CONFERENCE REVIEW NOTES

ADMINISTRATIVE JUSTICE: COMPARATIVE AND RUSSIAN CONTEXT

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International conference "Administrative Justice: Comparative and Russian Contexts" took place in Tyumen at the Tyumen State University on September 29–30, 2016 in the framework of the II Siberian Legal Forum devoted to the development of administrative legal proceedings in Russia.

The conference was held in four sessions. The first section was devoted to administrative legal proceedings in economic litigation. The newly adopted Administrative Procedure Code regulates the administrative proceedings in courts of general jurisdiction. Commercial courts still have some competence to hear public matters cases. Such proceedings are governed by the Commercial Procedure Code. The retired judge of the Constitution Court of Russian Federation, professor **Mikhail Kleandrov** debated if judges have got specialization after the adoption of the Administrative Procedure Code. He pointed out that there were no real specialization before the Code, but he characterized the new Code as "a horse's saddle for a cow." The Code and other relevant legislation do not settle the peculiarities of the proceedings or a judge legal status for the administrative proceedings. He offered to address to German approach, in particular to give more competence in resolving public matter disputes to district courts and to justices of the peace. Also he suggested establishing a separate High administrative court, and later returning to the High Commercial Court. He pointed out that some competence of the court of general jurisdiction in

administrative cases is beyond their jurisdiction. He spoke in support of the idea to establish constitutional courts in regions and to develop separate law concerning constitutional proceedings.

The scholar of the substantive administrative law science professor **Yuri Starilov** (Voronezh State University) argued with the delegates who represented the procedural law science about their negative appraisals concerning the new Code. He thought that the Constitution of Russian Federation had correctly prognosticated the necessity of the administrative justice. The new Code is not "early fruit," but circumspect act, that establishes the new procedural form of justice (administrative one). The Code does not create any problems for the judges, but defend ordinary citizens from arbitrariness of the state. The reporter admitted that the Code had already been amended seven times, but he considered it as normal practice for the act of such complexity. The main urgency now in administrative law is the federal regulation of administrative proceedings that take place in state (executive) bodies.

The representative of the practical views the Judge of the Arbitrazh Court of the West-Siberian Circuit **Olga Chernousova** pointed out some main characteristics of adjudication of public matter disputes in commercial courts. The most frequent public matter cases are concerned tax, budget and antimonopoly (competition) legal relations. Commercial courts apply mechanisms of e-justice and systems of video conferencing in such disputes. Some public matter cases could be settled by means of summary proceedings. It is interesting that the problems of adjudication of such disputes arise not from procedural law regulation, but from some deficiency of administrative law. For example, there are four state bodies that control preservation of roads and it is difficult to define the right defendant in such cases. Also new mechanisms of the execution of the state functions had appeared, i.e. the "system of one window," when an applicant applies to one state body and the latter itself obtains all necessary permissions from other state bodies. In this case often such questions arise as whose decision to dispute in case of rejection to perform state functions, who should be defendant, who would pay court's costs. Also it is not still clear how to distinguish normative and non-regulatory acts, non-regulatory act and decision of an executive state body. Sometimes the relations that are regulated by the administrative law and subject of dispute are quite complicated for application. The reporter also mentioned that it is possible to challenge only acts, that violates somebody rights. But in practice it is quite difficult to establish a fact of negative consequences of the act. For example, it is impossible to dispute an official warning about offence. But if a company does not perform duties stated in the notification the fine can be imposed.

The Judge of the Tyumen Regional Court Professor **Maxim Mateykovich** in his report concerning protection of rights and freedoms of person in administrative proceedings pointed out that it is important to ensure a balance of private and

public interests in administrative proceedings. It is not clear what public interest is, for example in a case concerning duties of the regional or municipal authorities to remove waste. This interest also is not uniform. There are federal, regional and municipal authorities. Disputes with citizens can involve state bodies with different status and powers. The reporter doubted that such cases as a setting of an administrative supervision or defense of the voting rights should be adjudicated in administrative proceedings. In practice it is quite difficult to choose the right form of adjudication (civil, administrative or criminal), for example in such cases as road accident. But sometimes there is a malusage of choice of these forms. The Judge saw the perspective of the development of administrative justice in further reforming of the legislation (the Administrative Procedure Code). He offered to regulate a right to void acts of non-profit corporations that perform some state functions (i.e. Platon), but he disputed the necessity of specialized administrative courts.

The second and third sessions under moderation of the Chairman of the Arbitrazh Court of West-Siberian Circuit **Vladislav Ivanov** and professor **Dmitriy Maleshin** (Lomonosov Moscow State University, Russia) were devoted to the analysis of the administrative justice in comparative context. Professor of the University of Pavia (Italy) **Elisabetta Silvestri** presented an extensive overview of the administrative justice in Italy. Administrative justice in Italy is dispensed by special courts (twenty Regional Administrative Tribunals, one for each Italian Region). The Council of State is the appeal administrative court. In one case of lack of jurisdiction one more appeal can be brought before the Court of cassation. Also there is a separate administrative court which adjudicates cases concerning public finance (the Court of Accounts). The Constitution of the Italian Republic regulates main basics of the administrative justice. It grants individuals the right to seek judicial protection against state bodies. Another act that thoroughly regulates the administrative proceedings in Italy is the youngest Italian Code – the Code of Administrative Procedure (September 2010).

It is interesting that ordinary courts also have competence to hear administrative cases and the delineation of competence of ordinary and administrative courts bases on the distinction between "substantive right" (which is protected by ordinary courts) and "legitimate interest" (that is protected by the set of administrative courts). The reporter pointed out that the distinction between the two forms of entitlement is very elusive. The fact that a public entity or administration is a party of a case does not mean that an administrative court has jurisdiction over the case. According to the Article 7 of the Code of Administrative Procedure legitimate interests arise when a state body exercises (or fails to exercise) an authoritative power affecting individuals. The administrative court now may also award monetary compensation to the claimant for the harm caused by unlawful acts of the state body. Earlier such damages had been compensated only for the infringement of subjective rights. Administrative courts have a general jurisdiction to review the lawfulness of any

administrative acts. The administrative act, once found unlawful, is declared null and void, while ordinary court cannot declare the act null and void, it can only disregard it, and decide the case as though the act had never existed. Administrative courts also have so called "exclusive" jurisdiction, when some cases concerning protection of substantive rights are excluded from the jurisdiction of the ordinary court and adjudicated by administrative one. The reporter referred to the speech of the Chief Justice of the Council of State who had emphasized that in spite of the improvements brought about by the Code of Administrative Procedure there is still room for more efficiency and, most of all, for a better understanding of the important role played by administrative courts. But in fact, people do not recognize administrative courts as their protectors and doubt the necessity for their existence.

The Federal Judge of Rio de Janeiro, the Executive Secretary of the Drafting group of the Model Code of Administrative Procedure for the countries of Latin America **Ricardo Perlingeiro** in his report about the reform of administrative justice in Latin America noted that in the field of the administrative justice the prerequisites for effective judicial protection of rights are judges who are administrative law specialists and independent from the authorities responsible for the challenged decisions, as well as the reinforcement of procedural principles that enable weighing private interests against public interests. In many Latin-American countries there are three main rules of effective judicial protection in administrative disputes. First, the judicial protection must be complete. Second, the judicial protection must cover every type of conduct of public authorities. The third rule concerns the timeliness of the protection.

The reporter focused on two different approaches of organization of administrative adjudication. The first way can be found in common-law countries where there are no specialized administrative courts but specialized quasi-judicial bodies within the administrative body. The second way when the courts have a special division for adjudication of administrative cases is typical for Continental Europe. So regardless of the organizational system, administrative justice is always placed in hands of specialized adjudicators.

As former Iberian colonies, the countries of Latin America inherited the Continental European legal culture, with its civil law tradition. Lately the USA Constitutional law had a strong influence on Latin-American countries. As a result, most of them have adopted a judicial system in which ordinary courts of general jurisdiction hear both civil and administrative disputes. Thus, now administrative dispute resolution system in Latin America countries suffers both from the lack of specialized administrative courts and absence of quasi-judicial bodies within the administrative authorities themselves.

The reporter offered a solution for the noted problem. He thought that after over two centuries of a judicial system consisting only of courts of general jurisdiction, it would not seem the best option to establish administrative courts. The future

of Latin American administrative justice depends on compensating for the lack of specialized administrative courts by endowing administrative agencies with guarantees of procedural due process.

The speaker from France Professor **Hugo Flavier** (University of Bordeaux**)** gave an overview of the administrative justice in France. He began with the history of development of the administrative law and administrative proceedings which had been originated in the XVII century. The reporter pointed out that the administrative law in France was developed by case law.

There are ordinary and specialized administrative courts in France, the ordinary administrative courts are the *Conseil d'Etat*, administrative courts of appeal and administrative courts. *Conseil d'Etat* was established by the Constitution of the Year VIII and consists of 300 members who work in 7 sections. The judicial powers of the *Conseil d'Etat* are governed by Article L. 111-1 of the Administrative Justice Code. The *Conseil d'Etat* is the highest administrative court. The *Conseil d'Etat* hears cases at first and last instance. Administrative courts were created by the Decree of September 30. Administrative Courts of Appeal were established on December 31, 1987 to unload the *Conseil d'Etat* overloaded with administrative cases. These courts have both administrative and judicial powers, what is subject to criticism by French experts. But in 2006 ECtHR in the case Sacilor Lormins v France considered that such powers duality did not violate the principle of judicial impartiality.

The French case law has elaborated the principle of separation which governed the determination of jurisdiction of courts of general jurisdiction and administrative courts. The principle means that jurisdiction follows the substance, so competent court is determined by applicable law (civil or administrative). There are two criteria that determine the jurisdiction of administrative courts – organic and material one. The organic criterion concerns that person involved in the dispute (public or private one). The material criterion concerns the nature of activity or the nature of act in dispute.

There is special *Tribunal des conflits* had been established which adjudicates conflicts of jurisdiction between ordinary courts and administrative courts. It can hear cases of negative or positive conflict. There are negative conflicts when neither court considers that it has jurisdiction to hear the case brought before it. There are positive conflicts when both courts consider that they have jurisdiction.

The reporter made some remarks concerning the influence of the European laws on the French administrative justice. The speaker admitted that the standard of protection required by the European Convention resulted changes in the French administrative justice.

Professor **Jaroslaw Turlukowski** (Warsaw University, Poland) gave extensive analysis of the development of the administrative justice in Poland over the last centuries. He outlined the system of the administrative courts and judges in Poland and presented fundamental principles that governed administrative proceedings

in Poland. There is dual court's system in Poland. There are courts of general jurisdiction and administrative courts headed by the Supreme Administrative Court. The proceedings in administrative courts are regulated by the special act – Law on Proceedings before Administrative Courts. According to this act administrative courts have control functions over activities and acts of public state bodies.

The speaker emphasized the following principles of the administrative justice: the principle of two instances, the principle of legality, the principle of legal assistance to parties, the principle of procedural economy, the principle of transparence, the principle of access to the court and others.

Professor **Francisco Verbic** (University La Plata, Argentina) overviewed the administrative justice in Argentina. Argentina is a federal country, and the Article 5 of the Federal Constitution sets that Provinces must organize their own administrative justice system. Thus, there are 25 different system of procedural law in Argentina now. The system of administrative court is quite complicated in Argentina. The administrative justice delivered by the Argentina Supreme Court of Justice, 15 Appellate Courts, courts od federal general administrative jurisdiction and 6 specialized administrative courts. It is worth to mention that even though there is system of administrative courts in Argentina, there is no special regulation of the proceedings in such courts. Administrative courts hear cases followed by the National Civil and Commercial Procedural Code. The speaker also paid attention to the problem of class actions in administrative proceedings.

The forth session under the moderation of professor **Sergey Belov** was devoted to Reforms of Administrative Justice in Russia. The moderator pointed out that the Russian Administrative Procedure Code was created by thoughtless extraction of the norms concerning public matter disputes to the separate act. There are two main problems arise in the field of administrative justice: 1) it is complicated to distinguish civil and administrative procedure and uniform terminology in the Civil Procedure Code and the Administrative Procedure Code leads to the unification of the procedural form, but not to the peculiarities of the administrative justice; 2) it is not clear what is the main task of a court in administrative justice (to resolve a dispute or to check the legality of the acts and actions of the state bodies).

The judge of the Tyumen Regional Court **Svetlana Koloskova** highlighted main problems that arise during adjudicating public matter cases. The speaker noted that the list of the cases that can be adjudicated under the Administrative Procedure Code is not exhaustive. It is set that other cases can also be heard in accordance with the Code. But that results problem to identify such cases. For example, should a court consider as administrative a case concerning an exemption from paying execution fee.

Other problem is the question of a choice of the form of procedure. There are complicated cases that include claims concerning both public and private relations. For example the claim about void of an act and claim for damages, caused by such

act. The recently adopted the Act of the Plenum of the Supreme Court of the Russian Federation No. 36 concerning the implementation of the Administrative Procedure Code interprets that a court may not adjudicate any disputes concerning civil rights (also concerning damages) under the regulation of the Administrative Procedure Code. It means that a court should terminate proceedings and explain a claimant that he may take action to a court under the Civil Procedure Code. Moreover, in case when a court had adjudicated a case concerning private relation in accordance with the Administrative Procedure Code, his decision should be overruled by the appellate court and the case should be adjudicated again in accordance with the "right" Code. Thus a court would hear the same case twice, and the legal certainty of the rights of a plaintiff would not be attained for a long time.

Professor **Svetlana Savchenko** (Institute of the State and Law of the Tyumen State University) overviewed the main tasks of the administrative justice.

Professor **Nataliya Bocharova** (Lomonosov Moscow State University) criticized the Administrative Procedure Code and doubted the necessity of its adoption. The Code for the most part just replicates norms of the Civil Procedure Code and the Commercial Procedure Code. The Code also uses legal terms related to action-based proceedings that results some confusion especially party autonomy in administrative proceedings is analyzed. Party autonomy is one of the principles of civil procedure law and international arbitration. Traditionally it is explained by way of the possibility to freely dispose one's civil law substantive rights (which are subject of the dispute). In Russian civil procedure theory we called it dispositive principle, which in the first place means the possibility to dispose one's civil substantive rights during the judicial proceedings. It is obvious that the nature of private and public rights is different. There is the possibility to dispose public rights (for instance to refrain from disposition of a public right), but the scope of such disposition is incomparably less than for civil rights. Public relations by the legal nature are subordinated. Russian scholars admit that public right unlike private one does not include the possibility to claim something from the state body. The private person has only right to appeal to the court for protection against unlawful acts of public authorities and official. The Administrative Procedure Code contains the list of principles that governs administrative justice (Art. 6), which includes such principles as independence of the judiciary; equality before the law and the courts; the legality and justice of adjudication of administrative cases; the implementation of the administrative proceedings within a reasonable time and the enforcement of judgments in administrative cases within a reasonable time; transparency and openness of the trial; the immediacy of the trial; equality of parties and adversarial administrative proceedings with the active role of the court. The principle of party autonomy is not mentioned in this list. Russian scholars acknowledge that in some extent this principle should be applied to the adjudication of administrative cases. Meanwhile this principle is confined (in more extent than in civil procedure) by the

idea of the active role of the judge. The active role of the court in administrative justice is manifested in the implementation not only to the principle of adversarial proceedings but also to other principles. In particular, the specificity of the party autonomy principle in administrative proceedings assumes, in contrast to the civil proceedings, that the court overseeing the development of the judicial process and the disposition of the substantive rights.

Professor **Dmitriy Tumanov** (Kutafin Moscow State Law University) in his report concerning the defense of common (public) interest noticed that the development of law concerning public matter disputes did not proceed the path of formation of a separate administrative procedure, but the path of attribution of universality to the civil procedure form. It means that public matter disputes were adjudicated in accordance with special norms of the Civil Procedure Code and there was no need in the separate Administrative Procedure Code. The new Administrative Procedure Code is not original one; it is "legal clone" of the Civil Procedure Code and the Commercial Procedure Code.

The analysis of the Administrative Procedure Code indicates that the right to protect the public (common) interest in the court is totally unacceptably regulated by this Code. For example without any reason the right to protect common interest was granted only to the state bodies. Also the Code allows these state bodied to decline their claim. In this case the process would continue. But there is no rules that indicate who would keep up the claim before court.

One of the procedural mechanisms that help to defend common (public) interest is class administrative action. The Administrative Procedure Code mentioned class action, but there is no detailed regulation of the proceedings, initiated by such action.

Professor **Dmitriy Abushenko** (Ural State Law University) in his report concerning replacement of a defendant in administrative procedure also made critical review of the Administrative Procedure Code. The reporter focused on the rule of the Code that sets the right of a judge to bring to trial another defendant without consent of a plaintiff. The rule that gives a court in adversarial proceedings to define proper defendant before adjudication of a case is unacceptable. It means that a court predetermines a court decision before adjudication. Bringing to trial another defendant against the will of the administrative claimant means ad litteram the possibility of the court to initiate a new administrative lawsuit, which violates the fundamental principle of the procedural law.

The conference showed that administrative justice is very controversial and complicated subject and in Russia and other countries we still do not have some perfect systems of protecting the public rights of individuals against violations of their rights by state authorities.

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