

GROUNDS FOR THE SPECIALIZATION OF COURTS AND JUDGES IN RUSSIA

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This article touches upon the different ways of specialization of courts and judges that exist under the legislation of the Russian Federation. The lack of a unified and circumspect approach is noted. The formation of specialized courts, according to the national legislation, takes the form of their establishing within the existing subsystems of regular and arbitration courts. As for the specialization of judges, it is more diversified and is presented by either creation of separate types of procedure (special proceedings, proceedings on cases arising from public relations and some other), or by introduction of special rules on jurisdiction that establish competence of specific courts to consider cases of a particular category: on the compensation for the excessive time taken to consider a case, on the adoption of a child by a foreign national and others.

An analysis of existing literature on the issue in question shows that Russian scholars support the idea of judges' specialization. Against specialization of courts the following arguments are brought: significant material costs, not being in accordance with the small number of cases decided by specialized courts; problems with access to justice; and the necessity to give special training to narrowly specialized judges.

Key words: specialization of courts; specialization of judges; judicial system; administrative courts; versed persons; alternative means of dispute resolution.

1. Introduction

It is hard to overestimate the significance of the Judicial Reform of 1864, the 150th anniversary of which is celebrated by the legal community this year. A generally accepted fact is that this reform was originally brought about by objective necessity, and in many ways determined the development of other institutions of Russian society, which, perhaps, explain its incomplete character (Judicial Statutes of

November 20, 1864 were subsequently subjected to numerous amendments). One of the most important parts of the reform was simplification of legal proceedings: instead of courts for different estates of the realm, common general civil courts were established. On October 19, 1865 Emperor Alexander II signed an Ordinance that approved 'Regulation on the Implementation of the Judicial Statutes of November 20, 1864.' According to this act, throughout 1866 new courts were being established in 10 provinces and during the subsequent four years – in all other provinces (*guberniyas*) of the Russian Empire (it is to note that these terms were not complied with). However, military, ecclesiastical, commercial and ethnical courts remained, that is, along with the unified system it was considered necessary to have also 'specialized' courts.

Specialization of both courts and judges must be based on an objective necessity, and be justified by both practical and scholarly arguments. In this connection we believe it is necessary to consider the reasons for which the issues of specialization are raised.

Throughout the whole history of mankind the two main approaches were used: establishing of the specialized courts or the usage of single unified state judicial machinery. In Russia, in addition, various forms of extrajudicial dispute resolution were in use. As it was previously noted, despite the fact that the reforms of the second half of the 19th century marked the beginning of establishment of a single centralized judicial system, ecclesiastical, ethnical and other tribunals continued functioning at the same time. Various objective and subjective criteria of specialization reflected the peculiarities of country's development and a tremendous influence of the church. In October 1917 this system was demolished, and during the Soviet times the very necessity of specialized courts was negated.¹

Current legislation does not contain any precise concept of specialization in terms of both its necessity and practical implementation. Article 118(2) of the Constitution of the Russian Federation and Art. 1(3) of the Federal Constitutional Law on the Judicial System² foresaw the exercise of judicial power by means of constitutional, civil, administrative and criminal proceedings. However, these provisions cannot be regarded as enshrining the specialization of the courts as the judicial system itself is presented differently in the FCL on the Judicial System (Art. 4(3)), and the establishing of specialized courts is seen as their institution within already existing subsystems of arbitration or regular courts (Art. 26 of the FCL on the Judicial System).

¹ Афанасьев С.Ф., Зайцев А.И. Специализация гражданских судов в России: история, реалии и перспективы // Юрист. 2005. № 7. С. 52–58 [Afanas'ev S.F., Zaitsev A.I. *Spetsializatsiya grazhdanskikh sudov v Rossii: istoriya, realii i perspektivy* // *Yurist*. 2005. No. 7. S. 52–58 [Sergey F. Afanas'ev & Alexei I. Zaitsev, *Specialization of Civil Courts in Russia: History, Realities and Perspectives*, 2005(7) Lawyer 52–58]].

² Федеральный конституционный закон «О судебной системе Российской Федерации» [Federal'nyi Konstitutsionnyi Zakon 'O sudebnoi sisteme Rossiiskoi Federatsii'] [Federal Constitutional Law on the Judicial System of the Russian Federation]] (adopted on Dec. 31, 1996 No. 1-FKZ) [hereinafter FCL on the Judicial System].

The Court for Intellectual Rights constitutes a specialized arbitration court (Art. 26.1 of the FCL on the Judicial System) and military courts, although not termed 'specialized' appear to be of such a kind, being separate autonomous entities within the system of regular courts (Art. 22 of the FCL on the Judicial System).

A. Pavlushina correctly observes: Constitution of the Russian Federation (Art. 118) and FCL on the Judicial System (Art. 26) do not establish a single test for courts' specialization: they distinguish the types of legal proceedings by one criterion, the system of courts – by another, and when they allow specialization – they involve a third one.³ In her opinion two criteria may serve as the basis for specialization: substantive (objective) and procedural (peculiarities of a particular type of proceedings) ones. All specialized courts forethought in recent years (family, patent, labour, *etc.*) had as their basis an objective (substantive) criterion. While maintaining a unity of procedure, such a specialization seems meaningless, as it becomes a way of specialization for the judges, not for the courts.⁴

2. Specialization of Courts v. Specialization of Judges?

When analyzing contemporary Russian literature, it seems that the necessity of specialization is not questioned, however, the majority of scholars support the idea of specialization for the judges but not for the courts.⁵ This is not accidental, as in creating specialized courts numerous problems arise, among which financial ones are far from being exclusive.

Thus, D. Bakhrakh reasonably drew attention to the following problems that appeared when establishing specialized courts: significant material costs out of

³ Павлушина А.А. К вопросу о критерии специализации судов // Российская юстиция. 2011. № 6. С. 37–40 [Pavlushina A.A. *K voprosu o kriterii spetsializatsii sudov* // Rossiiskaya yustitsiya. 2011. No. 6. S. 37–40 [Alla A. Pavlushina, *On the Issue of the Test for the Specialization of the Courts*, 2011(6) Russian Justice 37–40]].

⁴ *Id.*

⁵ Afanas'ev & Zaytsev, *supra* n. 1, at 52–53; Бахрах Д. Нужна специализация судей, а не судов // Российская юстиция. 2003. № 2. С. 10–11 [Bakhrakh D. *Nuzhna spetsializatsiya sudei, a ne sudov* // Rossiiskaya yustitsiya. 2003. No. 2. S. 10–11 [Demyan Bakhrakh, *There Is a Need for Judges, Not Courts' Specialization*, 2003(2) Russian Justice 10–11]]; Борисова Е.А. К вопросу о реорганизации судебной системы Российской Федерации // Арбитражный и гражданский процесс. 2014. № 3. С. 12–18 [Borisova E.A. *K voprosu o reorganizatsii sudebnoi sistemy Rossiiskoi Federatsii* // Arbitrazhnyi i grazhdanskii protsess. 2014. No. 3. S. 12–18 [Elena A. Borisova, *On the Issue of Reorganization of the Judicial System in the Russian Federation*, 2014(3) Arbitration and Civil Procedure 12–18]]; Еременко В.И. О создании в Российской Федерации суда по интеллектуальным правам // Законодательство и экономика. 2012. № 8. С. 9–22 [Eremenko V.I. *O sozdani v Rossiiskoi Federatsii suda po intellektual'nyim pravam* // Zakonodatel'stvo i ekonomika. 2012. No. 8. S. 9–22 [Vladimir I. Eremenko, *On the Establishing in the Russian Federation of the Court for Intellectual Rights*, 2012(8) Legislation and Economics 9–22]]; Кудрякова А.Х. Нужна ли России объединенная судебная система? // Российский судья. 2011. № 6. С. 39–41 [Kudryakova A.Kh. *Nuzhna li Rossii ob'edinennaya sudebnaya sistema?* // Rossiiskii sudya. 2011. No. 6. S. 39–41 [Alsu Kh. Kudryakova, *Does Russia Need a Unified Judicial System?*, 2011(6) Russian Judge 39–41]].

proportion to the small number of cases considered by specialized courts; disruption of the existing judicial system; problems with access to justice – remoteness of the newly established courts from the population (paying attention to the vast territory of Russia it does not seem possible to create a significant number of such bodies) and the difficulty of finding a court with jurisdiction over a case.⁶ The same reasons are mentioned by S. Afanas'ev and A. Zaitsev, who deny the necessity of establishing additional judicial systems and subsystems because, as they note, there already exists a unified judicial mechanism in Russia that be improved rather than broken apart. Thus, they advise the legislature to delay judges' specialization.⁷ Shortcomings in courts' specialization, in Gromoshina's view, appear in the difficulty of jurisdictional delimitation between the courts, especially in the presence of interrelated claims; in the necessity to train strictly specialized judicial personnel; in a rather low number of such courts (which raises the issue of access to justice paying attention to the size of Russia's territory); and in the problem of financing such changes.⁸

Disputes about the advisability of specialization frequently arise in the form of arguments concerning the need for introducing administrative courts. The advisability of their creation is raised quite often, on the legislative level. The reason for this is the abovementioned Art. 118 Constitution of the Russian Federation, which provided for administrative proceedings as one of the ways through which judicial power in the country is exercised. Still, the question remains unresolved. The Code of Arbitration Procedure of the Russian Federation⁹ and the Code of Civil Procedure of the Russian Federation¹⁰ include provisions on cases, arising from public relations (Sect. III of the CAP RF and Sect. II, Subsect. 2, of the CCP RF). Such an adjustment did not lead to the establishment of any specific and separate administrative courts. It is likely that the reason for this is an ambiguous appraisal by the judicial community.

D. Bakhrakh noted that procedural form depends on the content of the claims under consideration, according to which criminal procedural and civil procedural forms of justice had emerged. A great number of administrative cases appeared in the 90^s and current CCP RF and CAP RF appeared to be not quite adapted to deal with them adequately. Pointing out the necessity to have a separate law on the

⁶ Bakhrakh, *supra* n. 5.

⁷ Afanas'ev & Zaitsev, *supra* n. 1, at 54.

⁸ Громошина Н.А. Дифференциация, унификация и упрощение в гражданском судопроизводстве [Gromoshina N.A. *Differentsiatsiya, unifikatsiya i uproshchenie v grazhdanskom sudoproizvodstve* (Nataliya A. Gromoshina, Differentiation, Unification and Simplification in Civil Litigation)] (Prospekt 2010).

⁹ Арбитражный процессуальный кодекс Российской Федерации [Arbitrazhnyi Protsessual'nyi Kodeks Rossiiskoi Federatsii [Code of Arbitration Procedure of the Russian Federation]] (adopted on Jun. 24, 2002 No. 95-FZ) [hereinafter CAP RF].

¹⁰ Гражданский процессуальный кодекс Российской Федерации [Grazhdanskiy Protsessual'nyi Kodeks Rossiiskoi Federatsii [Code of Civil Procedure of the Russian Federation]] (adopted on Nov. 14, 2002 No. 138-FZ) [hereinafter CCP RF].

administrative proceedings, Bakhrakh, nonetheless, believed that such proceedings should be carried out by already existing arbitration and regular courts.¹¹ There are conflicting positions as well, in particular some constructive approaches to the establishing of administrative courts' system as proposed by M. Pavlova.¹²

D. Maleshin believes that the question of administrative courts is controversial in its essence. He notices negative (fragmentation of the judicial system, jurisdictional disputes, randomness of existing case law) and positive (increase of professionalism when resolving disputes) consequences of their introduction, however, but notices that neither practice nor statistics indicate that there are any problems in this area. Furthermore, in his view, it is necessary to take into consideration that the structure of the judicial system has a direct connection with a culturological type of society. A collectivist type, for instance, presumes certain passivity (*inertsia*) of citizens: a ramified system in such conditions is thus ineffective.¹³

Problems that arise when creating specialized courts currently may be demonstrated by the example of the recently established Court for Intellectual Rights. According to Art. 26.1 FCL on the Judicial System this Court constitutes a specialized body, an arbitration court that considers within its competence cases related to the protection of intellectual rights. The categories of cases, considered by the Court are set in Art. 34(4) CAP RF, *i.e.* with the help of jurisdictional rules.

There are complaints in the literature both about the list of cases coming within the jurisdiction of the named court, and about the norm that forbids appeals against its decisions, which, as V. Eremenko justly points out, is not in accordance with the general trend of civil procedure development. The author also notes that the courts in considering such cases are guided solely by the expert opinion (which constitutes in itself only one kind of evidence), which raises the question of judges' independence.¹⁴

Indeed, a serious problem should be observed: in establishing specialized courts the 'breaking' of ordinary appeal system takes place, and the legislature creates for these specialized bodies a separate and distinct way of review. Thus, there is no appellate instance to the Court for Intellectual Rights, which is incidentally regarded as the main option for the elimination of judicial errors. The similar legislative solution we find in the area of cases on the award of compensation for the violation of the right for the proceedings of the enforcement of the judgment in reasonable time (Art. 222.9(4) CAP RF).

¹¹ Bakhrakh, *supra* n. 5.

¹² Павлова М.С. К вопросу о специализации судов // Мировой судья. 2013. № 1. С. 16–20 [Pavlova M.S. *K voprosu o spetsializatsii sudov // Mirovoi sudya*. 2013. No. 1. S. 16–20 [Margarita S. Pavlova, *On the Issue of Courts' Specialization*, 2013(1) Magistrate 16–20]].

¹³ Малешин Д.Я. Гражданская процессуальная система России [Maleshin D.Ya. *Grazhdanskaya protsessual'naya sistema Rossii* [Dmitry Ya. Maleshin, *Civil Procedural System of Russia*] (Statut 2011).

¹⁴ Eremenko, *supra* n. 5, at 9–22.

As for the abovementioned dependence of the judges on the opinions of specialists and experts – it also presents a serious problem, which is not yet fully grasped. The judge, basically, becomes trapped in a vicious circle: he has to evaluate evidence on the basis of its reliability, but this reliability may be proven only by an expert or a specialist.

It is also important to note that establishing of the Court for Intellectual Rights, from the view of filling up its activity with real content is little different from introducing within the CCP RF or the CAP RF separate, often unmotivated, provisions that provide for special jurisdiction in certain categories of cases. For example, Art. 34(3) CAP RF provides that Federal Arbitration Circuit Courts consider as courts of the first instance applications for awarding compensation for violation of the right to proceedings at law within a reasonable time or the right to execution of a judicial act within a reasonable time. The legislature included this category of cases in Sect. IV CAP RF 'Specifics in Arbitration Court Proceedings on Individual Categories of Cases' together with cases establishing facts having legal importance and bankruptcy cases.

The CCP RF also contains special legislative rules that provide for the jurisdiction of the Courts of subjects of Federation to consider certain types of cases: Art. 26(1)(1) – cases related to state secret; Art. 269(2) – adoption of a child holding Russian nationality by foreign citizens. Among these rules a particular one vests the Moscow City Court (which is exactly a court of such level) with the competence to try as a court of the first instance civil cases, that are related to the protection of exclusive rights to films, including motion pictures, telefilms, in the information-communication networks, including the Internet (Art. 26(3) of the CCP RF). This is so despite the fact that neither the Moscow City Court nor the other courts of Federation subjects are considered 'specialized courts' within the meaning of the FCL on the Judicial System.

Dissolution of the Higher Arbitration Court and virtual subordination of the arbitration courts' system to the Supreme Court (the latter being the highest judicial instance in the system of regular courts) once again raise the issue of courts' specialization. The chosen legislative solution was negatively assessed by the specialists.¹⁵ They note, in particular, problems of the isolation of judges that consider cases arising from public relations; the necessity to resolve the question of the place of administrative and military courts.¹⁶ Indeed, the questions concerning

¹⁵ See, e.g., discussion in the *Zakon [Statute] Journal* (2014(3) 89–112).

¹⁶ Ярков В.В. Объединение высших судов: ожидания и последствия // Закон. 2014. № 3. С. 98–106 [Yarkov V.V. *Ob'edinenie vysshchyykh sudov: ozhidaniya i posledstviya* // *Zakon*. 2014. No. 3. S. 98–106 [Vladimir V. Yarkov, *Unification of Superior Courts: Expectations and Consequences*, 2014(3) *Statute* 98–106]; Борисова Е.А. Оптимизация устройства судебных инстанций в свете реорганизации судебной системы Российской Федерации // Закон. 2014. № 3. С. 107–112 [Borisova E.A. *Optimizatsiya ustroystva sudebnykh instantsii v svete reorganizatsii sudebnoi sistemy Rossiiskoi Federatsii* // *Zakon*. 2014. No. 3. S. 107–112 [Elena A. Borisova, *Optimization of Judicial Instances' System Organization in the Light of the Reorganization of the Judicial System of the Russian Federation*, 2014(3) *Statute* 107–112].

specialization of judges were differently resolved in the regular courts and in the arbitration courts. Thus, the latter followed the way of forming special boards to regard disputes of different categories. In each instance within arbitration courts there are established boards on administrative proceedings, moreover, there may be established other judicial boards to consider some certain categories of cases (Arts. 25, 33.2, 35 of the Federal Constitutional Law on the Arbitration Courts¹⁷). Such practice did not exist in the system of regular courts.

In this way, specialization in its current form is unsystematic and devoid of a single criterion empowerment of separate courts (or instances) with special competence to consider particular categories of cases. An objective criterion is assumed as a basis. In other words, the basis (ground) for specialization is an emergence of some special dispute subject matter (*e.g.*, protection of exclusive rights to motion pictures), considering of which requires taking into account its specificity. The legislator assigns such a special category of cases to the competence of particular courts and, all concerns about the specialization actually end at that point. It means that in the beginning a particular court is chosen (as in the aforesaid example of the Moscow City Court), whose judges subsequently specialize in trying cases of that specific category.

The most satisfactory way to implement specialization is specialization of the judges within the framework of separate types of proceedings. It is quite an acceptable option to readjust to another type of proceedings, *i.e.* to take into account individual exemptions and certain additions as compared with the traditional procedural form (*e.g.*, activity of the court in gathering evidence in cases arising from public relations). Such specialization will not impose costs on either the judge, nor the state as in this case a particular judge will have to work in accordance with procedural rules, slightly different from the general ones.

3. Problem of 'Vested' Persons

Quite another problem is 'objective' specialization in its proper sense. We believe that we can speak of it only when the very subject matter of the dispute due to its nature creates insurmountable difficulties for the judge in working with evidence. Moreover, these difficulties are so extreme that a simple involvement of an expert of a specialist is not enough to resolve them.

What is a principal concern for the judges when they face an 'untypical' case? The answer is – a correct determination of circumstances and an evaluation of an evidentiary basis generated, on the basis of which a final decision is to be taken. Both selection and evaluation of evidence due to the specificity of the case subject matter may require an expert knowledge that a judge does not possess (*e.g.*, in the

¹⁷ Федеральный конституционный закон «Об арбитражных судах в Российской Федерации» [*Federal'nyi konstitutsionnyi zakon 'Ob arbitrazhnykh sudakh v Rossiiskoi Federatsii'*] [Federal Constitutional Law on the Arbitration Courts in the Russian Federation]] (adopted on Apr. 28, 1995 No. 1-FKZ).

financial sphere). Two solutions for the problem are available: to give that expert knowledge directly to the judge, or to introduce 'vested' persons into the bench.

We have to note, that to date there are several options (which are multiple and varied) for the search of these 'vested' people, capable of dealing with the essence of a special case. For example, recourse to arbitration or mediation may be a way to find such a 'vested' person. Arbitration assessors in the court of first instance also present a way of specialization, an optimal form to answer the question: who is competent to decide a dispute? Before it can be comprehended it is important to know, what evidence shall be presented, who shall present it, how to examine and assess it. In such a case it is not enough to rely on the help of experts and specialists. It becomes necessary to have a specialist directly within the bench and this is the role played by arbitration assessors.

It turns out that legislation and legal practice already find required solutions. Arbitration assessors that have the power of the judge and that are at the same time specialists in a particular sphere are really a good legislative solution. A strict specialist is not required every day as it is impossible to foresee the number of specialized courts and their contents. Arbitration assessors are invited when the necessity really exists and there is no need to make them judges on a permanent basis. On the other hand, there is also no need for unduly narrow specialization of judges, who, in addition, may turn out to be underused.

Various ways of alternative dispute resolution (primarily, arbitration and mediation) also constitute a way of specialization. Permanent arbitration tribunals that are formed under different business associations are actually specialized courts (or judges) in some narrow industrial or business sphere.

For many reasons it is inefficient to train specialized judges to consider a separate category of cases. It is impossible to predict in advance the number of cases of particular kind and to be sure that it will preserve within those limits. This should not mean that objective specialization of judges is unnecessary. It is required if statistical data indicate with certainty that there is a large number of cases of one category and both science and practice show that a case of this category has objective specificity. For instance, it makes sense to train judges capable of considering financial cases when statistics indicate that within a long time period there is a large number of such cases. Thus, two factors need to be present at the same time: a significant number of cases and forecasted stability of this quantity for the future.

In order to ensure the consideration of cases by vested persons, it is necessary to use a combination of two methods: 1) development and improvement of rules that govern legal proceedings and 2) development of alternative means of dispute resolution. The former includes the use of certain types of proceedings; training of the judges to decide cases of certain categories; involvement of specialists for the bench (arbitration assessors). The latter method needs to be approached with a particular attention by the national legislature as nowadays only two of the alternative means of

dispute resolution – arbitration and mediation – are extensively covered by legislative provisions. And while mediation now is being intensively popularized, arbitration tribunals are undeservedly 'left behind.' Meanwhile, popularization of the latter form of dispute resolution could have been a success in case it had as its foundation the consideration of disputes by vested persons that are specialists in a required field.

4. Conclusion

Summarizing all the abovementioned it must be admitted that specialization of judges now has a clear priority over establishing of specialized courts. Paying attention to the peculiarities of Russian society and of the national legislation, it is noteworthy that it is, perhaps, precisely present, no true necessity (or possibility) for the introduction of specialized courts. This gap, in our view, must be filled in by alternative dispute resolution. Thus, mediation may be quite effective in labour and matrimonial disputes, while the other named areas are among those for which specialized court bodies are proposed most often. There are already proceedings to try administrative cases in the existing courts and in the system of arbitration courts special boards are established. Specialization of judges in the named cases has been shown to be efficient.

It is possible (we make a cautious prediction) that there is a current trend for of various forms of dispute resolution to be decided by non-state institutions. This does not require establishment of hierarchical and cumbersome structures similar to the state judicial system; non-state mechanisms are mobile and are established where and when the necessity for them arises. It is important to recognize the need for multiple forms of specialization and to support this multiplicity.

To what extent is the legislature able to consider and support such multiplicity? The experience of 1864 Reform shows that even in a situation where an urgent need for a complete renovation of the whole system of judicial proceedings in Russia was present (a complete break with an 'old court,' a full transformation of the judicial system was seen in those times as a condition for the modernization of the society¹⁸), necessity for specialization remained and was actively supported. This necessity for specialized courts or judges appears as an objective one, though it takes various forms at different stages of the state's development. We believe that in modern times such form includes the necessity of judges' specialization and the development of alternative means of dispute resolution, that can ensure the participation of vested persons in their capacity as arbitrators.

¹⁸ Кони А.Ф. Отцы и дети судебной реформы [Koni A.F. *Otsy i deti sudebnoi reformy* [Anatoly Koni, Fathers and Sons of the Judicial Reform]] (I.D. Sytin 1914) (as cited in: Смирнов А.Г. О некоторых вопросах историографии реформ 60-х годов XIX века // История государства и права. 2008. № 16. С. 17–19 [Smirnov A.G. *O nekotorykh voprosakh istoriografii reform 60-kh godov XIX veka* // *Istoriya gosudarstva i prava*. 2008. No. 16. S. 17–19 [Alexander G. Smirnov, *On Some Historiographical Questions of the Reforms of the 60th XIXth Century*, 2008(16) *History of State and Law* 17–19]).

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