

CONFERENCE REVIEW NOTES

ADMINISTRATIVE JUSTICE: INTERNATIONAL, FOREIGN AND RUSSIAN DIMENSIONS

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With the adoption of the Code of Administrative Proceedings of the Russian Federation¹ (hereinafter CAP), the discussion concerning the need to consider administrative justice as an independent branch of judicial authority has livened up in both doctrine and practice. On the one hand, the adoption of such an important normative legal act is positive. The implementation of public power received a procedural regulation and an effective protection of rights and interests of citizens and legal entities becomes possible. On the other hand, there are concerns about the efficiency of this Code, not only in doctrine but also in practice. Nonetheless, it is partly wrong to reduce an assessment of the law only to its efficiency. Therefore, a discussion of the issues, questions, and challenges facing administrative justice is important and necessary.

¹ Кодекс административного судопроизводства Российской Федерации от 8 марта 2015 г. № 21-ФЗ, Собрание законодательства РФ, 2015, № 10, Ст. 1391 [Code of Administrative Proceedings of the Russian Federation No. 21-FZ of March 8, 2015, Legislation Bulletin of the Russian Federation, 2015, No. 10, Art. 1391].

On September 29–30, 2016, Tyumen State University (Russia) hosted the international conference titled “Administrative Justice: Comparative and Russian Contexts” within the II Siberian Legal Forum – a forum devoted to the development of administrative legal proceedings. The conference continued the topic of the I Siberian Legal Forum “Specialization of Courts and Judges: World Practice and the Russian Experience” (held from October 16–17, 2014).² Its mission is to create a platform for debating a wide range of modern issues and trends within the legal sphere, exchanging experiences, and establishing multidimensional communication for researchers and practitioners of Siberia, Russia as a whole, and foreign states.

Many leading institutions in higher legal education within the Russian Federation presented at the II Siberian Legal Forum, among which included Lomonosov Moscow State University, Kutafin Moscow State Law University, St. Petersburg State University, Ural State Law University, and Voronezh State University. Likewise, representatives from a number of foreign countries presented as well – including France, Brazil, Argentina, Italy, Poland, Spain, and Serbia – countries whose administrative jurisdictions developed rather long ago. The issue in question concerned not only doctrine, but also business structures. Likewise, the conference discussed the idea of judicial authority, like the Constitutional Court of the Russian Federation, the Supreme Court of the Russian Federation, the Arbitrazh Court of the West-Siberian Circuit, the Tyumen Regional Court, and a number of the regional *arbitrazh* courts within the West-Siberian Circuit. Representatives of the judicial authority moderated two sessions – the chairman of the Arbitrazh Court of the West-Siberian Circuit Vladislav Ivanov and the vice-chairman of the Tyumen Regional Court Vyacheslav Antropov. In particular, the reports of some judges concerned the settlement of disputes between businesses and authorities. Of note is the fact that the number of such disputes has increased, demonstrating stronger businesses and its aims to assert its rights.

Allocation in an independent branch of legislation and codification of administrative legal proceedings received assessment from different aspects. According to Professor Mikhail Kleandrov despite the imperfections of the CAP, there was a clear necessity to adopt it. Only practice can illuminate the shortcomings of the CAP; theory is therefore powerless here. On his assumption, in the following ten years, changes in separate sections and in the concept of the CAP will be made, especially if the judicial system changes (if, for example, special administrative courts are established). Only time will show how such a system will function once different options are possible. Regarding administrative cases, chapters 24 and 25 of the Civil Procedure Code the Russian Federation (hereinafter CPC) have played an important role, but civil proceedings are intended for permission of private legal disputes.

² See Sergei Marochkin & Anton Permyakov, *The Russian Constitution and the Specialization of Judges and Courts: The Current Reforms of the Judiciary in Russia. The Celebration of the Russian Judicial Reforms of 1864*, 39 *Review of Central and East European Law* 369–381 (2014); Yury Kondrashov, Dmitry Maleshin, Nadezhda Sukhova, Stefaan Voet, Valery Falkov, *The First Siberian Legal Forum “Specialization of Courts and Judges,”* 3(2) *Russian Law Journal* 142–148 (2015).

Professor Yury Starilov noted with satisfaction that the acceptance of the CAP is a considerable and important event in the development of the judicial system of the country. It also represents an improvement of the Russian legal system as a whole, an extension of legal statehood, the building of a judicial structure in appropriate order conforming the standards of ensuring the rights, as well as a step forward for the freedoms and interests of natural and legal persons.

According to the remarks of Svetlana Savchenko, a wealth of experience went into the CAP's creation, especially that relating to the legal proceedings of administrative cases at the *arbitrazh* courts. As such, certain gaps connected with the jurisdiction of this type of disputes are considered and eliminated; the conceptual framework of the administrative legal proceedings was fixed to distinguish the specifics elements of this legislation.

The existence of positive responses in the doctrinal environment is certainly a positive signal in the assessment of the legal decision concerning the availability of justice and the protection of citizens' rights when intersecting with public entities. Such a two-uniform approach to the settlement of disputes with a procedural difference in protecting private and public interests also finds support in the legal systems of other states, despite various forms of the judiciary, specialization of courts and judges.

Comparative aspects of administrative proceedings in some countries were also examined at the session moderated by Dmitry Maleshin. The specific feature of Argentina's justice administration system, which consists of at least 25 different procedural subsystems, each of which have a different approach. Even though there are special Courts to deal with administrative cases in Argentina, there are no general special proceedings enacted to attend the specificities and complexities of cases directly involving the Federal State or other situations. Several legislative initiatives were introduced in the Senate and the Chamber of Deputies in order to establish such proceedings on the federal arena.

Unlike Argentina, administrative justice in Italy is dispensed by a set of courts separate from the ordinary courts that decide civil and criminal cases. In a way, one can say that administrative courts are special courts, since their jurisdiction is conceived as an exception to the general jurisdiction of ordinary courts. The same situation occurs in France, where the administrative courts, which are the ordinary administrative courts, were created in 1953 (except the court at Strasbourg which was founded in 1903). The Administrative Courts of Appeal were added to the judicial hierarchy in 1987 for the purpose of unclogging a Conseil d'Etat, overloaded with litigation. The last two levels of jurisdiction operate on a collegial basis, even if the latter, like the judicial judge, tends to be undermined by the development of the single judge, created to accelerate the processing of cases and according to a managerial logic. In this case, a single judge makes most of the decisions.

The supreme supervision over the administrative activity of the administrative courts in Poland is exercised by the President of the Supreme Administrative Court.

Jaroslav Turlukowski, Assistant Professor of commercial law at the Institute of Civil Law at Warsaw University, noted that such supervision is of great importance because the administrative court cannot be dependent on the government administration. Additionally, the administrative courts are not supervised by the Supreme Court. On the other hand, the courts of general jurisdiction in the field of administration (not as to adjudication) are supervised by the Ministry of Justice.

The judicial system of some Latin American countries is undergoing an interesting period. In particular, Brazil, like Russia, is carrying out reforms of its administrative justice system. However, in Russia, this reform is instead connected with the adoption of the CAP and the recent merging (in 2014) of the Russian Supreme Commercial (Arbitrazh) Court and the Supreme Court. It shows that there are two very different approaches to judicial organizations that have been taken to create a specialization in administrative adjudication.

As Ricardo Perlingeiro, Federal Judge of Rio de Janeiro, Executive Secretary of the Drafting group on the Model Code of Administrative Procedure for the countries of Latin America, Fluminense Federal University (Brazil) states, there are generally no specialized administrative courts in countries of common law (especially in the USA, UK and Australia). Instead, there are rather highly specialized quasi-judicial bodies within the administrative agencies themselves. By contrast, in most Continental European legal systems with civil law origins, the courts have a special division for cases, which tend to have broad powers to review the factual grounds for administrative decisions (an open judicial review). Such broad powers of review work to counterbalance the traditional absence of internal dispute-resolution mechanisms within the administrative authorities themselves. Thus, regardless of the organizational system, administrative justice is always placed in hands of specialized adjudicators. The difference is that within the "Continental European" approach, specialized judges within the Judiciary itself resolve administrative disputes, whereas in the USA quasi-judicial bodies within the administrative agency play a decisive role, although they remain subject to relatively deferential closed review by the Judiciary. This dichotomy has given rise to serious problems in Latin American systems of administrative justice.

As former Iberian colonies, the countries of Latin America inherited the Continental European legal culture, with its civil law tradition. Since the early 19th Century, however, US Constitutional law has exercised a strong influence on Latin-American countries. As a result, most of them have adopted a judicial system with "general jurisdiction," meaning that the same courts handle both ordinary and administrative disputes. Since those countries have not managed to cut all their ties with European legal culture, their adoption of the US model of general jurisdiction has not been entirely successful. Countries that have organized their judiciary with general jurisdiction are now suffering from the weaknesses of both predecessor systems: the lack of specialized administrative courts in the U.S. model, combined

with the absence of quasi-judicial bodies within the administrative authorities themselves, which is typical of the Continental European model.

As the reporter says, 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, as established by the 5th and 14th Amendments to the U.S. Constitution and adopted by most Latin American national constitutions.

The main problems of administrative justice in Russia are connected with the establishment of boundaries and competences of different elements of the judicial system, the correct interpretation and use of procedural rules, and ensuring uniform approaches to court hearings and litigation in public disputes. They are caused by the fact that currently, in Russia, courts of both general jurisdiction and the specific *arbitrazh* courts consider these kinds of disputes within their competence by the rules of three codes – the CAP, the Commercial (Arbitrazh) Procedural Code (hereinafter APC) and the Code of the Russian Federation on Administrative Offenses. At the same time, as a judge at the Arbitrazh Court of the West-Siberian Circuit Olga Chernousova notes, the illegibility of formulations of particular provisions of the legislation concerning participants of the court proceedings is a matter of a dispute. Likewise, the complexity of these categories have resulted in uncertainty of their perception, in both interpretation and application. However, the issues brought to life by the existence of several procedural codes have a widespread (world) character.

In particular, according to Francisco Verbic, adjunct Professor of Procedural Law II and Academic Secretary of the LL.M. in Procedural Law at the National University of La Plata School of Law and Social Sciences (Argentina), administrative conflicts are still widely discussed today. However, numerous procedural rules have been enacted to deal with private conflicts, particularly those in the National Civil and Commercial Procedural Code. Another problem is the impossibility to find, within Argentina, a systematic and comprehensive procedural mechanism to deal with considerable administrative conflicts. The lack of adequate procedural devices at the federal level is particularly problematic because, since the 1994 reform to Argentina's Federal Constitution, standing to sue in order to enforce collective rights has acquired a constitutional pedigree, while some collective substantive rights are considered "collective incidence rights."

The Italian legal system distinguishes two different forms of entitlement that every individual can claim against a public entity, namely, "subjective rights" and "legitimate interests." This distinction is at the basis of the institutional arrangement of jurisdiction: in the system of dual jurisdiction, at least in principle, subjective rights can be enforced by ordinary courts while legitimate interests must be claimed before administrative courts. Elisabetta Silvestri, professor in the Department of Law at the University of Pavia (Italy) outlines one way to make the dual system of jurisdiction (the jurisdiction of ordinary courts and the jurisdiction of administrative courts) more

understandable, thereby circumventing the complex distinction between “subjective rights” and “legitimate interests.” She argues that institutions should emphasize that when a public entity or administration is a party to a case, it does not mean that the court holding jurisdiction over the case itself is always an administrative court, since the plaintiff determines jurisdiction. As the Italian Constitutional Court has clarified in several judgments, the mere fact that the public administration is involved in a judicial proceeding is not sufficient cause to establish the jurisdiction of administrative courts. By the same token, a generic element of public interest in a case does not imply necessarily that the case at stake would fall within the jurisdiction of the administrative courts.

According to doctor of jurisprudence, professor, and judge at the Tyumen Regional Court Maxim Mateykovich, in raising the question of protecting a person’s rights and freedoms, we must consider that at the same time, courts have to protect public interest. Moreover, the right of the individual sometimes conflicts with public need. Public interest is of great importance for administrative justice, and in this framework, the cases following from administrative and other public relations are considered. A court faces, in this regard, a complex challenge: how not to break balance between subjective, private interest and public ones. Moreover, there is a problem of interpretation of public interest, which is expressed, as a rule, by bodies of the public power. A real danger exists that the selfish personal claims of some public officials can be made in the name of public interest.

It is also impossible to forget that private and public interests are in indissoluble communication. Therefore, according to the author, it is necessary to recognize that administrative justice, as a less formalized and respectively operational instrument for the protection of the rights and freedoms, is not a certain ideal or panacea for resolving conflicts in the public sphere. It should therefore not expand its jurisdiction nor involve itself in new types of disputes. He insists that it is necessary not to allow the washing out of the civil regulative procedure, and to exclude a possible solution for any material claims by means of other judicial processes. This is preferable to a full-fledged research and assessment of the evidence by the court in a competitive format for traditional claim proceeding.

From this point of view, Hugo Flavier, Associate Professor of Public and European Law at Montesquieu University – Bordeaux IV, Centre de Recherche et Documentation Européen et International (CRDEI) (France), notes that the adage that “jurisdiction follows the substance” presupposes knowledge of the applicable law (civil or administrative) to determine the competent court (either civil or administrative). There used to be two criteria for such a determination – an organic criterion and a material one. The organic criterion concerns the public or private nature of the person involved in the dispute. The material criterion concerns either the nature of the activity (is it a public service or not), or the nature of the act adopted (does this involve the exercise of public powers or not).

The criterion for determining the correct definition of a type of legal proceedings (civil or administrative) is the nature of legal relationship. This is predetermined not only by the body of the authority's participation, but also by the fact that participants of such a legal relationship have no equality, and one of them is given authority in relation to another. It was a leitmotiv of the session moderated by Associate-professor Sergei Belov (St. Petersburg State University). As judge at the Tyumen Regional Court, the chairman of the judicial body for administrative cases Svetlana Koloskova noted that such an approach does not fully provide an effective realization of the right of citizens to judicial protection. Though they can independently choose a way for protecting their violated rights while appealing to court with different requirements, this could be mistaken in a type of legal proceedings (administrative or civil) which must actively consider the legal requirements.

The Constitutional Court of the Russian Federation repeatedly specified that the inalienable right to judicial protection of one's rights and freedoms – as it is formulated in Art. 46 of the Constitution – does not strictly follow the possibility that a citizen can choose their own procedure of judicial protection. These are instead defined by the federal law according to the Constitution.³

For this reason, with the entering into force of the CAP, an incorrect definition by the applicant of a type of legal proceedings as well as an inclusion of the requirements for public and private legal relations into one application leads to the refusal to adopt such applications completely or partly. According to point 1 Part 1 Art. 128 of the CAP, the judge must refuse to accept an administrative claim if it is not subject to consideration in administrative proceedings and it is instead to be considered in a court of general jurisdiction by civil or criminal proceedings, or even in an *arbitrazh* court in line of the *arbitrazh* procedure legislation.

If one considers the close interaction and an the interconnectedness of questions concerning private and public law as noted above, then the adoption of the CAP may further complicate the protection of rights and interests. This is because the interpenetration of private and public law can lead to some difficulties in determining the proceedings (civil or administrative) which are more suitable for the consideration of a claim.

At the same time, the CAP is not the original law containing special rules as it only retells the provisions of the CPC and the APC. According to Dmitry Tumanov, Candidate of Juridical Sciences and associate professor at chair of civil and administrative

³ Определение Конституционного Суда РФ от 24 ноября 2005 г. № 508-О [Determination of the Constitutional Court of the Russian Federation No. 508-O of November 24, 2005] (Feb. 20, 2017), available at <http://doc.ksrf.ru/decision/KSRFDecision31176.pdf>; Определение Конституционного Суда РФ от 19 июня 2007 г. № 389-О-О [Determination of the Constitutional Court of the Russian Federation No. 389-O-O of June 19, 2007] (Feb. 20, 2017), available at <http://doc.ksrf.ru/decision/KSRFDecision16458.pdf>; Определение Конституционного Суда РФ от 15 апреля 2008 г. № 314-О-О [Determination of the Constitutional Court of the Russian Federation No. 314-O-O of April 15, 2008] (Feb. 20, 2017), available at <http://doc.ksrf.ru/decision/KSRFDecision17349.pdf>.

legal proceedings of Kutafin Moscow State Law University, this issue is indirectly confirmed by the fact that the approaches and terms revealed in the CAP are actually characteristics of private legal disputes, but not public ones. As Natalia Bocharova, Candidate of Juridical Sciences, associate professor law at Lomonosov Moscow State University also notes, the legal terms related to action-based proceedings can be found now in the APC, but this results in some confusion, particularly when analyzing the autonomy of parties in administrative proceedings. This itself demonstrates that there is actually no need for the existence of some special (different from the existing in the CPC) regulation of judicial review of public (administrative) affairs.

Some other particular provisions of CAP also raise such questions. In particular, granting a court of discretion power to invite a person as a secondary administrative defendant in case the administrative plaintiff expresses accurate and unambiguous disagreement on the replacement of the primary administrative defendant with another person. Dmitry Abushenko, doctor of jurisprudence and professor at the chair of civil processes at the Ural State Law University, notes that such court power leads to a categorical conclusion that the rule of point 1 Art. 43 of the CAP, which gives a court the authority to initiate replacement of the inadequate administrative defendant, presents a contradiction with the adversary trial. Such a perversity of an appeal to the administrative plaintiff with a claim to a certain person goes beyond such an adversary trial. There are no reasonable foundations as to why the court should have the right to anticipate the final judicial act, directly indicating on the incorrect administrative defendant. The author asserts that in such a case, there cannot be a discussion of competitiveness because the court has already taken a certain position and decided for itself that it would refuse satisfaction of the administrative claim to this defendant.

All this, with some other controversial innovations, leads some authors to an idea that the adoption of the CAP does not ensure the realization of the right for judicial protection and formation of effective administrative justice. Currently, the CAP is imperfect, but throughout the world, the legal practice of adopting separate acts that regulate a procedure for resolution of public disputes between individuals and public entities is not widespread. At the same time, the importance of a differentiation between private and public questions in the procedural sphere indicate the need of adoption of such a statutory act. Therefore, the CAP is an important step in ensuring the effectiveness of judicial legal protections of the rights and the interests of citizens concerning the interaction with public entities. Withal, the doctrine and practice unconditionally help the legislator improve upon its activities. Only through a practical analysis of this procedure can one accurately see the merits and demerits of the adopted acts.

Issues linked with administrative justice are generally similar in all states, especially when separate regulation is required. They are connected not only by the existence or absence of administrative courts, but by the creation of administrative

legal proceedings and its differentiation from civil legal proceedings. Finding such points lead to the positive effect of ensuring the right of judicial protection in the conditions of globalization and rapprochement of legal systems.

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