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Discretionary Power of Administrative Judges

The term

- In the literature of administrative law the terms discretionality, discretionary authority or margin of decision are frequently used as synonyms, and no regard is given to their internal differentiation.

Between Scylla and Charybdis

- Classically, the issue of judicial discretion in broad terms is associated with vague legal concepts and general clauses. The need to apply in the legal texts the vague terms means that the legislator, sometimes due to the law being enacted sometimes for a distant future, must oscillate between the Scylla of the legal certainty and the Charybdis of its flexibility. Vague legal concepts appear in all areas of law. Under the concept “vague term” there shall be understood the concept, the content and the scope of which is uncertain, it does not fix immediately and fully all the elements of the hypothesis and the disposal, as opposed to a specific concept, whose hypothesis and disposition determine, in a complete and reliable manner, all the elements of the state of facts. As follows from the analysis of the structure of concepts, each abstract regulation is more or less vague and therefore requires a specification and interpretation. Interpretation and subsumption are also required in respect of “specific” concepts, namely those filled with content, clear and distinguishable from other norms and legal institutions.

Basic approach

- Wherever a judge does not approach the process of applying the law in a strictly formalised and bound manner, there comes to the fore the discretionary power of the judge. The judge is not then faced with the task of carrying out a simple, rational subsumption but is authorised to balance between a great many alternatives to deliver substantive judgements. The judge can then decide between two contradictory decisions (e.g. granting or not granting the right) or, in a disjunction, can choose among numerous acceptable solutions. The concept of “discretion” is also used in the sense of “assessment” when it comes to a valuating adjudication, which constitutes the nature of judicial discretion and a margin of decision granted to the judge. In contemporary Anglo-Saxon literature devoted to “judicial discretion” it is stressed that this issue should be discussed in a broad context that allows for taking into consideration semantic and epistemic aspects. Further, this allows for touching upon such issues, in this sense, as the knowledge of the social phenomena, the status of social ontology and the relationship between law and language.

Justice as fairness

- The principle of the democratic state of law shows that any decision should find its justification in the current law. In order to properly justify the judicial decision it also becomes necessary to appeal to the “code of practical reason”. Thanks to this, the decision will be limited not only by the rules and principles resulting directly from the applied statute, but it will also comply with the complex rules which also include the content of the law itself. In the context of “the revolution of law” taking place in Europe, consisting in the legal systems being based on the structure of the protection of the fundamental rights, a crucial role is also played by the principle of proportionality, which becomes the primary contemporary justification and instrument for controlling the discretion of the legislature and the executive.

- It assumes that the law has many sources, and the statute is only one of them. According to it, the law is justified by the authority of the nation, and therefore the will of the legislator can be for the judge only one of the benchmarks. The legal text only clarifies the law, which, however, is not exhausted in the legal provision, and the judge becomes the guarantor of such a broadly defined law against the arbitrariness of the legislator. The court is also presented here as an instrument that protects the citizen from the arbitrariness of the legislator. The result of the criticism of textualism is the emergence of a new conception of the role of the judge and the judging process. In this way the judiciary becomes a reality, because by judging the judges are given the power over the integration of the normative meanings in the culture.

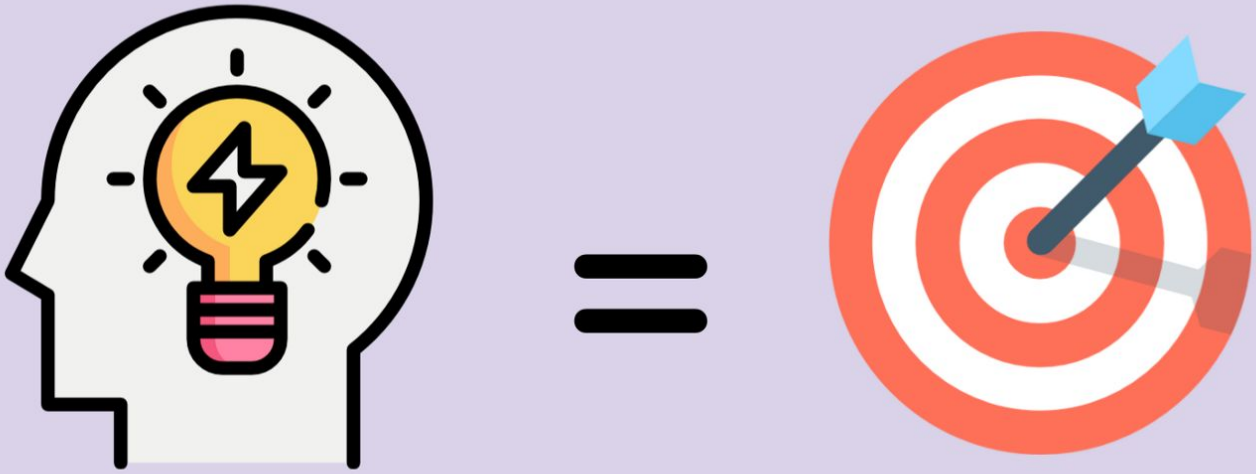
Justification

- What becomes utterly significant in this context in order to achieve the effect of understanding and acceptance of the judicial settlement is a demand of the claim to justifiability. According to the latter, everyone, when claiming something, has to believe it, yet it must be at the same time justifiable in order to be true, rational and correct. The claim to justifiability requires that the speaker was able to justify his claims at any time and in respect of anyone, unless he is able to provide the argument which justifies the refusal of justification. This rule is referred to as the “general rule of justification”. The decision is justifiable if it is possible to find a justification for it, namely to demonstrate arguability (in the strictest sense, in the strict sense or in the large sense on the ground, respectively, of formal aletheic logic, deontic or normative logic or argumentation theory) of the ruling from the theoretical and (or) axiological premises.

- It follows that, in the theory of legal discourse which consolidates the positivist understanding of legal norms, the fact of being bound by law is also understood as being bound by the ensuing values and goals. The judge is not allowed to settle disputes contrary to the unequivocal wording and purpose of a particular norm. If allowed freedom in such an evaluation, particularly in balancing certain principles and objectives which influence the choice of a given legal consequence in an adjudicated case, the judge should follow, in addition to the statutory guidelines, a discursively realized claim to rationality and other rules of practical discourse. The process of applying the law and balancing the different forms and rules of arguments, rules of practical discourse, and principles of law should be based on the limits arising from the argumentation bound by the formal principle of the rule of law. Such decisions should always be as close as possible to the aims and values arising from the applicable legal text and from the valid legal order, which guarantees its greater importance in argumentation.

- The function of the justification of the judgement is expressed in the fact that its addressee – in addition to the parties themselves – is also the Supreme Administrative Court (although, for obvious reasons, any observations also apply to its justifications). Therefore, the case law of the Supreme Administrative Court also shows that the justification of the judgement of the administrative Court, in a situation where it is accompanied by the deficit referring to “the clarification of the legal basis of the decision”, does not have the function of controlling its relevance, or a persuasive function, and is also far from carrying out the legitimising function. Accordingly, there is a disruption to its discursiveness, whose fundamental element is the justifiability of the judicial decision. In a situation where the body applying the law does not try to convince its “imaginable and indivisible” audience that the issued decision is rational, it does not undertake a comprehensive illocutionary act of justifying its decision. The objective of the justification is, in fact, to guarantee the absence of arbitrariness, eliminating the impact of purely personal preferences of the entity that applies the law, respecting the possibilities of defending one’s reasons by the party and, finally, a chance to inspect the decision-making reasoning.

Rationality



Rationality

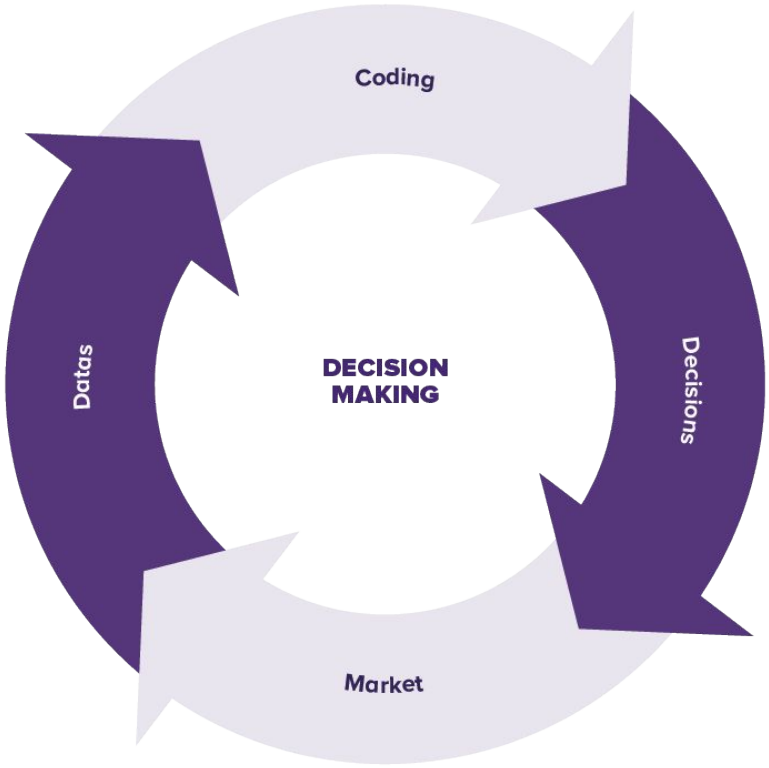
- Rational decision is a justified decision. Rationality is relative to the amount of knowledge of the decision-maker, to his evaluations and to the rules of inference accepted by him. Justified decision is relative to the norms, evaluations and inferences taken into account by the decision-maker.

- There are two kinds of justification of legal decision (Wróblewski and Alexy): internal and external justification. Internal justification deals with the validity of inferences from given premisses to legal decision taken as their conclusion. The decision in question is internally justified if the inferences are valid and the soundness of the premisses is not tested. In this respect internal justification is a "formal" justification and is not adequate for an analysis of the practical operation of legal decision and for its institutional control. External justification of legal decision tests not only the validity of inferences, but also the soundness of premisses. The wide scope of external justification is required especially by the paradigmatic judicial decision because of the highest standards imposed on it.

Three meanings of justification

- Justification" of legal decision has three principal meanings: "psychological justification"; "logical justification sensu stricto" and "logical justification sensu largo". 4.1. Psychological justification of legal decision consists in an explanation of the decision by psychical phenomena. Each decision is, generally speaking, a choice between various alternatives of behaviour the decision-maker is aware of. Hence these phenomena can be viewed as "reasons" for the decision and, in some psychological sense, as a justification of this decision. Each decision ex hypothesi can be justified in this way. This kind of justification is, however, outside our interest here. Logical justification sensu stricto is limited to the field of the propositions and the formal logic dealing with them. A proposition is justified by other propositions if it can be inferred from them by the accepted rules of logical inference.

Justification as demonstration



- This kind of "justification" is synonymous with "demonstration" of the truth of a proposition within the above mentioned field. The use of this kind of justification for legal decisions requires an acceptance of several assumptions. Simplifying the problem I reduce these assumptions to two: either (a) there is a formal logic of norms adequate for a formal logical justification of any legal decision, or (b) legal decisions and reasonings justifying them are governed by the formal logic of propositions. Logical justfication sensu largo consists in giving proper reasons for legal decision. These reasons are the premisses for an inference of the decision according to the accepted directives of inference. Neither are these premisses restricted to propositions nor can these directives of inference be reduced to rules of the formal logic of propositions. It is my contention that this concept of justification is operationally adequate for analyses of the justification of legal decisions.