Centre for political and legal reforms

8, Kostyolna, Str, of. 24, Kyiv, Ukraine, 01001
tel /fax: (+38044) 278-63-87, 270-59-75, e-mail: centre@pravo.org.ua, www.pravo.org.ua

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REPORT

OF THE CENTRE FOR POLITICAL AND LEGAL REFORMS

On Modern Development Of The System Of Administrative Courts, Institutes Of Administrative Procedure And Administrative Responsibility

INTRODUCTION

In this Report experts of the Centre for Political and Legal Reforms have generalized and outlined the key modern features, problems and outlooks for future development of the system of administrative courts, institutes of administrative procedure and administrative responsibility (administrative delicts (offences).

The proposed recommendations & proposals are subject to further discussion by participants of the Conference.

I. OVERVIEW OF THE SYSTEM OF ADMINISTRATIVE COURTS IN UKRAINE

History

Administrative justice in Ukraine is represented by specialized administrative courts and administrative court proceedings. Previously, disputes between private parties and government bodies were decided by general and economic courts according to the rules of civil and economic procedure.

Decision on establishment of administrative courts was made by adopting of the law "On Judiciary of Ukraine" of February 7, 2002. It took nearly seven years to establish the system of administrative courts, from October 2002 until March 2009.

The Code of Administrative Proceedings was adopted on July 6, 2005, and came into force on September 1 the same year. In the process of establishing the administrative courts, administrative cases continued to be heard by general and economic courts, but according to the rules of administrative court proceedings. In addition, the Code of Administrative Proceedings retained the authority of general courts to decide certain categories of administrative cases in the future.

Jurisdiction

The following public law disputes are decided according to the rules of administrative procedure:

- disputes between individuals or legal entities and an administrative body concerning appeal of its decisions (normative or individual administrative legal acts), actions or inaction;
- disputes concerning the hiring of citizens to public service, employment in public service and dismissal from public service;
- disputes between administrative bodies on the realization of their competences;
- disputes arising from entering into and performance of administrative agreements;
- disputes upon a petition by an administrative body against an individual or a legal entity, in cases set forth by law;
- disputes concerning election or referendum process.

At the same time, jurisdiction of administrative courts does not extend to cases that are adjudicated according to the rules of constitutional or criminal proceedings. Also, administrative courts do not impose administrative sanctions on individuals.

System of administrative courts

The specialized administrative courts system consists of:

- 27 circuit administrative courts (operate at oblast levels);
- 7 appellate administrative courts;
- Higher Administrative Court of Ukraine.

In addition, 666 local general courts (which operate at city and district levels) hear certain categories of administrative cases. There is a Chamber on Administrative Cases in the Supreme Court of Ukraine, which is authorized to conduct extraordinary review of judgments in administrative cases.

The first instance is:

- local general courts – for cases involving local self-governance bodies, all cases concerning complaints by individuals against imposition of administrative sanctions, as well as all cases concerning pension and social security services;
- circuit administrative courts – for cases involving state administrative bodies.

Cases concerning complaints against actions or inaction of officials of local executive authorities are tried by local general courts or circuit administrative courts at the plaintiff's choice.

The second (appellate) instance for administrative cases, which were decided by local general courts and circuit administrative courts, is appellate administrative courts.

The third (cassation) instance is the Higher Administrative Court of Ukraine. In certain categories of election cases, the Higher Administrative Court of Ukraine can also be the first instance court – in such cases, its decisions are final.

Number of judges

As of May 1, 2009, the data on the number of judicial positions in administrative courts is as follows:

- circuit administrative courts – 672 planned judicial positions (in fact, there are only 263 sitting judges);
- appellate administrative courts – 352 planned judicial positions (in fact, there are only 137 sitting judges);
- The Higher Administrative Court of Ukraine – 97 planned judicial positions (but in fact, there are 54 sitting judges).

There are 7 judges in the Chamber on Administrative Cases of the Supreme Court.

Thus, as of now, less than half of the administrative courts' membership has been formed – only 40% of all judicial positions have been filled.

Comparing the planned number of judges against the population of Ukraine, there are about 70 thousand people per one judge of circuit

administrative court (1 million citizens per 15 judges); approximately 130 thousand people per one judge of appellate administrative court (1 million citizens per 8 judges); 480 thousand people per one judge of the Higher Administrative Court of Ukraine (1 million citizens per 2 judges). Taking into account that administrative cases are also tried by judges of local general courts, there would be 10 thousand people per one such judge (or 1 million citizens per 100 judges). However, it is important to remember that not all judges of local general courts try administrative cases, because these courts also hear civil and criminal cases.

Workload

Administrative courts have been overburdened with cases due to lack of judges from the very beginning of their activity. In 2008, there were, on average, 1160 cases filled per one judge of circuit administrative court, of which 750 cases were completed; 900 cases were filled per one judge of appellate administrative court, of which 430 were completed. These figures are approximate, because they use the number of judges as of the end of last year; however, many judges were appointed (elected) only during 2008, so the actual number of cases per one judge last year was much higher.

It is expected that in 2009, the workload of administrative courts will be reduced somewhat due to the increase in the number of judges. In addition, the workload of circuit administrative courts will also be reduced due to the transfer of disputes concerning social security matters to local general courts (according to the law that came into force in January of this year).

Peculiarities of administrative court proceedings

One of the features of the Ukrainian model of administrative justice is that the administrative courts, along with the general and economic courts, are part of the system of courts of general jurisdiction, and therefore the highest instance for them is the Supreme Court of Ukraine. In addition, to ensure better access to administrative justice, certain categories of administrative cases in the first instance are assigned to the jurisdiction of local general courts, which are territorially closest to people.

There are no mandatory requirements to appeal decision, action or inaction of an administrative body through administrative procedures before applying to administrative court in Ukraine. The Constitutional Court of Ukraine interpreted such rule from the Constitution.

Compared with other types of proceedings, administrative justice is more favorable for individuals in terms of court expenses. Court filing fee is minimal.

Rules of administrative court proceedings provide for a presumption of administrative body's guilt, so the burden of proof of legality of the defendant administrative body's decisions, actions or inaction lays with the defendant itself, not with the plaintiff. That enables equality in court proceedings between the parties that are otherwise unequal in public law relations.

The court has the authority to actively establish circumstances of the case; in particular, it can subpoena evidence on its own initiative. In addition, it is authorized, on its own initiative or upon a plaintiff's motion, to take measures for security of the administrative dispute (temporary protection measures): to suspend an administrative act that is being appealed or to prohibit to undertake certain actions. It should be noted that in the overwhelming majority of cases concerning appeal to the court of normative or individual administrative legal acts, this does not automatically suspend the act's enforcement.

For complete protection of the rights that a person seeks to protect, the court can go beyond the content of the claim. As has already been mentioned, the rules of administrative court proceedings include specific criteria for evaluating of decisions, actions or inaction of the administrative body.

Achievements

An indisputable achievement of administrative justice in Ukraine is the existence of rules that take into account the peculiarities of resolving public law disputes and are the most favorable for private parties in defending their rights against violations by administrative bodies.

Judges of administrative courts have gone through special trainings, and are therefore able to decide administrative cases more thoroughly, compared to their other colleagues. They are more prepared to satisfy the private parties' claims against the government bodies.

Staff of administrative courts are more cordial to the people. Participants in proceeding are better informed about their rights, in particular, through the distribution of reminders and instruction booklets.

Current Challenges

One of the problems of administrative justice relates to attempts by political forces to exert pressure on the administrative courts. In particular, this is connected to the fact that administrative courts decide election disputes. In 2008 there have been incidents of physical blocking of the work of certain courts, and there was even a decision to disband the circuit administrative court for the city of Kyiv. Today, some political forces are calling for the liquidation of all administrative courts. There is serious criticism of the administrative courts from the leadership of the Supreme Court of Ukraine. All of this can be explained by competition for

influence on the administrative courts on the eve of presidential and, possibly, parliamentary elections. In addition, some Parliament members propose to redistribute the jurisdiction of administrative courts in favor of economic courts.

Unfortunately, administrative courts were also not immune to manifestations of corruption, because many judges moved from other courts, where corruption schemes have existed for a long time. In late 2008, a scandal arose around the chair of one of the appellate administrative courts, who was charged with bribery in especially large amounts and with abuse of office. After the Parliament consented to this judge's arrest and removal from office, he spent three months hiding from investigation.

Dependence of administrative courts on local authorities and commercial entities corporation is facilitated by the fact that the state does not allocate sufficient resources for functioning of administrative courts. A significant number of courts have not been provided with adequate facilities, and recently, allocated funding has not been sufficient even to cover postage costs. Compared to the last year, the funding of administrative courts system was reduced by 23%, and even these allocated funds are not transferred on time.

Because of the large number of vacant judicial positions, administrative courts are facing excessive workloads, as a result of which there are delays in adjudicating the cases, which leads to justified complaints by participants in proceedings. Moreover, administrative courts are forced to hear a significant number of administrative cases that involve claims by administrative bodies against private parties. This is explained by deficiencies in substantive law. In fact, many of these cases are uncontested by their nature.

Overburdening at higher instance courts is grounded, among other reasons, in the fact that administrative bodies almost always attempt to appeal court decisions when they lose the case, often knowing in advance that such appeal will not be successful.

Another problem is the ambiguous practice concerning the separation of administrative jurisdiction from other types of court jurisdiction, which is further complicated by inconsistent practice of the highest court instances in certain categories of cases (primarily in privatization disputes, disputes concerning land plots, other property disputes involving state and local self-government bodies, disputes concerning state procurement, disputes involving the Antimonopoly Committee, etc.).

Court decisions in many categories of cases are not enforced due to lack of funds allocated for such purposes (for example, in pension disputes). Administrative bodies often simply ignore decisions of administrative courts. Unfortunately, administrative bodies do not always see administrative courts' decisions against them as a reason to review their administrative practice and bring it into compliance with the law.

II. LEGAL REGULATION OF ADMINISTRATIVE PROCEDURE

The Administrative Procedure Code, which would regulate relations between private individuals and administrative bodies, has not yet been adopted in Ukraine, although approval of such codified legislative acts is a common practice for many Western European countries. In these conditions administrative courts in disputes resolution between private persons and public administration are bound to use numerous normative legal acts, which are of contradictory nature in regulating administrative procedures. Draft of the Code only has been introduced to the Parliament by Government.

So today the principles of administrative procedure are established in the Code of Administrative Proceedings as criteria for evaluating of administrative acts by courts. Thus, the court reviews whether an administrative act was adopted:

- based on the principles, within the competence and in manner set forth by the Constitution and laws of Ukraine;
- using the authority for the purpose for which it was granted;
- reasonably, that is taking into account all the circumstances that matter for its adoption;
- impartially, in good faith, sensibly;
- with adherence to the principle of equality before the law, preventing unfair discrimination;
- proportionally, in particular by keeping the necessary balance between any negative effects on the rights, freedoms and interests of individuals and the goals towards which such administrative act is directed;
- taking into account the rights of a person to participate in decision making process;
- timely, i.e. within a reasonable term.

III. OVERVIEW OF THE UKRAINIAN ADMINISTRATIVE DELICTS (OFFENCES) LAW

The modern state of the institute of administrative delicts (offences) in Ukraine

The institute of administrative responsibility has not been subject to deep sensual transformations since independence of Ukraine. The effective Code on administrative offences (hereinafter - CUAO) was adopted at soviet times (1984). Among the key problems in the mentioned sphere there should be outlined the following ones:

Existence of court jurisdiction in the administrative delicts (offences) procedure. Nowadays cases on administrative offences are subject to the courts and constitute significant part of their activities. Such cases are decided without oral hearing and inviting interested parties thereto. The situation has been slightly improved in compliance with the Law on infringement of road-traffic rules dated September 29, 2008, it's adoption has resulted into a marked decline in the number of cases in the courts.

The principles of separation of state power into the legislative, the executive and the judicial branches is defined in the part 1 of the Art. 6 of the Constitution of Ukraine, grants inadmissibility of further existence of such a situation. Judicial bodies in the democratic society are empowered to administer justice, and should not perform powers of any executive authority or a legislative one, and vice versa.

Eclectic nature of material administrative delicts (offences) legislation. Among modern administrative offences there are present a lot of deeds, that are by their nature cannot be defined within the sphere of administrative delicts law (f. ex. "administrative delicts (offences)" of criminal nature, civil nature, that are at the same time subject to administrative courts/justice).

The most common delicts (offences) (hooliganism, petty larceny etc.) have been transferred from the criminal into the administrative law, that made it possible, formally, to reduce the number of deeds, punished under criminal law and to report on decline of criminality and prevailing of the soviet society over a capitalistic one. Another argument is a possibility for authoritarian states to use simplified methods in struggle with it's opposition, using procedures of imposing quasi-administrative penalties/punishments (for example, "execution/shooting in administrative order", that was effective in 1930-s) without effective judicial review/control.

Another part of "administrative delicts (offences)"is in a controversy with the provisions of the Code of administrative adjudication of Ukraine. It is about infringement/braking rights of private persons when performing entrusted public powers by public servants/officials.

Wide massive of administrative delicts (offecences) legislation. Apart from the CUAO in the legal system of Ukraine there is a wide massive of legal normative acts (over 50), defining liability for administrative delicts (offences).

Improper definition of the persons, subject to administrative liability. Military officials & the persons conferred with the same status are not subject to such a liability, that brakes the principle of equal citizen's rights (Art. 24 of the Constitution). These provisions form grounds for inapplicability of administrative punishment/responsibility. Legal persons till the very moment aren't still considered to be subject to administrative delicts (offences).

Possibility if simultaneous punishment of a physical and legal person for the same administrative delict (offence), that infringes the principle *ne bis in idem.*

Infringement of the legality principle in definition of the deeds, punished in administrative or criminal order. Separate administrative delicts (offences) and punishments are defined not by the laws, but by by-laws: governmental acts, acts of the President, the National bank.

Formalization & bureaucratization of administrative delicts (offences) procedure have been defined on adoption of the soviet Code as a counter-action to discretion & abuse of power by the state bodies. Now it has negative impact on private person's rights realization & granting in the administrative proceeding. It is a rule to consider, that without a written protocol there have been no detention of a person, it's examination, withdrawal of documents or assets etc.

Powers of administrative bodies for application of a huge number of intrusive actions (detention of a person, it's examination, withdrawal of documents or assets) originate from existence in administrative law of a huge number of infringements having criminal nature. Insecure, as may deem, the possibility of illegal usage of administrative proceeding results when investigating a criminal case.

But the most important problem constitutes the relations of a law-maker's and law-applying bodies to the institute of administrative responsibility to add the sphere of criminal law. Such an understanding implies quality of the legislation on administrative delicts (offences), that has become the generalization of casual rules (as am example of a medieval law), that doesn't possess the necessary level of generalization.

Conceptual provisions of the reform

On April 8 2008 the President of Ukraine approved the Concept of reform of criminal justice, that previews system-based changes in the spheres of criminal law, criminal adjudication and activities of law enforcing bodies.

Upon adoption of the Concept the working groups of the national Commission for strengthening democracy and the rule of law (consulting body at the President) have been drafted the Code on administrative delicts, the Law on amending the Criminal Code of Ukraine as to implementation of the institute of criminal punishments and the Criminal procedural code. In the nearest perspective these drafts are to be submitted to the Verkhovna Rada of Ukraine.

The main approaches of the reform

1. Administrative delicts (offences) should be subject only to the competence of executive authority, executive bodies of a local self-government, i.e. to the administrative bodies. From the number of bodies, empowered to define punishments for administrative delicts (offences) the courts must be excluded.

The part of administrative delicts (offences), that are staying within the jurisdiction of courts, are to be considered "criminal delicts (offences)".

2. Taking into consideration provisions of the Concept of criminal justice reform and the applicable practice of the European Court for Human Rights in the cases "on criminal accusation", the criteria for definition of administrative delicts (offences) as criminal delicts (offences) shall be the following: the level of danger for social relations, the type of a penalty applied. The- penalties, that prove criminal character of the offences, should become:

- confiscation of the asset/good, that is a mean or a direct subject;
- public works;
- short-term arrest.

As a result, administrative delicts (offences) and penalties for them shall be considered to be administrative, as they relate only to infringement of administrative law, shall be applied only in administrative (internal, not a court) order, and shall be reviewed by administrative court.

3. Subjects of administrative delicts (offences) should be understood both legal and physical persons.

It is necessary to resign from understanding subjects of administrative delicts (offences) – officials, that act on behalf of a legal person. During soviet times such an understanding of responsibility was justified. Application of sanctions to legal persons was senseless, as in fact it was costs transfer from one state body to another.

The state body, bodies of local self-government, their officials during performance of their powers cannot be subject of administrative delicts

(offences). Their actions can be subject to internal review by interested persons or court review.

4. Administrative penalties shall be considered only: notice, penalty and limitation of a special right realization, provided to a person.

It is necessary to change the mode of amounts definition and to refuse from ten different approaches to that. In future they may be differentiated in general p of the Code on administrative delicts into several cathegories, originating from the level of their dangerousness.

5. The procedure of responsibility application to physical persons or legal persons for administrative delicts (offences) should be regulated by a general law on administrative procedure. Such a procedure should be understood as a type of general administrative proceeding, that is supported by the necessity to provide equal rights to the persons in relations with public administration, shall promote to avoid duplication and/or collisions in legal regulation of administrative procedures, adherence to the principle of normative material effective usage, to form common practice of administrative courts according to the results of review for the decisions of all administrative bodies.

It is necessary to minimize the number of administrative penalties & sanctions applied in the newly-defined system of administrative sanctions. The officials of administrative bodies shall be deprived from the right to perform person's examination, it`s assets and goods, place of residence or another property of a person. These actions shall be performed only upon a person's mutual concern.

The possibility to pay the defined penalty to the representative of an administrative body at the place of incident/deed influences possibility of corruption-based practices and should be changed for the procedure of bank payment only.

In administrative delicts (offences) procedure it should be also realized as a whole the principles of equality of person's rights, their competitiveness, that shall make it possible for a body to a dispute to perform independent expert's and witness invitation to the court.