PUBLIC ADMINISTRATION & REGIONAL STUDIES
2nd Year, No. 1 – 2009
Galati University Press, ISSN 2065 -1759

STRUCTURAL AND DOCTRINAL GROUNDS FOR WEIGHING UP THE ADMINISTRATIVE COST BY ADMINISTRATIVE AND JUDICIAL DECISIONS

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Abstract

It is possible to include the administrative cost of administrative and judicial procedures among the criteria which the particular implementer of law provisions takes into account to pronounce the necessity of decisions by an application of the proportionality principle and, accordingly, to correspond the administrative and judicial efficiency/economy to necessity. Necessity cannot only be developed as a benchmark of the proportionality test by the "classic" model of restrictions of individual rights. An administrative decision or a judgement that overloads the citizen, but brings him an important economic advantage concerning the enjoyment of equivalent rights, can be considered as compatible with proportionality. At the same time, it is suggested in order to

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optimize the links between necessity and efficiency/economy, that the space of the application of the traditional economic Kaldor-Hicks criterion should be enlarged.

"Economizing" of Administrative Law and the Organisation of Public Administration

Empirical and normative Prerequisites

The term of "economizing" of state, administration, administrative law and administrative jurisdiction is used for situations, in which only economic standards and structures flow such as efficiency, effectiveness, market, competition, price, goods scarceness or individual need satisfaction into administrative and administrative considerations. [1] The economic crisis of State and the relating crisis of "regulating" Administrative Law, that is characterized by deficits during the application of certain branches of it, for instance as the Environmental Law[2], give nowadays the main impulse for the discussion about the modernisation of Public Administration. And this, in connection with a transformation from a liberal into a interventionist state, particularly with regard to the prevention of risks and the changing perception of the operations and the duties of State towards its citizens[3] respective the growing demands of the societies for the guarantee of infrastructure[4]. These conditions are prompt to the formulation of expedient normative and organisational terms, via which administrative activities might serve the public interest with as slight consumption of resources as possible[5]. This understanding of the changing role of the modern State, using words as allocation of responsibility[6], efficiency, or regulated auto-regulation[7], aspires to contribute towards bridging the gap between theory and praxis in the areas of Administrative Sciences and Administrative Law. A normative requirement of the economics, especially the New Institutional Economics, is on the other hand emerged to develop instructions regarding the legal order by analyzing first whether law and the jurisdiction achieve the

[1] LOEFFLER (2003), pp. 19 ff.
[2] PREHN (2006).
[3] See for example GRÖPL (2001), pp. 329 ff.
[4] APPEL (2005).
[5] MARTINI (2008), pp. 199 f.
[6] HOFFMANN-RIEM (2001a), pp. 47 ff.
[7] SCHMIDT-AßMANN (2001), pp. 253 ff.

politically given goals with the available means[1], so that they aim at pursuing for the change of legal rules, which are not considered to be able to contribute to this maximization.[2] In addition, the possible self-interest must be understood extensive, by not be related to only economic interests.

For the integration of Economics approach to law the framework which can be presupposed is present, at which its necessary democratic authentication is to be measured.[3] The contribution of the constitutional economics to incorporate fundamental constitutional principles like democracy and fundamental rights and their distribution within the economics. It focuses in the consent of the citizens as legitimating criterion and thus created one with the theory of public law (even if only partial) common basis.[4]

1.2 Methodological Prerequisites

The above mentioned tendencies are encouraged by the diagnosed possibility of an interdisciplinary cooperation between empirical and theoretical sciences, and particularly of a - even if by many law scholars disputed it compatibility between the methodological models of Law and Economics[5]. The references of Public Law to empirical sciences are not unknown in the theory and methodology of Public Law in European countries, affected by the legal system of the U.S.A. and its structural openness for social science approaches[6]. That speaks decisively in favour of the opinion, that some contents of certain economic principles could be compatible with the methodological perception of Public Law.[7] In general, in the Public Law prevails today methodological pluralism that is intensified by modern tendencies as the so called "Constitutionalisation"[8], "Europeanisation" [9], and "Internationalisation" [1] of the legal order and the Economic Theory of the Constitution as well[2], as well. [3]

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[1] So for instance TAUPITZ (1996), 114/122; LADEUR (2000), pp. 60/93.
[2] FELDMANN (1999); KIRCHNER (1988), pp. 192 ff.
[3] TONTRUP (1998), pp. 41 ff..
[4]Vgl. VAN AAKEN/PRESERVING MAN (2002), P. 28/43.
[5] POSNER (1987), pp. 761 ff. ·
[6] See LEPSIUS (1999), pp. 429 ff., KIRCHNER (1991), pp. 277 ff.
[7] LINDNER (2008), pp. 957 ff.
[8] SCHUPPERT/BUMKE (2000).
[9] See the contributions of RERNICE, LÜBBE-WOLFF και GRABENWARTER (2003), pp. 148 ff., respective 194 ff. and 290 ff.; concerning administrative law and administrative science VON DANWITZ (1996); RUFFERT (2003), pp. 293 ff.

1.3 Implementation Cases

In the environment of concretisation of the above mentioned radical changes of the public sector, an economical rationality steps in the place of a primarily judicial-political rationality by the administrative decisions. It concerns the efficient organization of the public administration including efficient employment of the personnel[4], the efficient organization of the administrative proceedings and court trials[5] and the efficiency of the material administrative decisions[6]. In the administrative procedure and other regimes of economic regulation, legislatures establish legal commands that engage the public administration to promote economic efficiency[7].

Possibilities of administrative obligations to save resources have been established in the administrative proceedings of the E.U. members since the beginnings of 1990's, as according to German Administrative Proceedings Law/Verwaltungsverfahrensgesetz it *"shall not be tied to specific forms when no legal provisions exist which specifically govern procedural form. It shall be simple and appropriate"* (section 10); burden of the participants of cooperating „in ascertaining the facts of the case" (section 26 paragraph 2); infringements of the regulations governing procedure or form can be ignored by additional correction of the proceedings (section 45). An obviously high administrative cost can be the reason for the authorities to deny access to administrative information (section 1 paragraph 2 sentence 3 of the German Law concerning Freedom of Information Law/Informationsfreiheitsgesetz). In the administrative trial, the role of judicial economy by judge-made law can be sometimes crucial. If an administrative act has ceased to exist before the trial ends, then, on application, the court shall pronounce through judgment that the administrative act was unlawful if the plaintiff is legitimate in such a

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[1] UERPMANN (2001), 565 ff. · KOKOTT und VESTING (2004), pp. 7 ff. respective pp. 41 ff. · concerning Administrative Law OHLER (2007), pp. 1083 ff.
[2]KIRCHGÄSSNER (2006), pp. 75 pp.; critical GRZESZICK (2003), pp. 649/652 f.
[3]Βλ. ROSE-ACKERMANN (1994), 53 ff.; concerning the meeting of law and economics in the various fields of public law ENGEL/MORLOK (1998); especially for the administrative trial MÖLLERS (2000), pp. 667 ff.
[4] KÖNIG (1997), pp. 265 ff.
[5] HOFFMANN-RIEM (2001b).
[6] FEHLING (2004), pp. 443 ff.
[7] See VOSSKUHLE (2001), pp. 349 ff., WEISE (1999), pp. 47/56 ff.

declaration (section 113 paragraph 1 sentence 4 of the German Code of Administrative Procedure/Verwaltungsgerichtsordnung). Although such an interest is basically recognized if the plaintiff is intended to raise a lawsuit for litigation in order not to let the "fruit" from the past procedure fall, this is acceptable according to some courts and some representatives of the , if the procedure of taking evidence can be carried out only under further, relatively high cost expenditure.[1]

2. The correspondence of the consideration of Administrative Cost in the Proportionality Test

2.1 Proportionality as the dogmatic Gateway for Taking into Account Concepts of Efficiency in Administrative Law

Economics as a comprehensive term nowadays is used for the multiplicity of the approaches, which aim to analyzing social institutions and concomitantly law and politics as phenomena of rational behavior of individuals. In addition, the administration should achieve political goals by reason of the budgetary economical principle[2] (that is being implemented by the Courts of Audit in most of the E.U. member states) at as small an expenditure of budgetary appropriations as possible to obtain the optimum result with a certain employment of means.[3] The proportionality test, mainly applied to check a case of infringement upon fundamental rights, is a suitable conceptual surface to create in dependence on constitutional law a *modified efficiency term*, particularly since it exhibits a rational structure of decision-taking (it requires a rationalized weighing up principles in goals-means relations = optimization of the relationship between costs and goals and thus reduction of the limitations of liberty) and remains open for the admission of models from economics. The principles of the suitability and the necessity as facets and yardsticks of the proportionality requirement turn off to the actual possibilities of the realization of the balancing principles.[4] Both efficiency and the

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[1] Supreme Administration Court of Baden-Württemberg, Judgement of 8.6.1993, Verwaltungsblätter für Baden- Württemberg 1994, pp. 24/27; CHRISTONAKIS (2002), pp. 390 ff. opposite to Federal Administration Court, Judgement of 27.3.1998, Neue Zeitschrift für Verwaltungsrecht 1998, pp. 1295 ff.=Baurecht 1998, pp. 999

[2] See ORTMANN (2007), pp. 565 ff.

[3] MARTINI (op. cit. note 5 above), p. 203.

[4]Regarding a doctrinal introduction JAKOBS (1985), pp. 59 ff., 66 ff.; VON ARNAULD (2000), 276/279; concerning the proportionality in the jurisdiction of the European Court of Justice KOCH (2003).

proportionality are *methods* for the solution of competing goals[1]. The aspect of efficiency can be consulted thus even with a balancing among different criteria which can be established to optimize to weigh those legal goods, the valid of which the criteria serve. The reasonable relation between means and goals required by the proportionality appears as a further case connected with the task of efficiency, to split up barely sufficient means into competing alternatives, so that the greatest possible use can be drawn from it. Optimization would be called then with regard to *legal and actual aspects of a realization of possible* principle contents in a concrete competing situation - depending upon kind, extent and modality of the respective goods. If such fundamental rights compete with other fundamental rights or come into conflict with constitutional principles, it has to be decided about the prevailing principle. Constitution of several European states (like Germany) is filled with concepts, which have to be carried out by an optimal resource allocation by weighing up legal goods as well.[2] One could express this quite differently: Economical and constitutional approach can be brought into accord to that extent, whereas the individual use can be aggregated in principles of constitutional law. Principles could be treated as criteria to achieve goals for tying to an economic approach.[3] The resort on the social use in the sense of the economics theory is actually not possible in constitutional (and administrative) law (at least in the same extent), but upon the principle of the effectiveness of the in each case respective fundamental rights, also the same fundamental rights of others. To that extent also competing fundamental rights assume a social use. The problem, which it finally concerns, is optimizing the fulfillment of the colliding principles, on optimal distribution of liberty. Balancing principles in favor of efficiency of administrative proceedings or of the judicial economy support consequently the guarantee of access to courts, especially the effectiveness of the judicial protection as an institution.[4]

The comparison of two right goods (or legally protected interests) always involves a valuation, which cannot be reduced to a cost-benefit calculation, nevertheless can in some cases agree with the economical valuation. It orients itself not the actual price of certain goods or on towards visual market prices, but at the rank, which a right property possesses holds unit within the legal order. Because prices reflect

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[1] LACHMAYER (2004), pp. 135/144; BIZER (2000); FÜHR (2002), pp. 113.
[2] WUERTENBERGER (1999), pp. 139/149 f., 154.
[3] VAN AAKEN, (2003a), Berlin p. 89/107; same (2003b), pp. 315 ff.
[4] ZUCKERMAN (1995), pp. 155 ff.; PIERAS (1986), pp. 943 ff.

shortage in markets, while the rank of a legal good/principle depends on legal and political importance for the community.[1]

Necessity as Platform for consulting of Efficiency Considerations

It is to be analyzed whether costs in the sense of the recourse to of national resources as argument debited to and/or to favor of alternative means and revealed in the argumentation can be used. Who ever wants to reach economy, may not be restrained to minimize the social costs (use is given) but consider possible alternative cost-benefit combinations and maximize the positive difference of benefits and costs.[2]

Necessity as a facet and standard of the proportionality requirements does not guarantee an optimization of the benefits, but a reduction alone of the expenditure for this goal to be achieved. As long as one keeps the benefits constant, possible improvements remain unconsidered, which can result in changes to the extent of the goals (and the costs). A certain situation is considered as Pareto-optimal, a means as necessary, if with application of all alternative means someone' s position is possibly worsened. The necessity corresponds to that extent to the economy principle only partly by covering only its first component, the minimum principle in form of the "slightest infringement of rights" without consideration for "cost as slight as possible".[3] Since such measures don't seem to be compatible with the economy principle if part of the costs applied for the reaching of the announced goal were not necessary, the necessity could not be related to efficiency, could necessity not be regarded from another perspective, this of the non-infringement upon rights. The general balancing principles rule that the fulfilment value of a principle which can be realized by the weighing is maximum, if it is more considerable than the value of the default of another, withdrawing principle, to which the fulfilment of the former leads,[4] can be reformulated for instance in second our implementation field in such a way: *The default of the legal protection guarantee in the cases of economically motivated judge-made law in favor of judicial economy causes an Pareto-improvement regarding work the courts, if its fulfilment possibly implies substantial costs for the operability of the justice and the goods that it protects.* If one wants to develop this thought further, a means applies as *necessary* in an Pareto-optimal state, if *an*

[1] EIDENMÜLLER (1995), p. 469.
[2] v. ARNIM (1988), p. 55.
[3] GERSDORF (2000), pp. 421 f., 445.
[4] ALEXY (2002), especially pp. 100 ff.

improvement of the position of disadvantaged groups (avoidance of infringements) deterioration of the level of reaching the goal or the degree of burden of the position of others; or if alternative means suppress the fundamental rights involved more than the applied means. A means is in reverse not necessary, if an improvement is possible, i.e. if by the execution of an alternative means, the aggrieved parties incoming goods in their fundamental rights slightly infringed and nobody worse situated, since the alternative means is at least as suitable as the former. Nobody becomes to that extent worse situated[1], the execution of the alternative means would be for all involved parties capable to achieve compliance. Procedure preferences would be thus in demand, which are so pronounced that the citizens would be willing to approve of the consideration of these preferences costs as for instance costs of the guarantee of constitutional State under the rule of law.[2]

With good arguments it is partly represented anyway that necessity does not unfold a special direction towards a protection just in favor of the citizens.[3] The choice of the necessary means should be - in view of the scarceness of goods such as time and financial means - a requirement of the economic reasoning.[4] The guarantee of an inalienable core of constitutional rights is also relevant to restrictions of the core range, in which a minimum of bringing competing constitutional principles into accord is being implemented.[5] If their special weight is sufficiently considered, then the possibility of a means more burdensome for the citizen but however more beneficial to the public may result in not regarding the original measure as necessary[6]. Necessity can also be determined regarding secondary goals lying outside the infringement situation.[7] At least optimality would then be called; a goal is up to the point of being realized, as the advantages of the fulfilment by other applications of means, is to be traded off at least against the social costs (side effects of the decision alternatives).

All this should apply to the following restriction: The significance to avoid the administration expense is to be determined more concretely. The decision of the democratically legitimized legislator over the expensive means and its preponderance regarding household problems has always

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[1] CLÉRICO (2001).
[2] GROSSEKETTLER (op. cit. note 23 above), pp. 31/38.
[3] DECHSLING (1989), pp. 70 ff.
[4] RUEHL (1998), p. 390.
[5] SCHERZBERG (1989), p. 209.
[6] Comp. DECHSLING (op. cit. note 38 above), p. 63.
[7] See CLÉRICO, (op. cit. note 36 above), p. 122.

priority. Success regarding the aimed target must depend on a higher realization of the avoidance of the administration expense. In addition, importance of the infringed subjective right in concreto for the realization of the self-determination of the person concerned, the social life or the democracy must be relatively slight.[1]

2.3 The Kaldor-Hicks Criterion as Counterpart of Necessity

Having noticed so far that decisions of institutional bodies of the State are to be based also on such alternatives that do not favorite liberty, but however are more favourable to the public[2] Thus a slight infringement of the subjective right to general freedom to do as one pleases should require less resources for the assistance and *compensation* to those[3] who are not able to exercise their rights to organization and procedure in time. This rule is nothing but an application of the criterion *Kaldor-Hicks* of economics. Compensation means in this context nothing else but deciding among possibilities with their respective pros and cons to be weighed[4], which represents the modified Kaldor-Hicks criterion.[5] All (the negative) consequences of a decision, to which two (under the aspect of suitability) equivalent measures are applicable, cause infringement to fundamental rights, in other words result in the statement that the disadvantages of the decision which can be preferred should be more considerable than the consequences of another decision[6].

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[1] Rules by CLÉRICO (op. cit. note 36 above), p. 132.
[2] So DECHSLING (op. cit. note 38 above), p. 74.
[3] CLÉRICO (op. cit. note 36 above), p. 125.
[4] DECHSLING (op. cit. note 38 above), p. 74.
[5] In addition only VAN AAKEN (op. cit. note 30 above), pp. 217 ff.; but comp. ADLER/POSNER (2000), pp. 1105 f.
[6] "*If those that gain into principle compensate those that have been ‚harmed' and still be better of*", VELJANOVSKI (1984), 12/20; GENZ (1968), p. 1604. The term of the compensation analyzes VOßKUHLE (1999).

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