

Judges' Appointments to the Administrative Judiciary: How to Guarantee Knowledge and Experience to Adjudicate Disputes in the Area of Administrative Law?***

Abstract

The paper is devoted to the issues connected with the judge's specialisation in the framework of the administrative judiciary. Its aim is to explore how the special knowledge and experience of judges who are candidates for administrative judiciaries are being verified. The main assumption for the analysis is that judge's specialisation provides knowledge and experience that are indispensable for professional adjudication. Although there is currently no one prevalent system of judicial appointments and there is no need for such, nor one way of equipping courts with specialist and detailed knowledge, in each of the analysed regulations (Austrian, German and Polish) a space for guaranteeing special knowledge and experience is foreseen. In the paper, these regulations are presented and compared in order to find out methods of how to organize the adjudication process professionally.

Keywords: judicial independence, administrative judiciary, judge's specialisation, appointment proceedings, judicial careers

I Introduction

A right to a fair hearing is closely connected with the appointment of judges because the latter has a direct impact on the composition of the judicial panels that adjudicate concrete disputes. This process impacts judicial independence in both the institutional

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and personal spheres¹ and may stimulate public (dis)trust in judicial power,² and is crucial for the proper selection of candidates for judicial positions. The present analysis is aimed at the last component. Besides the need for the procedure to be objective and free from undue pressure, the appointment process shall be focused on selecting candidates who will guarantee professional decision-making and ensure a high level of individual protection. This criterion is even more significant for specific branches of the judiciary, for which specialised or additional knowledge and experience are expected. One of those branches is the administrative judiciary,³ which is responsible for solving disputes between state authorities and individuals.⁴

The starting point for the analysis is based on the importance of the judge's specialisation particularly in those types of courts that exhibit unique characteristics due to the subject or object of adjudication. Those characteristics should be relevant for judicial appointments, creating a basis for the proper selection of candidates for judicial positions, in accordance with their education and legal experience. There are many reasons for treating the administrative judiciary as a judicial branch that needs to be staffed by judges with specialised education and experience. These reasons are combined with the specificity and broad scope of administrative law,⁵ the differences between law application in ordinary and administrative courts,⁶ the functions performed by the administrative judiciary,⁷ the interrelations between national and EU legal orders within the jurisprudence

¹ The division into those spheres is presented both in the jurisprudence of the ECtHR and in the literature. See ECtHR, 09.02.2021, *Xhoxhaj v. Albania*, No. 15227/19, para 291, H.J. Papier, 'Die richterliche Unabhängigkeit und ihre Schranken' (2001) (15) *Neue Juristische Wochenschrift* 1090–1092; F. Wittreck, *Die Verwaltung der Dritten Gewalt* (Mohr Siebeck 2006) 177–186.

² ECtHR, 18.06.2019, *Rustavi 2 Broadcasting Company Ltd and Others v. Georgia*, No. 16812/17, para 332, ECtHR, 09.02.2021, *Xhoxhaj v. Albania*, No. 15227/19, para 410.

³ The existence of this special branch of the judiciary is typical for the majority of countries in Europe, either on one or all instance levels. The last new creation of administrative courts was in Slovakia, embracing the Supreme Administrative Court (established in 2021) and the first instance of administrative courts (established in 2022). See M. Davala, R. Chudo, 'Amendment to the Constitution of the Slovak Republic focuses of the reform of the judiciary' HKV Law Firm Blog 2021, <<https://www.hkv.sk/en/amendment-to-the-constitution-of-the-slovak-republic-focuses-on-reform-of-the-judiciary/>> accessed 16 June 2022.

⁴ For more on the specificity of this branch of the judiciary, see Ch. Waldhoff, 'Ideengeschichtliche Grundlagen von Verwaltungsrechtsschutz' in A. von Bogdandy, P.M. Huber, L. Marcusson (eds), *Handbuch Ius Publicum Europaeum*. Band IX. (C.F. Müller 2021) 11–48.

⁵ J. Zimmermann, *Aksjomaty prawa administracyjnego* (WoltersKluwer 2013) 13–29; W. Kahl, 'Allgemeines und besonderes Verwaltungsrecht' in W. Kahl, M. Ludwigs (eds), *Handbuch des Verwaltungsrechts*. Band I. (Grundstrukturen des deutschen Verwaltungsrechts, C.F. Müller 2021) 477–492.

⁶ J. Wróblewski, 'Zwroty stosunkowe – wypowiedzi o zgodności z normą' *Zeszyty Naukowe UŁ* 1969, seria I, z. 62, s. 5–6. See also the report from the seminar organised by ACA Europe: 'How our Courts Decide: The Decision-making Process of Supreme Administrative Courts' <<https://www.aca-europe.eu/index.php/en/evenements-en?start=6>> accessed 20 May 2022.

⁷ E. Schmidt-Assmann, 'Funktionen der Verwaltungsgerichtsbarkeit' in H.U. Erichsen, W. Hoppe, A. von Mutius (eds), *System des verwaltungsrechtlichen Rechtsschutzes* (Carl Heymans Verlag 1985) 107–108; J.P. Tarno,

of administrative courts,⁸ and the interrelations between the administration and the administrative judiciary.⁹ High-quality jurisprudence is crucial, not only for individuals but also for public administration, which is bounded by the applications of law made by the administrative courts. In other words, the quality of the administrative courts' jurisprudence directly affects the quality of the decision-making process within the public administration.¹⁰ In this sense, the adjudication performed by administrative courts exceeds the framework of particular disputes and is seminal for the whole state.

The aim of this paper is to explore how the special knowledge and experience of judges who are candidates for administrative judiciaries is being verified. First, the notion of judges' specialisation within the appointment procedure will be presented from the perspective of European law, including the jurisprudence of the ECtHR and CJEU. Second, the conditions for appointing judges to administrative judiciaries within selected national legal orders will be described. Third, new challenges for judges' appointments connected with the specialisation of legal systems and technological progress will be mentioned.

II The European Perspective

Focusing on Article 6 § 1 European Convention¹¹ and Article 47 EU Charter of Fundamental Rights,¹² one of the conditions for a judge's appointment is the establishment of a court or tribunal by law. This means that the appointment procedure has to find a normative basis that excludes any discretion in this process, which does not depend on the executive but is regulated by law emanating from parliament.¹³ It would be not lawful to create an appointment procedure on the basis of an issued administrative act, or a statute passed *ad hoc* for political reasons, or without any conditions that make the appointment procedure objective and verifiable. The procedure should be based on well-known and acceptable criteria and also guarantee the professional-oriented selection of judges, with regard to their qualifications, integrity, ability and efficiency.¹⁴ These criteria should be subject

'Funkcje sądownictwa administracyjnego' in J.P. Tarno, E. Frankiewicz, M. Sieniuc, M. Szewczyk, J. Wyporska (eds), *Sądowa kontrola administracji* (Wydawnictwo Zrzeszenia Prawników Polskich 2006) 24–30.

⁸ K.P. Sommermann, 'Europäisierung der nationalen Verwaltungsgerichtsbarkeit in rechtsvergleichender Perspektive' in R.P. Schenke, J. Suerbaum, *Verwaltungsgerichtsbarkeit in der Europäischen Union* (Ius Europaeum 64, Nomos 2016) 199 and forth. <https://doi.org/10.5771/9783845276472-189>

⁹ W. Steiner, 'Verwaltungsgerichte aus Sicht der Verwaltung' (2020) 7 (1) *Zeitschrift der Verwaltungsgerichtsbarkeit* 49. <https://doi.org/10.33196/zvg202001004801>

¹⁰ From this perspective, it can be said that the administrative courts perform an educational function with regard to public administration. See Schmidt-Assmann (n 7) 114.

¹¹ Convention for the Protection of Human Rights and Fundamental Freedoms.

¹² Charter of Fundamental Rights of the EU.

¹³ Report of the Commission, 12 October 1978, *Leo Zand v. Austria*, No. 7360/76.

¹⁴ ECtHR, 01.12.2020, *Gudmundur Andri Astradsson v. Iceland*, No. 26374/18, para 110.

to strict scrutiny.¹⁵ Neither the European Convention nor the EU Charter imposes any detailed requirements that candidates for judicial office should meet. The specification of this competence is reserved for national legislators. However, it is remarkable that such special conditions are formulated for judges' posts in European tribunals, treated in the literature as the European administrative judiciary.¹⁶ Among the criteria for ECtHR posts, the candidates should require 'recognised competence', which is understood as referring to 'full satisfaction of the Convention's criteria for office as a judge of the Court, including knowledge of public international law and other national legal systems'¹⁷. From the perspective of candidates' experience, considerable attention should be devoted to such matters as knowledge of national legal systems, public international law and language skills, being proficient in English or French, and possessing at least a passive knowledge of the other language.¹⁸ When it comes to the CJEU, the appointment criteria for judges are comparable to the qualifications required for appointment to the highest judicial offices of the respective countries.¹⁹ The special criteria for judges' positions in the ECtHR and CJEU are synchronised with the specificity of their adjudication. A general legal education can be evaluated as insufficient to become a judge in the ECtHR or CJEU. These courts are aware of the specificity of their adjudication and therefore try deliberately to gain those candidates who meet the mentioned criteria. It is noticeable that those criteria are verified both at the national level and by special panels established within the Council of State and the EU in order to guarantee a professional-oriented choice of judges.²⁰ Those strategies can be regarded as a direction for defining criteria appropriate for adjudication in other courts, including national jurisdictions, among them being the conditions to become a judge in an administrative court.

A need for judges to possess high-level qualifications is expressed in international legal acts devoted to judicial status. It is postulated that decisions concerning the selection and career of judges should be based on merit, having regard to the qualifications, skills and

¹⁵ ECtHR, 08.11.2021, *Dolińska-Ficek and Ozimek v. Poland*, Nos. 49868/19 and 57511/19, para 137.

¹⁶ L. Hering, 'Der Gerichtshof der EU als Verwaltungsgericht' in A. von Bogdandy, P. Huber, L. Marcusson (eds), *Handbuch Ius Publicum Europaeum*. Band IX. (Verwaltungsgerichtsbarkeit in Europa: Gemeineuropäische Perspektiven und supranationaler Rechtsschutz, C.F. Müller 2021) 649.

¹⁷ High-Level Conference on the Future of the European Court of Human Rights, Interlaken Declaration, 19 February 2020, para 8(a) in Philip Alston, Vaughan Lowe (eds), *The European Convention on Human Rights*. (Oxford Commentaries on International Law, 2015, Oxford) 652.

¹⁸ Guidelines of the Committee of Ministers on the Selection of Candidates for the Post of Judge at the European Court of Human Rights, CM(2012)40 from 29 March 2012, II. Points 3 and 4. In the previous versions of this document, experience in the field of human rights was also indicated as desirable. See Alston, Lowe (n 17) 654.

¹⁹ Article 253 TFEU.

²⁰ J.M. Sauvé, Selecting the European Union's Judges. The practice of the Article 255 Panel, in M. Bobek (ed.), *Selecting Europe's Judges* (OUP 2015) 79–82, H. de Waele, 'Not quite the bed that Procrustes built' in M. Bobek (ed.), *Selecting Europe's Judges* (OUP 2015) 35–39; A. Drzeczewski, 'Wybór sędziów Europejskiego Trybunału Praw Człowieka' (2021) (10) Europejski Przegląd Sądowy 6–8.

capacity required to adjudicate cases.²¹ Those objective criteria should be pre-established by law, or by the competent authorities, and in all cases be prescribed by law.²² The judges' qualifications and abilities should be extended and improved during their service through training and courses aimed at the development of legal and social skills.²³ The concretisation of these criteria is a matter for national legal regulations and the authorities responsible for judicial appointments, who should also be responsible for guaranteeing independence.²⁴ They are obliged to act accordingly and scrutinise the content of the criteria, including their practical effect.²⁵ The final decisions of those authorities should be the subject of control performed by institutions with full jurisdiction to examine all the details of the appointment procedure, including appeals against its course.²⁶

The validity of the standards mentioned above is confirmed in legal acts focused exclusively on the administrative judiciary. Judicial review of administrative acts should be conducted by a tribunal established by law and encompass independence and impartiality.²⁷ The focus on the judge's specialisation is also visible in the reports prepared by administrative judiciaries belonging to the Association of the Council of States and Administrative Jurisdictions of the EU.²⁸ It has been analysed in connection with case allocation²⁹ or functions performed by administrative jurisdictions.³⁰

Though the criteria for selecting judges for administrative courts are formulated by national legislators to reflect the needs of selected jurisdictions and their legal culture, the above-mentioned requirements, which are general rather than detailed, offer a basis for the creation of specific conditions aimed at professional-oriented adjudication processes within general and special branches of judiciaries. Due to cultural, historic and constitutional differences between national legal systems, it should not be expected that one model of judicial appointments will be adopted by all or the majority of European countries. Instead,

²¹ Recommendation of the Committee of Ministers. Judges: independence, efficiency and responsibilities. CM/Rec (2010)12 from 17 November 2010, para 44.

²² Explanatory memorandum to the Recommendation CM/Rec (2010)12, para 49.

²³ In the explanatory memorandum to the recommendation CM/Rec (2010)12, it is stressed that such trainings should comprise theoretical and practical teaching methods, including European law, the European Convention and the case law of the ECtHR. See para 58 of the explanatory memorandum.

²⁴ Magna Carta of Judges (Fundamental Principles) adopted by the Consultative Council of European judges on 17 November 2010.

²⁵ Opinion no 1 (2001) of the Consultative Council of European Judges on standards concerning the independence of the judiciary and the irremovability of judges, from 23 November 2001.

²⁶ ECtHR, 07.04.2022, *Gloveli v. Georgia*, No. 18952/18, para 58-59.

²⁷ Recommendation of the Committee of Ministers to member states on the judicial review of administrative acts CM/Rec (2004) 20 from 15 December 2004, § 3a.

²⁸ See <<https://www.aca-europe.eu/index.php/en/courts-reports>> accessed 20 May 2022.

²⁹ Report from ACA Europe seminar (n 6).

³⁰ Report from seminar titled Functions and access to Supreme Administrative Courts, Berlin 13 May 2019, <<https://www.aca-europe.eu/index.php/en/evenements-en/725-berlin-13-may-2019-seminar-functions-of-and-access-to-supreme-administrative-courts>> accessed 20 December 2022.

it is more reasonable to define similar mechanisms that organise judicial appointments within the administrative judiciary in the most professional way possible.

III National Perspective

The freedom to establish criteria for selecting candidates for administrative judges results in two basic systems, namely a system of separation of judicial careers and the unification of judges' education, including appointment proceedings. The former is present in Austria and Poland. The latter is represented in German legal regulation. In all of the mentioned countries, administrative courts function as specialized jurisdictions separated from ordinary judiciaries competent in civil and criminal matters or even from financial courts, like in Austria,³¹ or from financial and social jurisdictions like in Germany.³² Unlike administrative jurisdictions in France³³ or Italy³⁴ where separate administrative courts also exist and some of their sections perform consultative tasks towards the executive power,³⁵ in Austria, Germany and Poland it is not possible to appoint a judge to an administrative court for any other tasks than adjudication.

1 Austrian and Polish Legal Regulations – Differences in Similar Approaches to the Appointment of Judges to Administrative Courts

A basic feature of the judges' appointment to administrative courts is that it occurs through a separate judiciary career development path to that of the ordinary judiciary. In Austria and Poland, it is not obligatory for candidates to finish judicial training and pass a judge exam to become administrative judges.³⁶ However, those similarities do not mean that there are no differences between these two systems.

³¹ W. Steiner, 'Systemüberblick zum Model >>9+2<<' in J. Fischer, K. Pabel, N. Raschauer (eds), *Handbuch der Verwaltungsgerichtsbarkeit* (Jan Sramek Verlag 2014) 132–140.

³² For more on the German system of administrative courts, see K.P. Sommermann, B. Schaffarzik (eds) *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und in Europa*. Band I, 871 and forth.

³³ J. Lemasurier, *Le contentieux administrative en droit comparé* (Economica 2001, Paris) 16–17; S. Wittkopp, 'Der französische Conseil d'Etat – eine aktuelle Bestandsaufnahme' (2021) (2) *Verwaltungsarchiv* 281–290.

³⁴ C. Fraenkel-Haberle, D. U. Galetta, 'Verwaltungsgerichtsbarkeit in Italien' in A. von. Bogdandy, P. Huber, L. Marcusson (eds), *Handbuch Ius Publicum Europaeum*. Band VIII. (Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren, C.F. Müller 2019) 303–304.

³⁵ S. Cassese, *Monismus und Dualismus der Gerichtsbarkeit(en)* in A. von. Bogdandy, P. Huber, L. Marcusson (eds), *Handbuch Ius Publicum Europaeum*. Band IX. (Verwaltungsgerichtsbarkeit in Europa: Gemeineuropäische Perspektiven und supranationaler Rechtsschutz, C.F. Müller 2021) 56–58.

³⁶ R. Thienel, 'Qualifikation von VerwaltungsrichterInnen – System und Entwicklung' (2020) (1) *Zeitschrift der Verwaltungsgerichtsbarkeit* 35–37. <https://doi.org/10.33196/zvg202001003501>; W. Piątek, 'Ustrój sądów administracyjnych – stan obecny oraz potencjał do zmian, Zeszyty Naukowe Sądownictwa Administracyjnego' in *Studia ofiarowane Profesorowi Romanowi Hauserowi* (2021) 391–392.

In the case of the Austrian ordinary judiciary, after finishing legal studies it is obligatory to participate in preparatory service (*der Vorbereitungsdienst*), pass the judge exam, and complete four years of practice, including one year in the judicial preparatory service.³⁷ However, those conditions are not binding for candidates to the administrative judiciary. The basic rules of the judicial appointment procedure for administrative courts have a constitutional basis under Article 134 § 2-4 B-VG. The judges in administrative courts (*die Mitglieder der Verwaltungsgerichte der Länder*) are obliged to complete their legal studies and acquire five years of legal professional experience (*juristische Berufserfahrung*), which is increased to ten years for the Federal Administrative Court.³⁸ The content of the term '*juristische Berufserfahrung*' has not been normatively defined and raises doubts concerning the variety of institutions in which it is possible to gain professional experience. Undoubtedly, it may be gained in public administration, courts, legal scholarship, or by representing parties.³⁹ It is not obligatory to engage in those practices exclusively or even partially within the administrative judiciary.⁴⁰ It is debatable if this experience can be also gained in the private legal market. The emphasis on the need to obtain broad and diversified experience within the administrative judiciary⁴¹ should not exclude this possibility, at least if that experience is enriched by other extensive experiences within public institutions.

Though it is possible for judges from ordinary courts to apply for positions in the administrative judiciary, the reality is that, in Austria, those positions are occupied by employees from the public administration or by research assistants from the Federal Administrative Court, the Constitutional Court or other administrative courts.⁴² The most recent scholarship raises questions concerning the uniformity of judges' education and the judges' ability to perform judicial obligations without any judicial experience.⁴³ As a result, it has been postulated that the entire process of judges' education should be

³⁷ Article 26 para 1 Bundesgesetzes über das Dienstverhältnis der Richterinnen und Richter, Staatsanwältinnen und Staatsanwälte und Richteramtsanwärterinnen und Richteramtsanwärter (RStDG), BGBl. No. 305/1961. The exceptions from these obligations are regulated in the next two paragraphs. They concern university professors who are exempted from the preparatory service and practice (Art. 26 para 2 RStDG). The Ministry of Justice may also waive a candidate from an obligation of one year's practice in judicial preparatory service (Art. 26 para 3 RStDG).

³⁸ In practice, those terms are much longer, due to competition between many candidates. See P. Segalla, in *Die Neuordnung der Gerichtsbarkeit öffentlichen Rechts. 20. Österreichischer Juristentag – Öffentliches Recht. Band I/2*, (MANZ'sche Verlags- und Universitätsbuchhandlung 2019) 58.

³⁹ Thienel (n 36) 35.

⁴⁰ G. Grünstäudl, 'Richterausbildung für Verwaltungsgerichte? – Status quo und Ausblick' (2020) (7) *Zeitschrift der Verwaltungsgerichtsbarkeit* 272. <https://doi.org/10.33196/zvg202004026901>

⁴¹ Segalla (n 38) 62–63.

⁴² Thienel (n 36) 37.

⁴³ In the literature, the status of the administrative judges or their independence is not questioned. See Markus Vasek, 'Berufsbild Verwaltungsrichter*in' (2020) (7) *Zeitschrift der Verwaltungsgerichtsbarkeit* 499. Simultaneously is stressed, that the deficits of judicial experience should not be left unsaid. <https://doi.org/10.33196/zvg202006049501>

made uniform.⁴⁴ However, besides the above-mentioned limitations in typical judicial competencies, the advantages of a separate path to a judicial position connected with experience in administrative law and practice are stressed.⁴⁵

As a reaction to those opposite models of a judge's education, two initiatives are being undertaken. The first is based on cooperation between the administrative judiciary and two Austrian universities (*Johannes Kepler Universität Linz* and *Wirtschaftsuniversität Wien*), which established the Austrian Academy of Administrative Judiciary (*Österreichische Akademie der Verwaltungsgerichtsbarkeit*). It offers judges plenty of courses covering both the area of typical judicial competencies, such as scholarships from specialised sub-branches of administrative law, as well as soft skills, encompassing contacts with the media and the public.⁴⁶ This initiative, which is not formalised in any statutory regulations, shapes a possibility for deep specialisation in many areas of law, also offering a possibility for cooperation between judges and scholars. In the appointment procedure, this specialisation can be treated as a continuation of the specialising knowledge verified at the beginning of a judicial career.

The second project is aimed at making both judicial career paths uniform (*Richter/innenausbildung neu*). One of the basic assumptions is a division of the education process into four sections, including 'specialisation'⁴⁷. Soft skills are also taken into consideration within the programme.⁴⁸ Besides that, the need for flexibility in this process is stressed, both from the theoretical and practical sides. This should be particularly helpful for those candidates who come from outside the judicial system and have other experience pertinent to dispute resolution.⁴⁹ At yet this project has not been concretised in any statutory provisions.

As was mentioned above, in Poland, as in Austria, there are two separate systems of judicial appointment, one within the ordinary judiciary,⁵⁰ and the second within the administrative judiciary.⁵¹ For the latter, it is not obligatory for candidates to complete judicial training and pass a judicial exam. However, a candidate should show a high level of knowledge in the field of public administration and administrative law.⁵² Similarly to the

⁴⁴ Das Projekt ist unter dem Motto „*Richter/innenausbildung neu*“ angekündigt. Mehr dazu Thienel (n 36) 37–41.

⁴⁵ According to P. Segalla, typical judicial abilities required for leading a public hearing can be acquired through education. See P. Segalla, 'Die Stellung des Verwaltungsrichters' in M. Holoubek, M. Lang (eds), *Die Verwaltungsgerichtsbarkeit erster Instanz* (Linde Verlag 2013, Wien) 160–161.

⁴⁶ The current programme is available on the website of the Academy <<https://www.jku.at/oesterreichische-akademie-der-verwaltungsgerichtsbarkeit/aktuelles/veranstaltungen/>> accessed 21 May 2022.

⁴⁷ Thienel (n 36) 39; D. Moser, '5 Jahre der Verwaltungsgerichte – Basis für Weiterentwicklung' (2020) (7) *Zeitschrift der Verwaltungsgerichtsbarkeit* 46–47.

⁴⁸ Grünstäudl (n 40) 274.

⁴⁹ Thienel (n 36) 40–41.

⁵⁰ It is regulated in the Act of 27 June 2001 on the structure of the ordinary judiciary from (Journal of Laws 2020, item 2072 as amended). See Articles 55–64.

⁵¹ The Act on the system of administrative courts (Journal of Laws 2021, item 137 as am.). See Articles 6–8.

⁵² Article 6 § 1 point 6 of the Law on the system of administrative courts.

Austrian model, emphasis is placed on the need to attract candidates with diverse legal backgrounds.⁵³ In practice, contrary to Austria, the majority of administrative judges come from the ordinary judiciary. For them, promotion to the administrative judiciary is connected with higher salaries⁵⁴ and better work conditions.⁵⁵ Unlike in Austria, there is no discussion in Poland about the possible reduction of judicial independence among administrative judges if they come from areas of expertise other than the ordinary judiciary. Instead, there is concern about the danger of those candidates lacking professional knowledge, especially if they are from the ordinary judiciary and do not have any contact with administrative law. The requirement concerning high knowledge in the field of public administration and administrative law is too general and therefore hardly verifiable.⁵⁶ The vague character of this formulation, connected with a lack of judicial control over presidential acts of judges' nominations,⁵⁷ implies that this criterion has almost no practical importance.

Similarly to Austrian solutions, in Poland, the judge's specialisation is deepened by training organised for judges after their appointment. Those are prepared within the administrative judiciary without any institutionalised cooperation with universities or other public or private institutions, but sometimes with the attendance of invited guests, such as professors or employees of the public administration. As yet there have been no legislative reforms initiated, aimed at changing the procedure for judicial appointment to administrative courts. In our opinion, those amendments are not necessary, because the existing regulation creates appropriate conditions for judges' appointments in accordance with the adjudication tasks of administrative courts.

2 The German System of Legal Education as an Example of a Uniform Path to Becoming a Judge

Although the German system of special branches of courts is more diversified than in Austria and in Poland, because it embraces special financial and social courts, there is

⁵³ R. Hauser, K. Celińska-Grzegorzczak, 'Sądy administracyjne a system sądownictwa powszechnego' in R. Hauser, Z. Niewiadomski, A. Wróbel (eds), *System Prawa Administracyjnego*. Tom 10. (Sądowa kontrola administracji publicznej, C.H. Beck 2016, Warszawa) 106.

⁵⁴ While the ordinary judiciary is three-level, the administrative judiciary is two-level. The first instance (voivodship) administrative courts are at the same structural level as the third instance ordinary (appeal) courts. The Supreme Administrative Court has the same position in the court's hierarchy as the Supreme Court. In reality, every promotion from the first or second level is for ordinary judges automatically connected with a rise in their salaries.

⁵⁵ Administrative courts are better equipped with personal and material resources than ordinary courts, due to their financial independence from ordinary courts and competence for budgetary self-preparation (see Article 14 § 1 the Law on the system of administrative courts).

⁵⁶ Hauser, Celińska-Grzegorzczak (n 53) 106.

⁵⁷ According to the stable jurisprudence of the Supreme Administrative Court, those acts are excluded from judicial control. See the judgment of the SAC from 04.11.2021, III FSK 3626/21, accessible at the website <orzeczenia.nsa.gov.pl> accessed 24 May 2022. The whole process of judge's appointment is excluded from judicial control.

no separate path for becoming a judge in any of them. For the guarantees of the judge's position, including appointment and judicial independence, the common constitutional and statutory rules are binding.⁵⁸ The judicial training provides the same structure for all candidates (*die Referendare*), regardless of their later professional development. The training covers all areas of law. As well as other institutions, candidates for the judiciary take part in training within the administrative authority.⁵⁹ Candidates may also attend the University of Administrative Sciences in Speyer for judicial training credits.⁶⁰ This education may be treated as a compulsory stage in an administrative authority or may be considered a compulsory elective stage.

A candidate for a judge should become familiar with both the legal and non-legal aspects of employment in the administration, such as work organisation, staff management, and dealing with citizens' applications⁶¹. These qualities are not only determined during the judicial training but also during the probationary period, when a judge exercises full jurisdiction that is reduced in terms of employment (*der Richter auf Probe*). After this probationary period of at least 3 years, professional judges are appointed for life.⁶² This mechanism can be regarded as a tool for eliminating those judges whose adjudication is not compatible with the professional expectations towards judges for a long-term perspective.⁶³ The grounds for the decision can be connected with unprofessional adjudication resulting from a lack of specialist knowledge and experience in the field of adjudication.

The details of the judicial training in Germany are regulated by the federal states (*die Länder*). The duration of the individual stations does not have to be determined uniformly for all trainee lawyers in all states. For this reason, it is possible for trainee judges who wish to work in an administrative court to have a longer practice period with an administrative authority than other trainee judges. A customary rule that has been established in Bavaria's general administrative court system is also noteworthy: during the probationary period, a judge is required to work for a public administration authority for a number of years in order to qualify for the right to adjudicate without time limitation (*der Richter auf Lebenszeit*) in an administrative court. This system, known as rotation (*das Rotationsmodell*), enables a judge to acquire comprehensive knowledge of the functioning of the public administration in order to make 'factual' and 'life-like' judgments in the future.⁶⁴ This custom finds no

⁵⁸ Schmidt-Assmann (n 7) 112.

⁵⁹ Article 5b § 2 point 3 Deutscher Richtergesetz (BGBl. from 19. April 1972 I S. 713 as am.). This training should last at least three months.

⁶⁰ U. Stelkens, 'Die Funktion des verwaltungswissenschaftlichen Ergänzungsstudiums für Rechtsreferendare an der Deutschen Universität für Verwaltungswissenschaften Speyer in der Juristenausbildung' (2017) (4) *Die Öffentliche Verwaltung* 152–157.

⁶¹ J. Schmidt-Räntsch, *Deutsches Richtergesetz. Kommentar* (C.H. Beck 2009) 152.

⁶² Article 10 § 1 DRiG.

⁶³ Segalla (n 38) 63–64.

⁶⁴ G. Beckstein, 'Die Ressortierung der Verwaltungsgerichtsbarkeit in Bayern beim Innenressort' in *Festschrift zum 125-jährigen Bestehen des Bayerischen Verwaltungsgerichtshofs* (2004, München) 45.

confirmation in a written law. Nevertheless, it is firmly anchored in the practice of the administrative courts in Bavaria and is recognised by the German law doctrine.⁶⁵ Another possibility for gaining more specialisation in courtrooms is based on the engagement of candidates for partial adjudication (*der Richter im Nebenamt*)⁶⁶, combined with their employment in other institutions, for example at universities. Such kind of presence of professors being experts in detailed areas of administrative law, additionally with different to ordinary judges' perspective, leads to strengthening their level of judicial specialisation.

Although the German philosophy for judges' appointments is not similar to their Austrian or Polish counterparts, which foresee special conditions for candidates to administrative judiciaries, judges' specialisation in Germany is visible both in the structure of the administrative judiciary as well as the judicial training, where education in administrative law is foreseen. In addition, adjudication in a reduced time offered for law processors is a tool for gaining special knowledge from administrative law inside judiciaries.

IV New Competencies for the Judges' Candidates

Although the criteria for the positions of administrative judges are demanding and embrace both legal education and practical experience, it is questionable if they are sufficient for the contemporary challenges associated with public administration, administrative law, and the judicial verification of administrative acts. Do judges need additional specialisation connected with modern challenges faced before the administrative judiciary? Currently, administrative law is coming under the constantly growing influence of EU law, which in many areas is applied directly by public authorities and courts. Administrative courts are described as European courts.⁶⁷ In addition, citizens' expectations with regard to courts are also growing. Nowadays it is not enough to guarantee the parties to the proceedings the right to active participation in them, which during the COVID-19 pandemic resulted in a growth of online contact forms⁶⁸ – this participation should also be understandable for them, and the final resolution ought to be convincing. In addition to the vested interests of the parties, selected proceedings are a subject of interest to a broader audience, thanks to

⁶⁵ H. Schmitz, 'Der Blick der Verwaltung auf die Verwaltungsgerichtsbarkeit' (2019) Deutsches Verwaltungsblatt 267.

⁶⁶ W. Piątek, 'Die Schranken der Nebenaktivitäten der Richter im Lichte ihrer Unabhängigkeit und Dienstaufsicht' (2020) (4) Verwaltungsgarchiv 474–481.

⁶⁷ See the jurisprudence of the Polish Supreme Administrative Courts: the judgment from 29.4.2021, II GSK 79/19, from 20.4.2021, II GSK 936/18, 15.4.2021, II GSK 906/18, published at <orzeczenia.nsa.gov.pl> accessed 27 December 2022.

⁶⁸ A. Wimmer, 'Audiovisuelle Verfahrensführung vor Verwaltungsbehörden und Verwaltungsgerichten' (2020) Zeitschrift der Verwaltungsgerichtsbarkeit 477–478. <https://doi.org/10.33196/zvg202006047701>; S. Rebehn, 'Mehr als 50.000 Verhandlungen in 2021' (2022) (4) Deutsche Richterzeitung 153; W. Piątek, 'Rozprawa w formie zdalnej przed sądem administracyjnym – nieunikniona przyszłość czy rozwiązanie tymczasowe na czas pandemii?' (2022) (2) ZNSA 17–19. <https://doi.org/10.14746/rpeis.2020.82.2.5>

media engagement. Unfortunately, media reports are sometimes not objective, because of their sensationalism or lack of competence in merits-oriented reporting.⁶⁹ Those conditions, which are dynamic, lead to questions about new competencies that should be demonstrated by candidates for the position of judge in the administrative courts. To what extent should they be verifiable within the appointment procedure and within scholarships organised for judges?

Above all, in our opinion, knowledge and experience in the area of administrative law should be more detailed and evaluated. Besides formal requirements connected with the implementation of administrative law at various stages of candidates' professional careers, it is worth considering verifying this knowledge.⁷⁰ The appointment procedure gives a possibility to verify the candidate's formal and practical abilities when it comes to performing judicial obligations. Since many candidates usually apply for judges' positions in the administrative judiciary,⁷¹ there is a need for a professional-oriented selection and choice of the most suitable candidates.

It is questionable whether other competencies that are not strictly associated with judicial education should be verified within the appointment procedure. To be sure, language skills can offer better chances to apply EU law, become acquainted with the jurisprudence of the ECtHR and CJEU, and compare legal interpretations across various jurisdictions.⁷² Although judges adjudicate in their own national languages, some specific areas of administrative law, such as industrial property law or stocks and shares law, and those which involve international trade, tend to use English. Expectations from the private sector⁷³ may gradually increase the public administration and administrative courts' readiness to solve disputes in this language. On the one hand, there is no need to rush in expecting all candidates for judges' positions to have fluency in English. On the other hand, complete avoidance of this obligation may lead to enclosing the administrative judiciary in an exclusively national background of administrative law interpretation, without any deeper inputs from international (EU law and ECtHR, CJEU jurisprudence) perspective.

⁶⁹ It is noticeable that a rather small number of journalists studied law or even have some other professional experience.

⁷⁰ As an example of this, the Italian solution, based on an examination of the candidate's knowledge from the area of administrative law, should be considered. See Fraenkel-Haberle, D.u. Galetta (n 34) 303–304; M.L. Maddalena, *Evaluation criteria in the selection process of administrative judges in Italy* (printed version, 2019) 2–4.

⁷¹ It is typical for Poland where judges' positions apply many candidates. All applications are published in the official bulletin Monitor Polski.

⁷² Language skills – para 58 explanatory memorandum rec. (2010)12 – adoption of EU law, comparative reasoning, the rule that a judge is focused only on his language is insufficient

⁷³ P. Meier, 'Fremdsprachige Verhandlung vor deutschen Gerichten?' (2018) WM 1827–1828; F. Diekmann, 'Commercial courts – innovative Verfahrensführung trotz traditioneller Prozessordnung?' (2021) *Neue Juristische Wochenschrift* 605–606; P. Biesenbach, 'Spezialkammern: NRW sucht neue Wege in der Ziviljustiz' (2022) (3) *Deutsche Richterzeitung* 107.

A current area of development is the courts' digitalisation. It is worth considering whether candidates for judges' positions should exercise competencies in this sphere in order not to be reliant exclusively on parties' statements or IT assistance services. Simultaneously, the role of automatism or even the adoption of artificial intelligence inside courts will be constantly growing.⁷⁴ Judges should be aware not only of the functionalities of those systems but also potential and threats that are associated with their adoption.⁷⁵ In any case, the public administration procedure and private sectors are gradually becoming increasingly digitalized. Judges should at least understand these mechanisms in the process of supervising public administration in order to issue professional-oriented judgments.

V How to Guarantee Knowledge and Experience to Adjudicate Disputes in the Area of Administrative Law?

Although specialisation within administrative judiciaries plays a significant role in professional adjudication and, from this perspective, also in the exercise of a right to a fair trial, it should not be treated separately as a key solution for organising every judiciary system from all points of view, including reasonable disposition time, professional adjudication and the individual's protection. There are even legal systems without a special branch of administrative courts where, at first sight, the appointment process for judicial positions does not involve specialisation.⁷⁶ Even in those systems where great significance is placed on general legal knowledge, judicial specialisation is safeguarded in many other ways, such as through the partial composition of judicial panels from specialists even without a legal education,⁷⁷ or shifting the burden of specialisation to the parties in the proceedings.⁷⁸ However, it is not possible to adjudicate in contemporary factual and legal circumstances without any specialist knowledge, since this would lead courts to issue accidental, not merits-oriented judgments, which, in turn, could result in the public administration facing difficulties in their enforcement.

Focusing on mechanisms for verifying specialisation among candidates within the appointment procedure, it is evident that specialist knowledge in the area of administrative law is significant for both uniform (Germany) and separate systems (Austria, Poland) of

⁷⁴ Z. Cao, 'Evolution of online courts in China: situation and challenges' (2021) 2 (11) *International Journal of Procedural Law* 305–309, L. Greco, 'Roboter – Richter? – Eine Kritik' in H.G. Dederer, Y.Ch. Shin (eds), *Künstliche Intelligenz und juristische Herausforderungen* (2021) 105–108.

⁷⁵ Greco (n 74) 108.

⁷⁶ A. Filfet, 'Judicial independence and the appointment of judges in Norway' in N.A. Engstadt, A.L. Froseth, B. Tonder (eds), *The independence of judges* (Eleven International Publishing 2014) 69.

⁷⁷ A.K. Sperr, *Verwaltungsrechtsschutz in Deutschland und Norwegen. Eine vergleichende Studie zur gerichtlichen Kontrolle von Verwaltungsentscheidungen* (Nomos 2009) 70.

⁷⁸ W. Piątek, 'O różnych sposobach dążenia do specjalizacji sędziów orzekających w sprawach administracyjnych' (2020) (2) *RPEiS* 70–71.

judges' appointments. In the uniform system, they are parts of judicial training that embrace all branches of law. For this path, details connected with a programme of judicial training have crucial importance. In other words, it is important to take into consideration not only basic information from administrative law and practice but to assign the same priority to this branch of law as civil and criminal law.⁷⁹ An advantage of this model is that one way of educating judges may help to create common practice and the uniform jurisprudence of administrative courts. In addition, this system is more flexible for managing the structure of the judiciary and deciding in which panel a specific judge will adjudicate. In addition, a judge exam ensures the objective verification of knowledge and competencies necessary to apply the law in practice. If it is connected with an additional probationary period (e.g. *Richter auf Probe*⁸⁰), the opportunity to eliminate persons who do not guarantee a high level of adjudication is even greater.

An advantage of the opposite system is connected with the deep practical knowledge of administrative law that the candidates can gain before becoming judges. They are lawyers with a wide range of experience that may provide an additional perspective when analysing detailed disputes, and they are aware of the practical consequences of the issued judgments. Professional and life experience are significant for adjudication, because they help judges to settle complicated disputes in a fair way. Even if the judgments in similar disputes are not entirely uniform and a judge who was previously a member of public administration is obliged to make up for knowledge from procedural law, she or he can still issue a merits-oriented judgment, which is the key purpose of a judge's appointment. In our opinion, it is less complicated to equip a judge with the knowledge of procedural law that is necessary to conduct a procedure and issue a judgment than it is to provide her or him with the knowledge and experience necessary to make the final resolution a professional one. It is possible to gain experience from many years of legal practice, not only through legal education. Knowledge focused on procedural law can be deepened within judicial training or by the assistance of other judges, or even members of court administration.

However, both of those models, as long as they are not disturbed by particular (political or private) interests, can offer a sufficient standard of judicial professionalism and protect individuals from the unlawful activity of the public administration. Their diversity as well as various pros and cons offer a broad perspective when creating the conditions for judges' positions in specialised jurisdictions. Nevertheless, the higher standard of specialisation is realised by those candidates who at the beginning of their judicial career can benefit from

⁷⁹ The proportionality in judicial training is disturbed within the Polish regulation in which administrative matters are considered only in a minimal amount of time. Undoubtedly, candidates to judicial positions do not receive during judicial training a thorough knowledge and experience about administrative law and public administration.

⁸⁰ G. Lippok, 'Der Richter auf Probe im Lichte der Europäischen Menschenrechtskonvention' (1991) NJW 2383–2385; L. Bode, 'Proberichter im Justizvollzug?' (2021) NJ 542–544.

both their knowledge and professional experience. Being judges, they deepen this experience by profiting from the previous contact with the area of adjudication.

Coming back to the modern challenges faced before judiciaries, the majority of them can be verified within the appointment proceedings because they are verifiable by certificates or tests confirming the candidate's language skills or digital knowledge. Conversely, social skills and communication competencies are not really verifiable and for that reason should be improved together with further development of specialised knowledge, language and digital competencies within the process of judicial education. Communication competencies are decisive, not only for comprehensible communication between judges and parties to the proceedings but for the evaluation of the whole judicial system and creating trust in the judicial power. Certainly, there is an urgent need to bring courts close to society through regular contact with the media,⁸¹ preparation of justifications for issued judgments in plain language⁸² and their publication in available resources,⁸³ and offering detailed information about the court's functioning electronically and physically in court buildings. In our opinion, the Austrian combination of judicial and academic cooperation seems to be a useful tool for offering judges professional knowledge and simultaneously providing academics with contact with practical realities. This cooperation is beneficial for the whole judicial system, too. It offers feedback on how to change the court's practice in a manner that is expected by citizens.

VI Conclusions

The judge's specialisation provides knowledge and experience that are indispensable for professional adjudication. This should be taken into consideration within the process of appointing judges through reference to detailed and professional-oriented criteria that can be objectively verified. Such conditions for appointing judges' positions would reduce the danger of subjective or arbitrary selections.

The specialisation of judges can be introduced in various ways. There is currently no one prevalent system of judicial appointments and there is no need for such, nor one way of equipping courts with specialist and detailed knowledge. However, for the administrative judiciary, it would be beneficial if judges had that knowledge at the beginning of their professional careers. They should be aware of the mechanisms that govern public

⁸¹ For example, in Norway some judges offer journalists assistance in following with analysis of court's reasoning in order to present it publicly in an understandable (both for the public and journalists) way. See more R. Aarli, 'Independent judges and their relations with media' in N.A. Engstadt, A.L. Froseth, B. Tonder (eds), *The independence of judges* (Eleven International Publishing 2014, Hague) 334.

⁸² U. Saxer, 'Vom Öffentlichkeitsprinzip zur Justizkommunikation – Rechtstaatliche Determinanten einer verstärkten Öffentlichkeitsarbeit der Gerichte' (2006) (1) *Zeitschrift für Schweizerisches Recht* 476–479.

⁸³ M. Heese, 'Die praktisch uneingeschränkte Pflicht des Staates zur Veröffentlichung der Entscheidungen seiner (obersten) Gerichte' (2021) (13) *JZ* 665–666. <https://doi.org/10.1628/jz-2021-0210>

administration and lead to issuing administrative acts in concrete instances of dispute resolution. This is more important than the experience connected with the implementation of procedural law and technical issues combined with internal judicial actions, which can be gained in the process of judicial education.

Besides specialisation, other abilities connected with language and foremost digital competencies will gradually gain increasing importance in judicial education and profession. They can be verified already at the stage of judicial appointments. In contrast, communication abilities should be developed as part of judges' educational training. All of the competencies mentioned above are responsible for professional adjudication and the understandability and acceptance of its results.