrative law and, thus, form in fact a kind of “informal” administrative jurisdiction.

Talking of the role of our courts we must also not forget that an independent and effective legal system plays an important economic role as location factor as well. An investor will always need licences or permissions for his projects and, thus, might favour a location where the

administration is integer and judicial relief guaranteed within reasonable time. I know that the performance of the Finnish economy is outstanding. In Germany, however, we could use more international investment, notably in the territories of the former GDR. In this situation it is up not only to the politicians but also to our courts to contribute to sustainable economic growth by reducing the duration of processes and paying attention to the economic impact of our judgements.

And our jurisdiction is an economic factor in other respects as well. As employers we provide jobs not only for judges but also for research and administrative, secretarial and technical, security and facility management staff.

Moreover, we are engaged in the education of judicial and non-judicial staff. The German administrative courts of first instance, for example, provide work experiences for students and practical training for young lawyers. Many of my colleagues - and I am sure it is the same here in Finland - teach at universities or institutions for advanced training and work as examiners. In addition to that the opportunity for every interested citizen to sit in on oral proceedings contributes to the general education of the public. It is quite frequent that groups of pupils, legal practitioners, employees of other public institution and even tourists visit our court.

In this connection, however, I have to explain that the Federal Administrative Court resides in a quite impressive building which formerly housed the Supreme Court of the German Empire. After the German reunification the building has been restored and is now one of the most beautiful courthouses in Germany with historic courtrooms and even a ballroom. For this reason we have actually become a tourist attraction. Some parts of the building are always open to the public during the normal service hours other parts may be visited in form of guided tours. Furthermore, we let the ballroom and the Great Courtroom to third parties for seminars, lectures, panel discussions, receptions or concerts. Thereby our courthouse has become a popular venue for cultural events as well. These activities are of course no principal duties of a supreme court, however, I believe that they are an important sign of transparency and make a substantial contribution to the acceptance of our jurisdiction in society.

But now let me now come back to the actual judicial role of our courts and turn from the national to the international level.

The ever closer European Union has brought and still brings significant challenges for the administrative jurisdiction in general and the Supreme Administrative Courts in particular. Our role has changed from a mere national to a European jurisdiction and our work is fundamental for the European cause in many aspects.

Europe - as it appears today - is mainly defined by its legal framework. This framework is one of the most important if not the most important pillar of the actually existing European Union and we have the challenging

mission to defend this pillar which supports the present state of cooperation and integration.

When a European provision is implemented the administrative courts are often the first ones to assess their validity. Moreover, the preliminary reference procedure before the European Court of Justice has changed the role of our Supreme Administrative Courts. On the one hand they have ceased to be the supreme instance in cases where Community law is involved and are subject to the rulings of the European Court of Justice just as any lower court. But on the other hand the European Union has brought about new chances and responsibilities for our jurisdiction, too. Our competence is no longer confined to the national sphere only. In cooperation with the European Court of Justice we not only control the implementation of European law by our national authorities but also provide judicial protection against unlawful acts based on Community provisions. It still occurs quite frequently that the litigants do not see the European dimension of a case. In this instance the courts are called upon to guarantee the effective enforcement of Community law. Moreover, by initiating a preliminary ruling we may - at least indirectly - influence the legal practice in other Member States since many questions occur Europe-wide.

Sometimes the feedback given by national courts may even influence the process of European law-making. As a consequence the modern administrative judge must always be aware of his European role and the impact his rulings might cause at Community level.

These new tasks require not only a specialised jurisdiction more than ever before but also new personal qualifications on the part of the judiciary. In former times some research in the court's library was sufficient to solve a case. Today, not only the traditional reference books but also national and international online databases - sometimes in foreign languages - have to be checked in order to find the right solution. Thus, the modern administrative judge has to be capable of operating these new research facilities which includes not only the willingness to acquire the necessary technical skills but also a working knowledge of English.

In addition to that the European legislation has increased the need for communication and cooperation among the Supreme Courts of the different Member States. Community law may only be effective when it is applied in an equal way in all Member States and sometimes a cumbersome preliminary ruling procedure may be dispensable because another court has already initiated a preliminary ruling on the same question. Therefore it is important to keep in touch with our foreign colleagues. A particularly useful instrument for such contacts are the new research facilities of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union. As you might already know the Association has recently installed two online-databases:

- "DEC-NAT" containing national decisions and

- "JURIFAST" providing information on preliminary ruling procedures and national Supreme Court decisions of European importance. The databases may be accessed via the Association's website. Moreover, an internet forum has been set up which allows the judges of all member institutions to ask questions and exchange information.

Besides, the Association's next colloquium will be held in May 2006 on the premises of the German Federal Administrative Court in Leipzig and I would be delighted to welcome two delegates of the Supreme Administrative Court of Finland as well. The subject will be a case-study combining aspects of project planning and European environmental law.

Speaking of Europe, I come to another role which goes well beyond the mere judicial function of our courts. What I mean is the function as advisors or better "role models" for the Supreme Courts of the new democracies in Central and Eastern Europe. After the fall of the Iron Curtain the former socialist states have begun to enact administrative laws and to establish administrative jurisdictions. Some of which have opted for a genuine dualistic system such as Lithuania and Poland. Most of the others have at least specialised administrative law divisions within their unitary courts. However, all of them have recognised that a law-abiding administration and the independent judicial control of public powers are vital to the process of democratisation. Clearly, the prospect to join the European Union was one factor which accelerated this process but the success of our systems was an incentive as well. It is not just by chance that almost all of the new administrative laws are modelled on our western prototypes and that many of our colleagues have been asked to support the legislative process as advisors. Sometimes, it appears to me that - besides beer, cars and soccer coaches - the German administrative law has become one of Germany's most successful export articles.

And what is also remarkable: This development does not stop at the borders of the European Union but spreads into the states of the former Soviet Union and even into the Far East. Just recently the new Administrative Court Act of the Ukraine has entered into power and earlier this year I had the opportunity to visit Thailand where the establishment of an administrative jurisdiction has begun in 2001. The supreme instance and a certain number of county courts are already working and it is to be hoped that other countries in this region will follow the Thai example.

However, being role models is not only a great honour for our traditional administrative jurisdictions but also a great responsibility because the democratisation of the aforementioned states is still a "work in progress". The formal establishment of an administrative jurisdiction is only the first step. Now the new systems have to stand their test in practice and I know from my own experiences with the former GDR territories that there is still a long way to go.

We must not forget that the citizens of the former socialist states had never experienced an independent jurisdiction and their administration had been dominated by corrupt employees, autocratic leaders and the

doctrines of the socialist party. The rule of law was unknown or at least inexistent. Consequently, the relationship between the population and the state was characterized by deep distrust.

It is true that the democratisation has now brought more civil liberties, however the radical political and economic changes have also been very disorienting for many people. More liberty is always accompanied by more responsibility for the individual and if you are not used to decide for yourself because “the party” has always taken the necessary decisions you might find it difficult to adjust to the new freedom.

In addition to that, the expectations into the new system were high, sometimes too high and, thus, could often not be fulfilled. Consequently, there is much disappointment in the former socialist states and this disappointment is often directed against public authorities. Bärbel Bohley, a civil-rights activist from the former GDR had once put it as follows: “We hoped for justice and all we got was the rule of law.” One might not share her opinion but the quotation illustrates the sceptic attitude of many “new Europeans” towards the state and its judiciary. What makes the situation even more complex is the fact that distrust occurs on the side of the administration as well. It is quite frequent, for example, that public authorities just ignore the courts’ rulings.

Under these circumstances the position of the administrative jurisdictions is at the same time especially important and especially uncomfortable. As courts designed to protect the individual against the abuse of public powers they can do much to strengthen the rule of law and to encourage public confidence but on the other hand every unpopular decision will be bound to deepen public distrust.

In addition to these “moral” problems our colleagues within the new democracies have to master significant practical difficulties as well. The heritage of socialism - especially the reallocation of the socialist state property - puts immense workloads on the courts. Moreover, the financial situation of judiciary and administration leaves much to be desired. Our colleagues are hard-working and highly motivated. However, given the aforementioned situation, it is clear that they will still need significant time to establish a firm “culture of rule of law” in their countries.

The reasons for which I dwell on that subject are twofold. On the one hand the situation in the new democracies shows us quite plainly how privileged we are with our well-functioning administrative and judicial systems. On the other hand I like to demonstrate that the influence of our courts is no longer confined to our national societies. With the export of our system we have strongly influenced other societies as well and thereby taken on a particular responsibility. One might call it a “life-long warranty” for the functioning of our export product. That means we cannot leave the recipients alone and just hope that the system will work somehow but we have to provide moral and practical support until the process of democratisation is definitely completed.

As Supreme Courts we can contribute to this support in many ways. Apart from legal advising during the legislative process we may help our colleagues with the practical implementation as well, for example by organising study visits, seminars or workshops. In Leipzig we already had bilateral study visits from Lithuanian and Estonian judges and I always got the impression that our colleagues were very grateful for the opportunity to get a deeper insight in the everyday work of our Court.

However, I am very well aware of the fact that telling these things here in Finland is like "carrying coal to Newcastle" or - as we say in Germany - "taking owls to Athens" - because my friend Pekka Hallberg has always been one of the most committed and most active representatives of our jurisdiction at the European as well as at the international level: The perfect role model so to speak ! His enthusiastic promotion for the global application of "the rule of law" always reminds me that our international role is not only "overtime work" but also a great chance and a great pleasure. Moreover, it is never a one-way road but an important opportunity to learn for both sides. For when I have said before that we have the privilege to work in a well-functioning system this does not mean that we should stop to improve ourselves.

One thing the German administrative jurisdiction might learn from its European colleagues is the exercise of judicial self-restraint. Our courts are often criticised for their extensive judicial control of administrative acts and our judiciary runs the risk of becoming too complicated. Public authorities complain that autonomous action is made virtually impossible because the judges will be looking even into the tiniest details of an administrative measure and not rest until they have found a mistake. And it is true that over the years we have extended our control into areas where it might be advisable to grant the administration more "creative freedom". Thus, a little bit judicial self-restraint might clearly be an improvement.

And there are other challenges - national as well as international - which will prevent us from resting on our laurels.

At the national level in Germany the administrative jurisdiction is still concerned with the heritage of the GDR, above all the re-allocation of former state property and the modernisation of the infrastructure. In relation to building projects concerning roads, airports and other kinds of infrastructural measures within the east of Germany the Federal Administrative Court was given original competence which is not only quite unusual for a supreme court but also very laborious and time-consuming. Presently, we are concerned with the construction of a new airport in the City of Berlin. Thousands of residents are directly or indirectly affected by this project and it is the biggest case we ever had to deal with.

Moreover, I have already mentioned that some German states intend to merge the three separate German administrative jurisdictions together. That means, judges who have specialised in social or tax law will on the

long run be concerned with general administrative law and vice versa. Given the fact that each jurisdiction has its own procedural law as well, the reform will not be easy.

In addition to that Germany is about to re-organise its systems of social welfare. New laws are made - unfortunately not always with the necessary skill - which restrict traditional entitlements to unemployment support, social benefit and health care. Of course these reforms are necessary and here again Finland with its outstanding welfare and educational system is one of Germany's main role models. However, many welfare recipients feel they are treated unfair and hope for the courts to help them.

But I do not want to bore you with our national problems since there are burning issues at the international level.

There is the increasing threat of international terrorism which creates new challenges for the judicial system in general and the administrative jurisdiction in particular. After the terrorist attacks of September 11 in the United States most European countries have reformed their anti-terrorism laws. However, as I already said before, it is not sufficient to merely enact new laws. Effective enforcement is required as well. As courts traditionally competent for the laws concerning national security, foreigners and asylum we are not only directly concerned with the control of these anti-terrorism measures but also bear a particular responsibility because the respective laws are somewhat problematic. They contain significant limitations on fundamental rights and civil liberties. In Germany restrictions are made on the right of assembly, the bank client confidentiality, the privacy of correspondence and the secrecy of telecommunication. Many of these restrictions are necessary and I know that other countries have enacted even more restrictive provisions. However, they are also a tightrope walk between reasonable precaution and illegal limitations of fundamental rights which may easily destabilise the sensitive balance of liberty and security.

Thus, it is important that the courts control the legality and proportionality of anti-terrorism measures as well as their compatibility with constitutional guarantees.

Distinguished Colleagues, our jurisdictions have made substantial contributions to democracy and the development of a culture of rule of law not only in our own but also in other societies and I hope that President Hallberg's excellent book on the "Rule of Law" will further increase the international interest in independent administrative jurisdictions. There are new challenges waiting for us but I am confident that by joint efforts we will master them.