

RESUME DES REMARQUES DU
RAPPORTEUR GENERAL APRES
LE PREMIER TOUR DES
INTERVENTIONS

SUMMARY OF THE REMARKS
OF THE GENERAL RAPPORTEUR
WITH REFERENCE TO THE FIRST
ROUND OF INTERVENTIONS

Discretionary power can be described as the possibility for an administrative authority to act in free judgment, within the restrictions set by law.

This means that the freedom is not absolute:

1. The restrictions may be specifically laid down by the statute which attributed the power. The following example can be given: the law declares that if a person is indispensable for carrying on the family-business, that person may be exempt from military service. In that case there is freedom of judgment for the administrative authority to decide that the applicant will be exempt or not. This decision must be based on an opinion about the alleged indispensability. The authority is not allowed to take its decision on other motives.

2. There are also general restrictions. The administrative authority should e.g. come to its decision by reasonably taking into account the principle of equality etc. The administrative authority, that is free to make a choice between possibilities in making this decision, must - in doing so - adhere to general rules like the principle of equality, fair treatment and so on.

I think that a situation more or less like this exists in every democratic country of Western Europe. Discussing this subject is very much worth-while, although of necessity at least partly will be of a semantic nature. I have the impression that in Ireland the administrative authorities, as much as elsewhere in their decisions take into account the principle of equality.

When it is stated in the Irish report that an administrative body is *not* permitted to adopt a line of general conduct which would prove to be an obstacle to examine each case to the substance, I think one should agree. But part of the substance of the case may be that it is like other cases, and if that be so, it should be decided in the same sense as the others have been. Discretionary power without restrictions is incompatible with any legal system in the true sense of the word. On the other hand, if a power has a duty to decide on the basis of its appreciation of a certain matter, it should not shrink from its duty.

The real difficulty and the real differences start with the introduction of judicial review. After listening carefully to the speakers of yesterday I am not quite sure that the scope of judicial review of acts of administrative bodies corresponds with the existence or non-existence of a specialized administrative judiciary.

Important seem to me the following points:

- a. What are the grounds of appeal and how are they interpreted and applied?
- b. May the courts-administrative or other-examine the legality of the administrative decision-written or unwritten-or may they as well investigate facts?
- c. How is the procedure organized and how much time takes a case before it is decided in the last resort?
- d. What are the costs?

On many of these points there have been made very interesting remarks in yesterday's discussion. It may not be necessary, even if it were possible, to summarize all that has been said. As far as the grounds of appeal are concerned it is perfectly clear that the legal formulations in the various legal systems differ a great deal. A narrow statutory basis may serve as a foundation for a wide scope of control, as is the case in France. When elsewhere - e.g. in Holland -the law states an elaborate structure of possibilities of appeal, implied or explicit exception may curtail it a good deal.

Mr. Blom Andersen pointed out that legislation in Denmark shows a tendency to demolish some of the barriers put up in the past to prevent the Courts from interfering with the executive. This may also be the case elsewhere. It certainly is in the Netherlands. Of course this should not lead to making it next to impossible for the administration to do its work in an effective and rational way.

As the degree of discretion with which the administration may operate becomes more extended, the civil servants and other governmental functionaries *show a tendency to identify themselves* with the interests they have to serve. This brings me to the important matter of the relation between the motives of a special administrative decision and the facts on which it is founded. Mme Grevisse, Mr. Paleologo, Mr. Tapy and others have made important observations on this point. It may be true that in Belgium the administration gives sufficient information about the factual aspects of a case. But I am not quite sure it is the same everywhere else.

Not very long ago I found among the documents of a case produced by an administrative body a copy of a letter stating some facts rather abnoxious for the case of that authority. Written on it-with pencil -were the words: 'Not to be sent to the Council of State'. Of course it was not meant to be in the files. An unhappy functionary promised to behave better in the future. It is among other aspects the identification of the functionary with the decision he, in his discretion when applying the law, has to make, which links the problem this meeting is debating with the problem of administrative procedure. As this was to a great extent the subject of the Berlin meeting 2 years ago, I will not elaborate on this. Proof in administrative procedure is difficult, Mr. Paleologo said, and he is right. So is proof in civil procedure and sometimes in criminal cases. In many administrative cases the facts as such are not in dispute. In other cases they can be verified by experts, reporting to the court. Sometimes there are opposing factual statements, which can only be verified by witness. In such cases a possibility to hear them may well be to the benefit of justice.

Mme Grevisse pointed out that motives and facts are often interrelated or even interwoven. This is certainly true. To distinguish between law and facts is in many instances difficult, if not impossible. Proof by witness will certainly not be a day to day occurrence. But if a court has the duty to find the material truth, a duty assigned to it by statute, it cannot renounce hearing witnesses. It is clear that on this point there are differences in the legal structures of the various countries. I leave aside other subjects of administrative procedure as being too far-fetched with regard to the scope of the present debate. Many speakers dealt with the subject of the so called 'normes vagues'-the vague standards. Perhaps here is some misunderstanding, caused by the original scheme proposed to the authors of the national reports. The expression 'vague standard' is the literal translation of a Dutch expression sometimes used in juridical literature. It is meant to indicate standards which leave much to the judgment of the authority who applies them. For instance, the local authorities are entitled to assign dwelling space to those who need it, if need be regardless of the refusal of the house-owner. But local authorities are only entitled to do so if the assignment serves a fair distribution of dwelling space in the local community. This standard: 'fair distribution of dwelling space' is in juridical literature labelled as a 'vague standard'. There are many such standards. Civil law knows standards like these for centuries, e.g. the legal duty to act 'like a good family-father'. One could also describe the 'vague standard' as 'an indeterminate standard' or something like that.

The essential thing is that a vague standard always attributes a measure of discretionary power. It does not seem probable that administration in modern society could easily dispense with standards like this.

I may close my remarks, Mr. Chairman, by saying a few words about some other points brought forward in yesterday's debate. I apologize for the fact that I cannot answer every remark that has been made. Besides, many of the observations which were made were not especially addressed to me.

Mr. Tapy observed that discretionary power in a very limited way occurs not only in social legislation, but also in fiscal legislation. This is true, although in practice the factual discretionary power of the fiscal authorities is considerable. Mr. Tapy indicated that the 'passive power' of the judiciary to refuse to apply delegated legislation which is considered unlawful does sometimes in effect amount to annulment, although each decision formally bears only on the individual case that is decided upon. I agree, although I would not bring this phenomenon under the head of judicial review.

As Mr. van den Berge already pointed out, there is a striking difference between countries where there are no means to carry out the judicial decisions like Belgium - and countries like the Netherlands, where means of execution by statute are put at the disposal of those who win their case. Nevertheless it is not to be expected that such means of execution will very often have to be put into effect. The real protection given by judicial review of administrative action lies in the acceptance of the decisions of the judge by the administrative bodies.

Mme Grevisse pointed out that circulars drafted by the administration, or internal rules laid down by administrative bodies, are more or less semi-official and have no legal value. I don't think there is much difference between most reports as to this point. Circulars and the like are not in any way legislation, but this does not imply that they are indifferent juridical material. They may be, in certain cases, of decisive importance as to the outcome.

Mr. Arendt pointed out, if I understood him well, that the concept of *détournement de pouvoir* has nothing to do with discretionary power. It seems to me that problems of *détournement de pouvoir* may very well arise where there is no discretionary power. But on the other hand, the scope of discretionary power is-like that of other powers-limited by the fact that *détournement de pouvoir* is not admissible.

Mr. Fischer indicated that the remark made in the Belgian report, and reproduced in the General Report on page 2, that an administrative order is not generally the result of one single decision but of several preparatory ones, which in turn may themselves be independent decisions, does not have any bearing on the problem of the discretionary power. I could have left the answer of this question to Mr. Tapy. But as I took over his remark in the General Report, I may point out that it is possible that a decision which in itself has no discretionary elements only became possible because of a previous decision being made, which contained a proportion of discretion. *E.g.*: a building license must be given when certain conditions are fulfilled. There is no discretionary power. One of the conditions is that the building project is in accordance with the destination of the building site as laid down in the legal planification of the region. A higher authority however- e.g. the provincial government, as is the case in the Netherlands - may give dispensation of the latter requirement, and has in doing so a large amount of discretion. Although it is the building license which concerns all those who oppose the project, even though in itself it does not touch them, it is the provincial decision which should be the object of judicial review.

I may conclude here, Mr. Chairman, and express the hope that I did not leave too many questions without an answer.