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ADVANTAGES AND DISADVANTAGES OF ADMINISTRATIVE-JUDICIAL PRACTICE

Summary: *In addition to certain contradictory opinions, most theorists agree that the courts treat the norms created in administrative court practice as legal norms that must be followed. It should be emphasized that our country's administrative-judicial system is still underdeveloped, with many ambiguities and gaps that make the work of courts more difficult in practice. Therefore, the case law must supplement the statute if a legal gap appears in the administrative dispute and adjust the content of its norms to the constantly changing social relations. It is also a confirmation of the greater adaptability of administrative court practice in social life than the statute. A conclusion can be drawn about the need for administrative court practice to replace the statute as a primary source of administrative court law in the European-continental legal system.*

Key words: *Judicial practice, source of law, legal gaps, administrative-judicial norms*

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INTRODUCTION

As in most European countries, the administrative-judicial system of state regulations of the European continental type has been developed in our country. It means that most legally relevant administrative-judicial relations are regulated by norms that are enacted by the legislative and executive authorities in the form of statutes and other general legal acts. According to the principle of separation of powers enshrined in the constitution, courts in administrative disputes must consistently apply general legal rules. The judiciary is independent, and the courts within administrative disputes judge based on the constitution and the law.

In modern legal theory, it is no longer disputable that a judge resolving administrative disputes has independence in applying the law. Despite certain contradictory opinions, most theorists agree that the courts treat the norms created in administrative court practice as legal norms that one must follow. It should be emphasized that our country's administrative-judicial system is still underdeveloped, with many ambiguities and gaps that make the work of courts more difficult in practice. In such circumstances, the courts in an administrative dispute, by the logic of things, have a more significant role in interpreting legal norms and filling legal and legal gaps.

Judicial practice arising in administrative disputes has significantly influenced the raising of the level of expertise of administrative court staff. Its authority and argumentation have significantly contributed to the improvement and stabilization of administrative court proceedings.

In other words, administrative court practice was not considered a formal source of law but had an undoubted role and importance in administrative disputes.

1. RELATION BETWEEN ADMINISTRATIVE-JUDICIAL PRACTICE AND STATUTE

The statute is the most important primary source of the law, and other legal sources stand according to it in certain relations of dependence. It should be emphasized that other secondary sources of law cannot be excluded by law, but their content and limits of their validity can be limited. This restriction is usually explicitly determined in the statute itself, but it can also result from its content. Other secondary legal sources must not exceed the limit determined by the content of the statute itself, which is especially true for administrative court practice. Courts are generally called upon to apply the statute in administrative disputes (Abbott 1999). In cases of uncertainty or lack of legal provisions, the judge must consider the same legal reasons as the legislator. It practically means that administrative law practice contra legem is not allowed, but only possibly praeter legem.

It should be emphasized that administrative court practice must not contradict the statute, which excludes the possibility that illegal judgments and legal principles formulated in them may acquire the status of a source of law (Branković 2021 272). Due to the higher place it has on the hierarchical scale, the statute may repeal the general legal rule established in the positions of the Supreme Court and cause a change in the established administrative court practice. It means that the judge has much less authority than the legislature. While the legislator is legally free to create legal norms, the judge is always limited in his legislative work by the principles and spirit of positive law. These restrictions leave the judge in an administrative dispute a relatively wide space for freedom of creativity, but they are still sufficient to emphasize his subordination to the legislator. This subordination of a judge to the legislator is not always the same and depends on the degree of abstractness of legal norms, that is, the type of legal gaps. If the norms within the administrative dispute are more abstract and the gaps are more extensive, the freedom of judges is more significant and vice versa.

From this determination of the judge as a legislator in the spirit and principles of positive law arises the subsidiarity of administrative court practice as a source of law concerning the statute. It should amend the statute in the event of a legal gap in an administrative dispute and adjust the content of its norms to ever-changing social relations.

This role of administrative court practice is vital because it provides greater certainty in applying the statute and makes the statute flexible and eternal. Namely, administrative court practice often gives legal norms meanings that they did not have at the time of their adoption but correspond to the newly formed social relations. These meanings are objectively contained in the text of the statute and the judge, judging them in an administrative dispute, only discloses them, which is the upper limit of judicial freedom. A judge can mainly interpret a legal norm outside but not against the statute.

According to the statute, administrative court practice has a subsidiary and a retroactive effect (Steinberg and Jonathan 2005). Unlike the statute passed in advance, before the cases to which it refers, administrative case law forms a general legal rule after specific cases that have been the subject of court proceedings in administrative disputes. Therefore, the subject of the judicial function is the resolution of specific disputes and not the direct creation of general legal norms.

General norms of administrative court origin suddenly arise when resolving specific cases. The resulting general norms are applied retroactively to the case that was the reason for its adoption. Thus, the statute acquires the status of a secondary legal source at the very moment of its entry into force. At the same time, administrative court practice will become a source of law only when it is applied to resolving specific cases within an administrative dispute.

In order to create a general legal norm in administrative court practice, it is necessary to repeat a resolved case within an administrative dispute and confirm this legal principle contained in the precedent in an administrative dispute by the same or another court (Taborowski 2012).
It is especially true in the case when one judgment is not enough to establish a universally binding rule but requires a plurality of consensual administrative court judgments. The general legal rule of judicial origin cannot conflict with the social reality, which excludes the possibility of resolving social relations in administrative disputes in a diametrically opposite way.
If such a thing happened in administrative-judicial practice, it would be a sure sign that the old legal rule has ceased to apply. Failure to apply the administrative court rule always results in the termination of its obligation. Validity and efficiency are inextricably linked in administrative court practice, while the statute is valid even when it is not effective if it is part of the current legal order.

2. ADVANTAGES OF ADMINISTRATIVE-JUDICIAL PRACTICE

The importance of administrative court practice is reflected in its flexibility and better adaptation to specific administrative court situations (Branković 2011). It is because administrative court practice arises only with the emergence of an administrative dispute, which gives the opportunity to comprehensively consider all legally relevant facts and choose the best solution. This possibility does not exist in enacting statutes because it seeks to anticipate controversial situations, starting from typical and not specifically given social relations. A judge in an administrative dispute can see the obsolescence of specific statutes faster than the legislator and find new and more correct solutions for them faster. The passing of statutes is very slow, so only the court can follow the fast pace of social life, which is the main feature of administrative court practice.
Due to its abstraction and relatively complex variability, the statute may, due to the inadequacy of its solutions, be a brake on the further development of these still insufficiently formed administrative-judicial relations (Sivakumaran 2011). Therefore, the administrative court practice within the administrative dispute appears necessary to leave the regulation of disputed social relations to the normative activity of administrative-judicial entities.
Administrative court practice is a suitable tool for accomplishing this task, primarily due to the easy deviation from the general legal principle (Jenks 1956). This elasticity of administrative court practice enables the adopted solution within the administrative dispute to be abandoned when it is realized that it is no longer suitable for regulating the given administrative court relations. In addition, the solutions reached through case law in administrative disputes serve the legislator as a kind of experiment to choose the best direction of legal regulation of specific administrative-judicial relations.
The legislator often uses the acquired experience in court practice in administrative disputes and only incorporates accepted solutions into the articles of specific statutes. It is also a confirmation of the greater adaptability of administrative court practice in social life than the statute. However, no conclusion can be drawn from the need for administrative court practice to replace the statute as the primary source of administrative court law in the European-continental legal system. Although it indisputably contributes to legal certainty and equality, in order to draw the correct conclusion about the fundamental importance of administrative court practice on administrative disputes and administrative legislation, it is necessary to examine its possible shortcomings and the indisputable advantages.

3. DISADVANTAGES OF ADMINISTRATIVE-JUDICIAL PRACTICE

It should be emphasized that administrative court practice, in addition to many advantages, also has certain disadvantages. These shortcomings are reflected primarily in the specific way in which administrative court practice emerges. The goal of administrative court practice is to resolve a specific disputed case when an administrative dispute is being conducted, and only indirectly and under certain conditions can it create a general administrative-judicial norm. This circumstance may adversely affect the acceptance of the same legal principle in an administrative dispute and resolving another similar disputed administrative court case.

It should be emphasized here that specific cases within an administrative dispute are never identical, and judges are free to assess the importance of individual elements. This fact often leads to the fact that the assessments of the essential elements for resolving identical administrative court disputes can be quite different. When it is added that every judge in an administrative dispute has his sense of justice when he tries to resolve a specific dispute within the existing legal regulations, the danger of universal application of the previously accepted administrative court principle becomes obvious.

Judges in administrative disputes are often inclined first to decide on a specific administrative court dispute and only then to seek a legal norm or legal principle to justify and justify that decision. The lack of administrative court practice is reflected primarily in its focus on specific cases.

Namely, only when a dispute arises between the parties and they turn to the court and initiate an administrative dispute can there be an objective discussion and resolution of the disputed administrative court situation. Due to this, many administrative-legal relations remain outside any court regulation, so the law created through administrative-judicial practice can never be complete and self-sufficient. In addition, a specific time is needed to develop administrative-judicial practice. It takes several years for the disputed case to appear before the Supreme Court and take a specific legal position.

It is necessary to emphasize that the already established administrative court practice shows specific weaknesses. They are reflected primarily in administrative court practice's relative uncertainty and uncertainty. Determining the true meaning of legal norms of judicial origin created in an administrative dispute is more complex than interpreting the statute. It can be rightly concluded that only legal experts have access to these rules established by administrative court practice, while ordinary citizens are generally deprived of it.

Legal uncertainty is also affected because the time of transformation of administrative court practice cannot be predicted. A reversal of administrative court practice is more dangerous than a change in the statute because courts create new general norms that have retroactive effects by changing their current administrative court practice (Longobardo 2020). When the shortcomings of administrative court practice are taken into account, the statute is a more suitable means for regulating administrative and legal relations and achieving legal security and protection of citizens' rights and freedoms within the administrative dispute.

In reaching this conclusion, the facts were taken into account that there is arbitrariness and corruption in the society and even within the administrative court and that even judges are not completely immune to them. Therefore, in the European-continental legal system, despite the mentioned shortcomings, the importance of administrative court practice is constantly growing, having in mind primarily the implementation of humanitarian law and approaching the Anglo-Saxon legal system, which is why the quality of the secondary source of administrative court law cannot be denied in administrative court practice.

CONCLUSION

In modern legal theory, it is no longer disputable that a judge resolving administrative disputes has independence in applying the law. Despite certain contradictory opinions, most theorists agree that the courts treat the norms created in administrative court practice as legal norms that must be followed.

It should be emphasized that our country's administrative-judicial system is still underdeveloped, with many ambiguities and gaps that make the work of courts more difficult in practice.

Therefore, administrative court practice in administrative disputes appears as a kind of necessity, necessary to leave the regulation of disputed social relations to the normative activity of administrative-judicial entities.

It is also a confirmation of the greater adaptability of administrative court practice in social life than the statute, based on which a conclusion can be drawn about the need for administrative court practice to replace the statute as a primary source of administrative court law in the European-continental legal system.

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