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The collection is dedicated to the issues of comparative administrative law and contains articles which were presented by the participants of two conferences held in 10th of May and 15th of October 2021: “The principle of proportionality is a basic principle of administrative law” and “The Protection of the Rights of Individuals and Private Organizations in Administrative Law”. The conferences were organized jointly by University of Campania "Luigi Vanvitelli" and Novosibirsk State University of Economics and Management. The articles are demonstrated varied problems of administrative procedures which there are in Russia, Italy, Germany, Austria, France, Greece, Kazakhstan, Uzbekistan. We express our gratitude to all participants of our conferences and hope that the collection of 2022 will be even more informative and useful for researchers of administrative law.

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The articles were published in the author's edition.

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Dear readers,

We are pleased to present to you the first collection, which was called the Annual Comparative Administrative Law Review 2021. We hope that this collection is a place for researchers and other professionals interested in administrative law issues, which cover many colourful and complex problems, both very intellectual and practical. We believe that the language of administrative law is understood by specialists all over the world and will contribute to the improvement of relations between the authorities and individuals. Comparative administrative law is at the heart of this collection, and we are delighted to have articles by authors from seven countries, consisting of France, Germany, Greece, Italy, Kazakhstan, Russia and Uzbekistan. All of these authors presented papers at our two conferences, so some articles were published as reports. The conferences, "The Principle of Proportionality is a Basic Principle of Administrative Law" and "The Protection of the Rights of Individuals and Private Organizations in Administrative Law", were held on 10th of May and 15th of October 2021 via zoom.

Last year there were some moments in administrative law, and many of them were related to anti-coronavirus regulations, which required administrative bodies to find a due balance in the new normality. Of course, these bodies have had traditional legal instruments, especially the principles of constitutional law, but many countries decided to establish new rules and, as it seemed, some legal constructions were not based on strict and customary principles. As a result, the discussion about how freedoms and security are connected has received new content. Here it is impossible not to recall the discussions of legal scholars from different countries about the "crisis of law". But let us be optimistic: in such circumstances it is important to remember the principle of proportionality and the protection of rights in administrative law. However, countries and their authorities have come to both the same and different ways of implementing legal positions declared similar, and the authors of the collection demonstrate this well. For instance, readers can observe

various versions of proportionality here; it may be the original German variant, and also the French or Italian ones, but there are kinds of proportionality that are only now being formed. It is interesting, that this principle was included in the Administrative Procedural and Process Code of the Republic of Kazakhstan, and for the first time this country demanded that its bodies comply with proportionality in administrative cases.

Nevertheless, it is too early to draw conclusions about the prospects for introducing modern principles into the practice of public administration in the countries of Commonwealth of Independent States (CIS). Here we are dealing with original legal traditions that require independent study. Let us note a somewhat unusual situation in this legal paradigm in Russia. Modern trends of openness, participation of citizens in the activities of public authorities are becoming more widespread both in legislation and in judicial practice. At the same time, a number of progressive tendencies are still not being properly developed (for example, we are talking about the stubborn unwillingness of the Russian legislator to adopt a law on administrative procedures). Thus, the exchange of accumulated experience, doctrines and best practices is not just a noble aspiration, but a vital necessity for all legal systems striving for progressive development. The role of legal science and comparative administrative law in this context cannot be overestimated. Therefore, we hope to continue the dialogue of scholarly lawyers from different countries. To this end, we are now organizing the next conferences and we hope you can take part in them. They will be dedicated to the protection of legitimate expectations in administrative law (25th of March 2022) and the problems of administrative discretion (27th of May 2022).

Let us hope that the series of our publications will contribute to the creative process of knowledge and harmonization of public administration in various countries!

Our best wishes,
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PROPORTIONALITY AND JUDICIAL REVIEW IN COMPARATIVE LAW

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Abstract. The author analyzes the application of the principle of proportionality in judicial review, in relation to rulemaking proceedings. The work highlights the differences between jurisdictions both on the concept of proportionality and as regards the limits of judicial review.

Keywords: proportionality, judicial review, reasonableness, participation in rulemaking, administrative comparative law.

1. Proportional reasoning and different approaches

Proportionality is applied in many sectors of administrative action. It regards the activity of independent authorities in the regulation of public utility services, controls of an environmental - landscape type, waste disposal, public services concessions, the procedures for the adoption of disciplinary sanctions, urban proceedings, and others.

The principle has the function of incrementing the investigation in proceedings, to achieve the better possible balance between public and private interests, in the ambit of the exercise of the discretional administrative power.

In many judgments, the search for the parameters individuated by the German and European judiciary is difficult to find[1]. Sometime the elements of proportionality appear excessively vague, and seem

[1] On the topic W. Leisner, Der Abwägungsstaat – Verhältnismäßigkeit als Gerechtigkeit?, Duncker & Humblot, Berlin 1997, 152 ss. D. U. Galetta & D Kroger, Giustiziabilità del principio di sussidiarietà nell'ordinamento costituzionale tedesco e concetto di "necessarietà" ai sensi del principio di proporzionalità tedesco, in Riv. it. dir. pubbl. com., n.2, 1998, 905 ss.

to grant a certain flexibility to administrative action, in the quest for the smallest sacrifice possible. Frequently, proportionality is utilised to enhance the importance of a correct organisation of the procedural phases[2].

Jurisdictions differ about intensity of proportionality review. In each country the basic element remains the balance between the adopted measure and the sacrifice inflicted on the citizens, but the principle shows a notable flexibility. At times, we can note a partial review, founded on the respect and the verification of only one of its three components. In other cases, there is a more penetrating control. It depends on the type of legal measure adopted, and the degree of judicial review varies in relation to the importance of the issues courts are charged to protect.

In the European Union, proportionality is applied to normative or administrative acts concerning common agricultural policies, financial aid sector, measures aimed at favouring cartels and associations among national companies, and abuses stemming from a dominant position, preliminary indictment cases, in reference to the free movement of goods, and the question of the irregular repatriation of citizens of a member State. Proportionality represents the main reference for balancing freedom with the restrictions of its exercise[3].

Judicial control is more tenuous when courts review discretional choices about political, social, and economic issues. In these cases, courts generally overturn only manifestly disproportionate measures. Judicial review tends to be less deferential when reviewing burdens and penalties, or if a measure violates EU rights. However, the problem of the intensity of the control may become more difficult when there is a broadly discretionary policy choice that allegedly violates a right, at the same time.

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[2] J. Rivers, Proportionality and Variable Intensity of Review, in 65 Cambridge Law Journal, n.1, 2006, 174 ss. T. Hickman, Proportionality: Comparative Law Lessons, in J.R., 2007, 31 ss.

[3] T. I. Harbo, The function of the Proportionality Principle in EU law, in European Law Journal, Vol. 16, n. 2, 2010, 158-185. J. Snell, True Proportionality and Free Movement of Goods and Services, in European Business Law Review, n.11, 2000, 50-57.

2. Divergences about the intensity of the control

In France, authorities must carry out a balance of the interests at stake[4]. In the *Benjamin* case, dated 19th May 1933, widely considered as being among the first questions decided with the application of the rules on proportionality, the *Conseil d'État* annulled the ban on meetings established by the *Nevers* review, due to the fact that it deemed it to be disproportionate in relation to the objective to maintain public order and safety[5]. In the following years, the French judiciary utilised proportionality in various sectors of administrative law; However, judicial review is frequently marked by *deference*, and it is rare to observe evaluation parameters of administrative action that extend beyond the cases in which the costs – benefits equilibrium is totally negative. Case law did not individuate specific criteria on which founding the illegitimacy of the act, nor can one note an in-depth doctrinal elaboration[6]. In Italy, the idea of the rationality of administrative action was connected to proportionality, non-contradiction and misrepresentation, and coherence to the objective. In a similar manner to the French experience, the evolution was notably conditioned by the approach to the abuse of power. The Italian judiciary, within the parameters of irrationality, inserted the contradiction and the misrepresentation of facts, typical elements of the vice of the function [7].

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[4] G. Kalflèche, Le contrôle de proportionnalité exercé par les juridictions administratives: les figures du contrôle de proportionnalité en droit français, in Les Petites affiches, n. 46, 2009, 46-53; V. Goesel – Le Bihan, Réflexion iconoclaste sur le contrôle de proportionnalité exercé par le Conseil constitutionnel, Rev. fr. dr. const., 1997, 227-267.

[5] Conseil d'État 19 May 1933, Benjamin, Rec. Lebon, 541. On the point cfr. M. Long et al., Les grands arrêts de la jurisprudence administrative, Dalloz, Paris 2001, 300-307.

[6] G. Xynopoulos, Le contrôle de proportionnalité dans le contentieux de la constitutionnalité et de la légalité, L.G.D.J., Paris 1995, 81 ss.

[7] G. Lombardo, Il principio di ragionevolezza nella giurisprudenza amministrativa, in Riv. trim. dir. pubbl., 1997, 942; A. Sandulli, La proporzionalità nell'azione amministrativa, Cedam, Padova 1998, 285 ss. V. Parisio, Principio di proporzionalità e giudice amministrativo italiano, Nuove autonomie, n. 4-5, 2006, 717 ss.

In Latin America, proportionality appears almost everywhere[8]. Brazilian doctrine confers a specific characterisation to the principle, as being different and distinct from reasonableness[9]. Latin America organised, at least at a normative level, precise standards with which the judiciary could control the exercise of discretional power, such as: correctness, rationality, justice, logic, proportionality and convenience, whose practical application depends thus on the completion of the ongoing constitutional transition processes.

In Columbia, the Council of State applied proportionality without distinguishing the intensity of the control, focusing instead on the verification of the existence of all the elements, both factual as well as juridical, necessary to pursue the objective via reasonable criteria. The consideration that proportionality represents above all an argumentative path, a specific form of protection or realisation of rights and individual freedom, originates from the orientation of the Constitutional Court. Constitutional judge sustains, in fact, that administrative action is to be considered proportional when the limitations of subjective juridical spheres follow an objective that is constitutionally legitimate, the predisposed measure constitutes a suitable means to realise it and above all if no other less damaging means exists to realise the same objective.

It regards generally the same elements that characterise the judgement of proportionality of a European type. In Venezuela, respect of the principle of proportionality is among the load-bearing elements of the structure of the law on procedures and constitutes the limit to administrative discretion. The basic approach tries thus to avoid that the power of public authorities to have a bearing and limit subjective juridical positions can determine, in the name of general interest, a limitation of the faculties connected to rights that is not adequate in relation to the end to be pursued, both in terms of

[8] A.R. Brewer -Carías, La regulación del procedimiento administrativo en América Latina con ocasión de la primera década (2001-2011) de la Ley de Procedimiento Administrativo General del Perú (ley 27444), in Derecho PUCT, n. 67, 2011, 62 ss.

[9] R. Perlingeiro, Los principios de procedimiento administrativo en Brasil y los desafíos de igualdad y de seguridad jurídica, in P. Aberastury & H. J. Blank (ed.), Tendencias actuales del procedimiento administrativo en latinoamérica y europa, Kas, Buenos Aires 2011, 316.

sacrifices, including economic requests, as well as for a more general tolerance of the measures imposed[10].

In particular, proportionality regards also the verification of the elements in proceedings for the adoption of emergency and necessary measures, for which the general law on procedure envisages the existence of special proceedings. The law elaborated a series of guiding criteria for administrative action to pass the test of proportionality when adopting urgent measures, criteria that would have more bearing in cases of the adoption of ordinary measures and not characterised, thus, by the consequent danger of a missing urgent intervention. First and foremost, there is the need to demonstrate the presence of effective elements of danger and the consequent urgency that does not permit the adoption of an ordinary measure for the issuance of an act. The measure must be perfectly in line with the objective of the conferred power and another measure typical of the juridical system should not exist that could immediately be adopted in that specific situation

A similar approach also appears in Peru and in Costa Rica.

Proportionality exists in a lot of Asian jurisdictions, including Taiwan, Korea, and Japan as well as China, and may come to play a still more prominent role in those jurisdictions in years to come. Judicial review of administrative discretion is extremely limited in China. Proportionality has made some scattered appearances there as well, including in a decision of the Supreme People's Court. In some jurisdictions, including Taiwan and South Korea, proportionality has been taken up unevenly by different high courts.

[10] V. R. Hernández-Mendible, Tendencias de los procedimientos administrativos en Venezuela, in P. Aberastury & H. J. Blank (ed.), Tendencias actuales del procedimiento administrativo en latinoamérica y europa, cit., 587 ss.

3. The particular case of United Kingdom

In England, the use of proportionality has been formally confined to one or a few areas within administrative law. In this experience, the affirmation of the principle is notably conditioned by the consolidation of the *Wednesbury-Test*[11].

The idea of proportionality would have permitted a much more penetrating judicial control in relation to the manifested irrationality model. Immediately, hence, English juridical thinking found itself facing the dilemma of the compatibility of its internal tradition with the data stemming from the EU system[12]. Some (Lord Steyn) saw nothing more than an overlapping between the criterion of unreasonableness and proportionality, with the effect that the majority of cases being decided in the same way, applying one or the other judgement parameter. Others highlighted that the need for the autonomy of the judgment of reasonableness was substantially reduced following *the Human Rights Act.* In reality, it was the two criteria of appropriateness and necessity that constituted the same parameters to be utilised in the judgement of reasonableness. The third element, that characterises the idea of proportionality in a strict sense, shifted the analysis onto the costs – benefits relationship and onto the evaluation of the suitability of the chosen means for the attainment of the defined objectives. Such an element leads to a careful ponderation of the interests involved.

In 1987, Millett J defined as being dangerous the entrance of proportionality in the *Allied Dunbar Ltd v. Frank Weisenger* case. The same fear arose in the *R. v Secretary of State for the Home Department ex parte Brind* in 1991. This situation began to change only at the end of the nineties, due to the effect of the internal approval of the *Human Rights Act* in 1998 and the continual pressure exercised by the European Union.

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[11] M. Taggart, Proportionality, Deference, Wednesbury, in NZL Rev, 2008, 423. J. Goodwin, The Last Defence of Wednesbury, in 3 Public Law, 2012, 445 ss.

[12] L. Hoffmann, The Influence of the European Principle of Proportionality upon UK Law, in E. Ellis (ed.), The Principle of Proportionality in the Laws of Europe, Hart, Oxford 1999, 107 ss.

In Canada, proportionality control is connected to the reasonableness review of administrative action, insofar as it implicates rights guaranteed under Canada's Charter of Rights and Values. With respect to Canada[13], English scholars thing that courts should more tightly integrate administrative law doctrines and constitutional law principles, including proportionality[14].

The year 2001 marked the acceptance of the principle of proportionality by the United Kingdom, both in *R v Secretary of State for the Home Department; Ex parte Daly*[15],as well as in *R v. Secretary of State for the Environment ex parte Alconbury*[16]. In both judicial cases, proportionality was applied to the EU right and to cases that could possible fall into the ambit of the *Human Right Act*. The *R v Governors of Denbigh High School di ex parte Begum* case, 2005[17], represented an important evolutionary step.

In reality, different approaches can be observed. In R. v. *Secretary of State for the Home Department ex parte Nadarajah*[18], the English judiciary deemed an engendered legitimate expectation to be negotiable as long as the chosen measure was proportionate in relation to public interest. In 2008, the House of Lords sustained, in *Somerville & Ors v Scottish Ministers*[19], that proportionality could constitute a special criterion of judicial review only in the ambit of cases that regarded the violation of human rights[20]. It is not a coincidence that in English manuals, the criteria of rationality and proportionality are analysed in the parts related to the acknowledgment of human rights. The principle of proportionality found thus its application in the United Kingdom in an extremely

[13] G. Webber, Proportionality, balancing, and the cult of constitutional rights scholarship, in Canadian Journal of Law and Jurisprudence 23 (01), 2010, 179- 202.
[14] P. Craig, Administrative law, Sweet & Maxwell, London 2012, 646 ss.
[15] R. v Secretary of State for Home Department ex parte Daly (2001) UKHL 2623.
[16] R. v. Secretary of State for the Environment ex parte Alconbury (2001)2 WLR 1389.
[17] R. v Governors of Denbigh High School ex parte Begum (2007) 1 A.C. 100.
[18] R. v Secretary of State for the Home Department ex parte Nadarajah (2005) EWCA Civ 1363**.**
[19] Somerville & Ors v Scottish Ministers (2008) UKHL 44.
[20] On the topic J.N.E. Varuhas, The Reformation of English Administrative Law, in 2 Cambridge Law Journal, 2013, 369 ss.; T.R.S. Allan, Human Rights and Judicial Review: A Critique of "Due Deference", in 65 Cambridge Law Journal, 2006, 671 ss.

different form, with a strong conception that is observed only in cases in which subjective juridical positions, protected at an international level, are involved, or in areas of competence of the European Union. In all other cases, its application within internal law is still rather uncertain and strictly connected to the *Wednesbury test*.

4. Effects of the relationship between participation and proportionality in the United States

The American judiciary utilises the *arbitrary and capricious test*, in informal proceedings cases, and the *substantial test*, if the final provision was undertaken based on formal proceedings.

Due to the fact that in formal procedures the phases to follow are described in detail, the jurisdictional analysis founded on logic does not touch procedural elements, whose violations would constitute flaws in the procedure. It only examines the relationship between the acquired preliminary material and the decision undertaken. On this point, courts apply an extremely weak evaluation and consider that the *substantial test* to have been passed, if the adopted evidence in support of the final provision is deemed to be sufficient by a reasonable citizen. It is the effect of *deference* that American courts show in relation to the functions of the agencies above all when they involve technical matters, delegated, in this experience, to the professionality and capabilities of the officials[21].

When authority follows instead the informal procedure, as occurs in the majority of cases, the system of judicial control occurs via the *arbitrary and capricious test*, that is more complex, due to the fact that it involves also the choices made in relation to the type of the adopted procedure. It is in this context that the Supreme Court embraces the *hard look doctrine* approach, based on which the authority must examine important data and offer an explanation that gives cognizance to the link between the facts ascertained and the choice taken. In this manner, American courts have the possibility to verify, via the provided motivation, whether the decision is based on important factors or whether there is a clear error of judgment.

[21] J. Mathews, Searching for Proportionality in U.S. Administrative Law, available in http://ssrn.com/abstract=2561583, 2015, 1 – 45.

Administrative action thus became *arbitrary and capricious* if: a) the agency has taken into consideration factors that by virtue of the mandate received from Congress, they should not have taken into consideration, b) it has totally omitted to take into consideration an important aspect of the problem, or c) it has offered an explanation to support its decision that went against that which was evident. However, also via the elements of the *hard look doctrine*, it proved difficult for the judiciary to detect a flaw in the ambit of the reasoning followed by the authority, except in striking cases and moreover connected to flaws in the thoroughness of the investigation[22]

The model of rationality in the United States needs that agencies must be able to justify the exercise of power within the ambit of the functions that are conferred to them and demonstrate the correspondence between the functions and the specific interests involved in the administrative action[23].

This condition, in reality, still remains unclear, if one takes into consideration that in informal procedures, the entity of the participation, the depth of the investigations, and the same degree of transparency depend on an evaluation that each agency carries out with a costs – benefits analysis, in which also the risks of losing in a judicial action are also taken into account.

According to the Supreme Court, administrators must proceed in steps, first verifying and analysing the interest that is harmed and the existence of possible alternative procedural models, and second the economic and fiscal impact[24]. The costs – benefits analysis regards the proceedings, and thus the content of the administrative action, and have effects also on the provision that will be adopted, that in turn would not be rational if the evaluations completed by the agency were incorrect. These are cases in which the analysis of rationality, when it regards the evaluation of costs and benefits, is much

[22] B. R. Clark, APA Deference After Independent Living Center: Why Informal Adjudicatory Action Needs a Hard Look, in Kentucky Law Journal, vol. 102, 2013-2014, 211-254.

[23] R. T. Bull & J. Ellig, Statutory Rulemaking considerations and Judicial Review of regulatory impact analysis, in 70 Admin. Law Rev., 2018, 888 ss.

[24] Cfr. SEC v. Chenery Corp. 381 U.S. 80 (1943) and SEC v. Chenery Corp., 332 U.S. 194 (1947).

resembling the analysis of proportionality on the European model, for which however juridical thinking demonstrates a deep-rooted adversity. Courts tend to be more deferential when the choice made implicate policy judgments, or administrative expertise, or the management of risk[25]. Courts are more likely to apply proportionality full strength to the extent that the measures under review threaten harm to individual rights or constitutional interests[26].

[25] F. J. Urbina, A critique of proportionality, in 57 The American Journal of Jurisprudence, 2012, 63.
[26] J. S. Masur & E. A. Posner, Cost-Benefit Analysis and the Judicial Role, in 85 U. Chi. L. Rev., 2018, 953.

FUNCTION AND STRUCTURE OF THE PROPORTIONALITY PRINCIPLE IN GERMAN PUBLIC LAW

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In German public law, the principle of proportionality is of paramount importance for government action. It has evolved from a yardstick for limiting state interference in the rights of citizens to a more far-reaching yardstick for assessing the appropriate level of government action. In my short presentation I will proceed as follows: 1. I will deal with the limiting function for the encroachment of rights and the much-differentiated structure of the proportionality test. 2. I will take up the second dimension of the principle of proportionality, which calls on the state not to do too little either. The 3. dimension then relates to relieving the state of having to meet too high demands in order to achieve a goal.

1. The principle of proportionality as a "barrier barrier"

The principle of proportionality was originally developed in police law and only found its way into German constitutional law through the Basic Law[27]. In terms of constitutional law, however, it can be traced back to the 19th century[28] and, under the jurisdiction of the Federal Constitutional Court it has been developed into a central constitutional legal principle.

Most important both in the historical derivation and in the current meaning is the function of the principle of proportionality as a so-called "barrier barrier" in the scrutiny of fundamental rights. According to German fundamental rights doctrine, this means the

[27] See Grzeszick in Maunz/Dürig, Grundgesetz-Kommentar, Werkstand: 93. EL Oktober 2020, Art. 20, Rn. 107 m.w.N.; Schulze-Fielitz in Dreier, Grundgesetz-Kommentar, 3. Auflage 2015, GG Art. 20 (Rechtsstaat) Rn. 179.
[28] Sachs, Grundgesetz, 9. Aufl. 2021, Art. 20, Rn. 145 m.w.N.

following: The freedoms of the individual protected by the fundamental rights may only be restricted by state acts by encroaching on this freedom if this encroachment is expressly permitted in the constitution itself. As a rule, this permission consists of a so-called legal reservation, i.e., the constitution allows the fundamental right to be encroached upon by or on the basis of a law.

So, the right to life and physical integrity in accordance with art. 2 para. 2. clause 3 GG, the freedom of assembly in the open air, acc. Art. 8, para. 2 GG, the secrecy of letters, post and telecommunications, according to Art. 10 para 2 GG, clause 1, and the freedom to exercise a profession, according to Art. 12 para 1 clause 2 GG, contain simple legal reservations. In contrast, in the case of a so-called qualified legal reservation it is only permissible to impinge on these rights under certain conditions, only for certain purposes or only with certain means[29]. In addition, fundamental rights without reservation, i.e. fundamental rights that do not contain an explicit legal reservation[30], are also subject to restrictions[31]. However, these restrictions must for their part must lie directly in constitutional law, ie. by other constitutional values[32]. This possibility of encroachment of fundamental rights by means of simple or qualified legal reservation or by conflicting constitutional law is referred to as a fundamental rights barrier.

However, the state's ability to interfere with fundamental rights is not unlimited. Rather, encroachments may only be based on certain limits on the fundamental rights barriers. The principle of proportionality represents such a limitation of the barriers to fundamental rights. For this reason it is called the barrier barrier and

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[29] Cf. Art. 5 para 2, Art. 10 para 2 clause 2, Art. 11 para 2 und Art. 13 para 6 GG.

[30] E.g., Art. 4 para 1, Art. 5 para 3 clause 1, Art. 8 para 1 GG.

[31] Fundamental BVerfG, 26.05.1970 - 1 BvR 83/69, 1 BvR 244/69, 1 BvR 345/69 - BVerfGE 28, 243 (261: “Only conflicting fundamental rights of third parties and other legal values with constitutional status are with consideration for the unity of the constitution and the entire system of values protected by it, and are exceptionally able to limit unrestricted fundamental rights in individual relationships. Conflicts that arise can only be resolved by determining which constitutional provision has the higher weight for the specific question to be decided. "; on the restriction of artistic freedom “. BVerfG, 07.03.1990 - 1 BvR 266/86, 1 BvR 913/87 - BVerfGE 81, 278 (292).

[32] E.g. the restriction of the freedom of research (art. 5, para 3 GG) through the right to informational self-determination (art. 2 para. 1 in conjunction with art. 1 para. 1 GG).

requires a "proportionate balance between the opposing, constitutionally protected interests with the aim of optimizing them"[33].

In this dimension, the function of the principle of proportionality is therefore to limit the scope of the restriction of freedom of the individual by state measures. What the applicability of the principle of proportionality results from is controversial in German jurisprudence[34]. References are the guarantee of human dignity (art. 1 GG), the guarantee of the essence of fundamental rights (art 19, para 2 GG)[35], the principle of equality (art 3. para 1 GG)[36], the fundamental rights as a whole[37] as well as the rule of law. By some scholars it is viewed as a general legal principle that permeates the entire legal system and claims validity for all areas of law, for example also in civil law, especially in labor law.

The doctrine of constitutional law sees this critically, because the principle of proportionality thereby loses its contours as a sharp sword to protect the individual against attacks by state violence. Against the background that civil law should find appropriate solutions between legal subjects of equal rank, the principle of proportionality does not apply to claims under civil law. For the most part, therefore the principle of proportionality is derived directly from the fundamental rights and reenforcing from the rule of law, which is substantively understood in Germany[38]. It is clear that in

[33] BVerfG, 07.03.1990 - 1 BvR 266/86, 1 BvR 913/87 - BVerfGE 81, 278.
[34] Grzeszick in Maunz/Dürig, Grundgesetz-Kommentar, 93. EL Oktober 2020, Art. 20 GG, Rn. 108.
[35] BGH, 25. 01.1952 – VRG 5/51, Rn. 6 –, BGHSt 4, 375.
[36] Wittig, DÖV 68, 817 (822).
[37] Cf. BVerfG, 11.06.1958 - 1 BvR 596/56 - BVerfGE 7, 377 (404); BVerfG, 15.12.1965 – 1 BvR 513/65 - BVerfGE 19, 342 (349).
[38] BVerfG, 18.07.1973 - 1 BvR 23, 155/73, BVerfGE 35, 382 (400); 04.02.1975 - 2 BvL 5/74, BVerfGE 38, 348 (369); 01.08.1978 - 2 BvR 1013, 1019, 1034/77, BVerfGE 49, 24 (58); 19.10.1982 - 1 BvL 34, 55/80, BVerfGE 61, 126 (134); 15.12.1965 - 1 BvR 513/65, BVerfGE 19, 342 (347); 24.04.1985 - 2 BvF 2/83, 2 BvF 3/83, 2 BvF 4/83, 2 BvF 2/84), BVerfGE 69, 1 (35); 30.09.1987 - 2 BvR 933/82, BVerfGE 76, 256 (359); 03.06.1992 - 2 BvR 1041/88, 2 BvR 78/89, BVerfGE 86, 288 (347); 09.03.1994 - 2 BvL 43/92, 2 BvL 51/92, 2 BvL 63/92, 2 BvL 64/92, 2 BvL 70/92, 2 BvL 80/92, 2 BvR 2031/92, BVerfGE 90, 145 (173).

this derivation, the principle of proportionality binds all state power, i.e. legislation, jurisdiction and administration, equally[39].

In German public law, the proportionality test does not represent a general relationing between purpose and means, but is strictly legally bound in four stages[40]:

The first step is to check whether the state is actually pursuing a legitimate purpose with the measure taken. While the purposes they are allowed to pursue are prescribed by law for administration and jurisdiction, the legislative power, due to its special democratic legitimation and the task of creating abstract-general norms, it is fundamentally free to determine purposes[41]. Limits arise only from the constitution itself[42]. Even in times of an increasingly rampant cancel culture, for example, it would not be a legitimate goal that professors have to let approved the content of their lectures by the university management in order to avoid unrest. That would violate several constitutional provisions.

In the second stage, it must then be examined whether the concrete measures that the state is taking to achieve the legitimate purpose are at all suitable. It is not about the state having to find the best solution to achieve its goals. It is sufficient that the measure can actually promote the achievement of the goal[43]. That a law is objectively unsuitable to support the achievement of the goal is very

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[39] BVerfG, 12.11.1958 - 2 BvL 4/56, 2 BvL 26/56, 2 BvL 40/56, 2 BvL 1/57, 2 BvL 7/57 – BVerfGE 8, 274 (310); Schulze-Fielitz in Dreier, Grundgesetz-Kommentar, 3. Aufl. 2015, Art. 20 Rn. 187.

[40] BVerfG, 15.12.1983 - 1 BvR 209/83, 1 BvR 269/83, 1 BvR 362/83, 1 BvR 420/83, 1 BvR 440/83, 1 BvR 484/83, BVerfGE 65, 1 (54); 20.06.1984 - 1 BvR 1494/78, BVerfGE 67, 157 (173); 08.10.1985 - 1 BvL 17/83, 1 BvL 19/83, BVerfGE 70, 278 (286); 03.03.2004 - 1 BvR 2378/98, 1 BvR 1084/99 - BVerfGE 109, 279 (335); 04.04.2006 - 1 BvR 518/02 - BVerfGE 115, 320 (345).

[41] BVerfG, 17.12.2014 - 1 BvL 21/12 – BVerfGE 138, 136 (189); 16.03.1971 - 1 BvR 52/66, 1 BvR 665/66, 1 BvR 667/66, 1 BvR 754/66 - BVerfGE 30, 292 (317); 10.04.1997 - 2 BvL 45/92 - BVerfGE 96, 10 (23); 09.03.1994 - 2 BvL 43/92, 2 BvL 51/92, 2 BvL 63/92, 2 BvL 64/92, 2 BvL 70/92, 2 BvL 80/92, 2 BvR 2031/92 - BVerfGE 90, 145 (173).

[42] BVerfG, 14.07.1999 - 1 BvR 2226/94, 1 BvR 2420/95, 1 BvR 2437/95 - BVerfGE 100, 313 (359); 28.03.2006 - 1 BvR 1054/01 - BVerfGE 115, 276 (304).

[43] BVerfG, 22.05.1963 - 1 BvR 78/56 - BVerfGE 16, 147 (181 f.); 20.06.1984 - 1 BvR 1494/78 - BVerfGE 67, 157 (175); 03.11.1982 - 1 BvL 4/78 - BVerfGE 61, 291 (313 f.).

rare. However, there are also cases in which the German Federal Constitutional Court has already defeated laws on the basis of the suitability test[44].

The third stage, the test of necessity, is much more important. Contrary to what the term "necessity" seems to suggest, it is not examined here whether the state measure, e.g. the law is really needed or whether the world has got along quite well without the measure so far. The necessity test is rather a methodically very strict test. The so-called milder means is checked[45]: First, it is checked whether the goals of the regulation can be achieved with other means than the one applied. Second, it is examined whether the other means would achieve the desired goal to the same extent[46]. Thirdly, if this is the case, it is examined whether the other means would place a lower burden on the rights of citizens than the means actually used[47]. At the examination level of necessity, the courts declare not a few state measures to be unlawful[48]. A classic application is e.g. police law: the police may only shoot when no other means are available to ward off a danger. Neither are there lesser means if they merely shift the burden of costs[49].

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[44] BVerfG, 23.03.2011 - 2 BvR 882/09 - BVerfGE 128, 282 (318); 05.11.1980 - 1 BvR 290/78 - BVerfGE 55, 159 (165 ff.); 07.04.1964 - 1 BvL 12/63 - BVerfGE 17, 306 (315 ff.); 14.12.1965 - 1 BvL 14/60 - BVerfGE 19, 330 (338); 09.03.1971 - 2 BvR 326/69, 2 BvR 327/69, 2 BvR 341/69, 2 BvR 342/69, 2 BvR 343/69, 2 BvR 344/69, 2 BvR 345/69 - BVerfGE 30, 250 (263 ff.); 07.04.1964 - 1 BvL 12/63 - BVerfGE 17, 306 (317).

[45] BVerfG, 16.01.1980 - 1 BvR 249/79 - BVerfGE 53, 135 (145 ff.); 16.03.1971 - 1 BvR 52/66, 1 BvR 665/66, 1 BvR 667/66, 1 BvR 754/66 - BVerfGE 30, 292 (316); 27.01.1983 - 1 BvR 1008/79, 1 BvR 322/80, 1 BvR 1091/81 - BVerfGE 63, 88 (115).

[46] BVerfG, 20.06.1984 - 1 BvR 1494/78 - BVerfGE 67, 157 (177); 16.03.1971 - 1 BvR 52/66, 1 BvR 665/66, 1 BvR 667/66, 1 BvR 754/66 - BVerfGE 30, 292 (316); 27.01.1983 - 1 BvR 1008/79, 1 BvR 322/80, 1 BvR 1091/81 - BVerfGE 63, 88 (115).

[47] BVerfG, 16.03.1971 - 1 BvR 52/66, 1 BvR 665/66, 1 BvR 667/66, 1 BvR 754/66 - BVerfGE 30, 292 (316); 26.04.1995 - 1 BvL 19/94, 1 BvR 1454/94 - BVerfGE 92, 262 (274).

[48] BVerfG, 30.03.1993 - 1 BvR 1045/89, 1 BvR 1381/90, 1 BvL 11/90 - BVerfGE 88, 145 (164).

[49] BVerfG, 18.11.2003 - 1 BvR 302/96 - BVerfGE 109, 64 (86).

The final and fourth stage is then the actual proportionality test[50]. Another term is appropriateness test[51]. A relationship is established between the goal, means and the impact of the burden. Even if a legitimate aim is being pursued and there is no more lenient means than the means used, a state measure can be inadmissible because the burdens caused for the citizen are unreasonable[52]. The state agency that used the measure in question is initially responsible for this weighing up. Only when the burdens caused by the measure are out of proportion to the advantages of the measure for the general public it is inappropriate. A classic example would be a policeman shooting a shoplifter, even if the theft can no longer be prevented in any other way.

In summary, this dimension of the principle of proportionality is about preventing excessive burdens on citizens from government measures. Therefore, the prohibition of disproportionate measures is also called prohibition on excessiveness[53].

2. The principle of proportionality as prohibition of insufficient measures

A different perspective than the prohibition of excessiveness, in which the proportionality test is applied to state *action*, is adopted with the prohibition of insufficient measures[54]. In this case the application of the principle of proportionality relates to the *inaction* by the state, i.e. to omission. Unlike the prohibition of excess, the prohibition of insufficient measures does not address all state powers, but only the legislative power. Another difference is that the

[50] BVerfG, 14.11.1989 - 1 BvL 14/85, 1 BvR 1276/84 - BVerfGE 81, 70 (92 ff.); 17.10.1990 - 1 BvR 283/85 - BVerfGE 83, 1 (19); 27.02.2008 - 1 BvR 370/07, 1 BvR 595/07 - BVerfGE 120, 274 (322).

[51] Cf. e.g. BVerfGE 13, 230 (236); 93, 213 (237 f.); 100, 313 (375 f., Rn. 219); 118, 1 (24, Rn. 92 f.); 128, 1 (68, Rn. 248); 131, 268 (291 ff., Rn. 81 ff.).

[52] BVerfG, 19.07.2000 - 1 BvR 539/96 - BVerfGE 102, 197 (220, Rn. 83); 16.03.1971 - 1 BvR 52/66, 1 BvR 665/66, 1 BvR 667/66, 1 BvR 754/66 - BVerfGE 30, 292 (316).

[53] Schulze-Fielitz in Dreier, Grundgesetz-Kommentar, 3. Aufl. 2015, Art. 20 GG (Rechtsstaat), Rn. 179 m.w.N.

[54] BVerfG, 28.05.1993 - 2 BvF 2/90, 2 BvF 4/92, 2 BvF 5/92 – BVerfGE 88, 203 (254 f.); 10.02.2004 - 2 BvR 834/02, 2 BvR 1588/02 – BVerfGE 109, 190 (247).

prohibition of nsufficient measures does not (only) restrict state access to protected legal positions, but legitimizes or even obliges them to do so[55].

According to the German understanding of constitutional law, fundamental rights are not only subjective rights to ward off state interference, but also have an objective side[56]. According to this understanding, the fundamental rights also contain the duty of the state to protect and promote the legal interests protected by the respective fundamental right and to protect them from illegal interference on the part of others[57]. In principle, however, it is up to the legislature to decide which measures to take to protect a legal interest. It has a wide scope for assessment, evaluation and design[58]. The prohibition of insufficient measures limits this scope of the legislature only if protective precautions have either not been taken at all or if the regulations made are obviously unsuitable or completely insufficient to achieve the protection goal[59]. It is only in exceptional cases that the legislature's freedom of choosing the measure is restricted to such an extent that the obligation to protect can only be satisfied by a specific measure[60]. The greater the risk to life or health, the narrower is the scope for design to a certain measure[61].

The test is therefore similar to the dimension of the proportionality test as a prohibition of excess in several stages, which, however, because of the legislature's much greater margin of discretion in the prohibition of insufficient measures, does not work quite as strictly as in the prohibition of excess.

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[55] Grzeszick in Maunz/Dürig, Grundgesetz-Kommentar, Werkstand: 93. EL Oktober 2020, Art. 20 Rn. 127.
[56] BVerfG, 01.03.1979 - 1 BvR 532/77, 1 BvR 533/77, 1 BvR 419/78, 1 BvL 21/78 - BVerfGE 50, 290 (337); 15.01.1958 - 1 BvR 400/51 - BVerfGE 7, 198 (205).
[57] BVerfG, 16.10.1977 - 1 BvQ 5/77 - BVerfGE 46, 160 (164).
[58] BVerfG, 14.01.1981 - 1 BvR 612/72 - BVerfGE 56, 54 (80 f.); 26.01.1988 - 1 BvR 1561/82 - BVerfGE 77, 381 (405); 28.01.1992 - 1 BvR 1025/82, 1 BvL 16/83, 1 BvL 10/91 - BVerfGE 85, 191 (212).
[59] BVerfG, 10.01.1995 - 1 BvF 1/90, 1 BvR 342/90, 1 BvR 348/90 - BVerfGE 92, 26 (46).
[60] BVerfG, 4. 5. 2011 − 1 BvR 1502/08 - NVwZ 2011, 991.
[61] BVerfG, 25.02.1975 - 1 BvF 1/74, 1 BvF 2/74, 1 BvF 3/74, 1 BvF 4/74, 1 BvF 5/74, 1 BvF 6/74 – BVerfGE 39, 1 (51; 65).

3. The principle of proportionality to protect the state's ability to act

In the dimensions of prohibition of excess and prohibition of insufficient measures, the principle of proportionality serves to guarantee the freedom of citizens protected by constitutional rights[62]. The topos of the proportionality test is also used for a completely different goal. This is not about protecting the individual against the state, but about protecting the state's ability to act against excessively high demands[63]. The state authority addressed here is exclusively the administration. I would like to give two examples of this:

For the principle of examination of the facts by the administration that applies to the administrative procedure (§ 24 Administrative Procedure Act), the type and scope of the investigations of the facts are determined by the authority. The duty of the authority to take into account all significant circumstances in the individual case is – unlike in legal proceedings[64] - limited by the principle of proportionality[65]. Aspects of proportionality are the type of investigations that are still possible, their likely scope, the time required[66], the financial resources to be used and the material weight of the decision. Accordingly, the principle of official investigation finds its limit where further efforts by the authority would no longer be justifiable and reasonable in relation to success[67]. The principle of proportionality can also limit the type and scope of the clarification of the facts if, in a specific case, e.g. quick decision-making is required. In such a case, it is necessary to weigh up the public and private interest in a quick settlement and in a thorough and complete

[62] BVerfG, 22.05.1990 - 2 BvG 1/88 - BVerfGE 81, 310 (338); 07.04.1964 - 1 BvL 12/63 - BVerfGE 17, 306 (314); 05.11.1980 - 1 BvR 290/78 - BVerfGE 55, 159 (165).
[63] Pautsch/Hoffmann, VwVfG, 2. Aufl. 2021, § 24 VwVfG Rn. 5.
[64] Kopp/Ramsauer, VwVfG, 19. Aufl. 2018, § 24 Rn. 3; Kallerhoff/Fellenberg in Stelkens/Bonk/Sachs, VwVfG, 9. Aufl. 2018, § 24 Rn. 36.
[65] VGH München, 12. 3. 2010 - 22 BV 09.1600 - NVwZ-RR 2010, 746 (747); Ritter in Ory/Weth, jurisPK-ERV Band 3, 1. Aufl. (Stand: 07.04.2021), § 24 VwVfG Rn. 14.
[66] BVerwG, 17.07.1986 - 7 B 234/85 - BayVBl 86, 665; OVG NRW, 20. 12. 2018 – 8 B 1018/18 –, juris Rn. 14.
[67] Ritter in Ory/Weth, jurisPK-ERV Band 3, 1. Aufl. (Stand: 07.04.2021), § 24 VwVfG Rn. 14.

gathering of facts[68]. The more serious the actual and / or legal consequences of the decision, the more detailed must be the investigation.

Another example is the procurement procedure, for which the application of the principle of proportionality is already expressly stipulated by the EU procurement directives[69]. On the one hand, the principle of proportionality protects companies from excessive requirements imposed by the awarding authority, e.g. only the evidence may be required that is really necessary to assess the suitability of the company[70]. On the other hand, however, the principle of proportionality is also applied in such a way that the contracting authority can, for example, dispense with certain, actually priority procedural designs if this would mean a disproportionate effort for the authority in individual cases.

Even if the term "proportionality" is used frequently and even explicitly in EU law for this examination of the expenditure for the authority[71], it should be pointed out that, according to the classic German legal understanding, it is not about the principle of proportionality, but about the principle of economic efficiency[72]. While the principle of proportionality serves to protect the individual against the state, the aim of the principle of economic efficiency, from the efficiency perspective of the authority, is to optimize the relation between ends and means[73].

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[68] Kallerhoff/Fellenberg in Stelkens/Bonk/Sachs, VwVfG, 9. Auflage 2018, § 24 Rn. 36.

[69] Art. 18 para 1 subpara 1 of the Directive from 26.02.2014 on Public Procurement 2014/24/EU.

[70] Dörr in Burgi/Dreher, Beck'scher Vergaberechtskommentar, Bd. 1, 3. Auflage 2017, § 97 GWB Rn. 54.

[71] Art. 52 para 1 clause 2 Charter of Fundamental Rights of the European Union; Art. 5 para 4 TEU.

[72] Dörr in Burgi/Dreher, Beck'scher Vergaberechtskommentar, Bd. 1, 3. Auflage 2017, § 97 GWB Rn. 54; Schneevogl in Heiermann/Zeiss/Summa, jurisPK-Vergaberecht, 5. Aufl.2018, § 97 GWB Rn. 64; Dreher in Immenga/Mestmäcker, Wettbewerbsrecht 6. Auflage 2021, § 97 Rn. 113 ff.

[73] Cf. Krajewski/Rösslein in Grabitz/Hilf/Nettesheim, 72. EL Februar 2021, AEUV Art. 298 Rn. 20 ff.

4. Closing remarks

I hope I was able to explain the strong position of the principle of proportionality in German public law. In the two dimensions, the prohibition of excess and the prohibition of insufficient measures, the principle is a core component of the protection of fundamental rights and serves to protect the individual. The principle of proportionality is applied in line with a clearly structured legal review in several stages. The tendency, also promoted by EU law, to understand the principle of proportionality in a broader sense, has not yet fully established itself in German law.

German abbreviations:

BayVBl.	Bayerische Verwaltungsblätter = Bavarian Administration Journal
BGH	Bundesgerichtshof = Federal Court of Justice
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen = Decisions of the Federal Court of Justice in Criminal Cases
BVerfG	Bundesverfassungsgericht = Federal Constitutional Court
BVerfGE	Entscheidungen des Bundesverfassungsgerichts = Decisions of the Federal Constitutional Court
DÖV	Die öffentliche Verwaltung = The Public Administration (Journal)
GG	Grundgesetz = Basic Law (German Constitution)
NVwZ	Neue Zeitschrift für Verwaltungsrecht = New Journal for Administrative Law
NVwZ-RR	Neue Zeitschrift für Verwaltungsrecht-Rechtsprechungsreport = New Journal for Administrative Law-Jurisprudence Report
OVG	Oberverwaltungsgericht = Higher Administrative Court
VGH	Verwaltungsgerichtshof = Higher Administrative Court

PROPORTIONALITY IN FRENCH ADMINISTRATIVE LAW

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In a comparative perspective, the field of administrative law could be considered as very wide in France. It covers not only judicial review on administrative acts, but also administrative liability, administrative contracts, tax law, public works and public property.

I will present the facets of proportionality for four issues of French administrative law, four fields in which this notion is the most at stake[74].

The order of my presentation loosely follows the chronological framework in which the issues arose in the history of administrative law.

I will not speak on the place of the control of proportionality in other fields of French public law, such as constitutional law and European law, as well as the issues concerning fundamental rights.

As you understand, my report won't be a complete overview of the French legal doctrine on the principle of proportionality, but rather a presentation of some key points of French administrative law on proportionality. Moreover, and even if I've been teaching for long as an invited lecturer, I am no legal scholar. This will rather be the point of view of a legal practitioner.

1. Administrative police (*police administrative*)

The expression "administrative police" designates in French administrative law the restrictive measures adopted by the competent administrative authority (such as the mayor or the prefect) in order to

[74] Roussel S., Le contrôle de proportionnalité dans la jurisprudence administrative, AJDA 2021, p. 780

prevent a trouble to public order, which is loosely defined as a trouble to public safety, tranquillity or health.

In other words, administrative police does not concern the police as the general public understands it, i.e. the "cops"; in fact, the cops have generally little to do with administrative police.

By nature, administrative police measures infringe personal freedoms, such as, depending of the context, the freedom of expression, the right to demonstrate, property rights or the economic freedom, classically known as the freedom of commerce and industry in French administrative law (*liberté du commerce et de l'industrie*).

French administrative courts have always been sensitive to the adverse effects of administrative police measures[75]. In 1917[76], the commissary of the Government (at the Council of State) Corneille stated the following famous sentence *"freedom is the rule and the restriction of police, the exception*"[77] (*la liberté est la règle et la restriction de police, l'exception*).

As you see, this opinion relies on a different notional framework (rule/exception). The control of proportionality of administrative measures has been introduced later, under the influence of comparative law, in two steps.

The first step is the grand decision "Benjamin" of the Council of State in 1933[78]. Mr Benjamin was a satirist intending to hold a meeting in the city of Nevers on a controversial political issue of this time. The order of the mayor to forbid this meeting was based on the risk of hostile demonstrations. The Council of State stating that less coercive means could have limited the risks to public order and cancelled that order. The introduction of proportionality narrows the

[75] Sauvé J.-M., Le principe de proportionnalité, protecteur des libertés, Institut Portalis, Aix-en-Provence, 17 mars 2017

[76] CE, 19 août 1917, Baldy, Rec.

[77] « Pour déterminer l'étendue du pouvoir de police dans un cas particulier, il faut toujours se rappeler que les pouvoirs de police sont toujours des restrictions aux libertés des particuliers, que le point de départ de notre droit public est dans l'ensemble les libertés des citoyens, que la Déclaration des droits de l'homme est, implicitement ou explicitement au frontispice des constitutions républicaines, et que toute controverse de droit public doit, pour se calquer sur les principes généraux, partir de ce point de vue que la liberté est la règle et la restriction de police l'exception. »

[78] CE, 19 mai 1933, Benjamin et syndicat d'initiative de Nevers, Rec. p. 541

control of the judge on the administrative measure. The influence of German administrative law on this case is well-known.

The second step is a simple refinement of the decision "Benjamin". The control of proportionality developed further in Europe, and was sophisticated into the famous triple test first by the German courts, and then by the European Court of Justice. The triple test (adequacy, necessity, and proportionality *stricto sensu*) has been explicitly worded in French administrative law by the decision "*Association pour la promotion de l'image*" of the Council of State in 2011[79]. The triple test was considered as an international standard, stating more clearly the content of the control of proportionality as practiced since the decision "Benjamin".

For long, French administrative law distinguished so-called "general administrative police" (*police administrative générale*) and "special administrative polices" (*polices administratives spéciales*). In the second case, the jurisdictional control was initially more limited, often limited to "manifest error of assessment" (*erreur manifeste d'appréciation*)[80] or "manifest disproportion" *(disproportion manifeste*). The case-law of the Council of State progressively erased this distinction concerning jurisdictional control since the 1990s.

Legal doctrine[81] notices that French courts tend to take the words of the control of proportionality, rather than adopting the full conceptual framework of its country of origin, Germany. First, French courts do not systematically check if the measure infringes an interest protected by law. Second, the three tests are not interpreted in a precise way, and tend to be blended. Necessity is often considered first, before adequacy. In fact, the decision "*Association pour la promotion de l'image"* retained that the conservation of eight fingerprints in the biometric passport database, whereas only two fingerprints were registered in the passport, was neither adequate, necessary or proportionate, altogether.

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[79] CE Ass., 26 oct. 2011, association pour la promotion de l'image et autres, n° 317827, Rec. p. 505

[80] CE Ass., 2 nov. 1973, Libraire François Maspéro, n° 82590, Rec. p. 153

[81] Roulhac C., La mutation du contrôle des mesures de police administrative, RFDA 2018 p. 343 ; Hochmann T., Un succès d'exportation : la conception allemande du contrôle de proportionnalité, AJDA 2021 p. 805

An important development of the control of proportionality is the introduction in 2000 of urgent interim proceedings in administrative courts (*référés administratifs d'urgence*)[82]. Given the litigation time for common judicial reviews, the control of proportionality was necessarily *ex post.* Therefore, the jurisdictional control was mainly declarative. In fact, the decision "Benjamin" of the Council of State was issued several years after the intended meeting of Mr Benjamin. Petitioners now have the possibility to ask for immediate interim measures. In these cases, the judge controls *ex ante* the proportionality of the measure, or at least in the very few days after its coming into force. This is a delicate exercise for the judge, especially in an emergency situation.

The epidemic crisis, for which the sanitary state of emergency has been declared in France, was a critical test for the control of proportionality itself. The abundant case-law of the Council of State on sanitary measures could be regarded as disappointing, questioning the effectiveness of the control of proportionality in such a new, serious and permanently evolving situation. However, the Council of State censored some measures a few months after the start of the epidemic, such as the general prohibition of demonstrations[83] and the restraints on places of worship[84].

Finally, I mention the fact that the administrative judge can be seized not only of judicial reviews against police measures, but also against the abstention of the administration to act through such measures. Such a configuration raises an issue on taking correctly the principle of proportionality and the effective protection of freedom into account[85].

[82] Loi n° 2000-597 du 30 juin 2000 relative au référé devant les juridictions administratives

[83] CE, 13 juin 2020, M. Renault et autres, n° 440846

[84] CE, 18 mai 2020, M. Freulet et autres, n° 440366

[85] CE, 22 mars 2020, syndicat Jeunes Médecins, n° 439674, Tables Leb.

2. The "balance sheet theory" (*théorie du bilan*)

Administrative police did not stay the only field where proportionality is at stake. Another grand decision of the Council of State deals with a completely different topic, the control of public utility (*utilité publique*) justyfing expropriation. Expropriation is preceded by an administrative act declaring the public utility of expropriation (*declaration d'utilité publique*), submitted to judicial review. How to control the "public utility" of an expropriation? The decision *Ville Nouvelle-Est* of 1971 introduced the so-called "balance sheet theory" (*théorie du bilan*), a costs-benefits analysis of the utility of the project for which the expropriation is intended. The "nalance sheet theory" gives the image of an accountant balancing the pros and cons of the project. The public utility of the project is recognised if the balance is positive. It is denied if the balance is negative. It stays however a fiction, because the elements at stake are not ponderable, and cannot be compared easily to one another.

This "theory" was not very fruitful in substantial administrative law. Concerning expropriation itself, it never lead the Council of State to cancel a declaration of public utility for a significant project, except in one case concerning a high voltage power line in a notorious natural landscape of the Southern Alps[86]. Neither did it expand largely in other fields of substantial administrative law.

3. Administrative sanctions (*sanctions administratives*)

An administrative sanction is a punishment inflicted by an administrative authority to chastise a reprehensible behaviour. Administrative sanctions are classical in some areas of administrative law, such as tax law or civil service. But they developed a lot more recently in other areas, such as economic regulation. Administrative sanctions are of course submitted to the control of the administrative judge. They differ from Russian administrative offenses, for which

[86] CE, 10 juil. 2006, association interdépartementale et intercommunale pour la protection du lac de Sainte-Croix, des lacs et sites du Verdon et autres, nos 288108, 2893967, 289777, 289968, Rec. p. 332

sanctions are directly inflicted by an administrative court at the end of a quasi-penal procedure.

In some areas, the sanctions are pre-defined by law and quasi-automatic, as long as the required conditions are met. This is specifically the case in tax law, where the tax fines are fixed by the legislator under the form of a percentage of evaded taxes. There is no place for a control of proportionality in such cases. It has been recognized both constitutional and conventional.

But that is not the majority of cases. Most frequently, the administrative authority, which has a discretionary power to pursue infringements, may choose the adequate sanction within a range of measures fixed by the legislator. In this case, the judge controls the proportionality of the sanction, its severity in relation to the gravity of the offence as well as some other elements. The idea behind is different of the control of administrative police measures, and is rather related to the penal law principle of proportionality of penalties.

The control of the proportionality of sanctions was initially limited to "manifest error of assessment" or "manifest disproportion", especially concerning civil servants. This is not the case anymore[87]. The jurisdictional control of proportionality on sanctions is, nowadays, always a "full" control.

The control of proportionality of administrative sanctions has, according to me, an implicit predicate, which is a pre-existing standard or framework on the proportionality of the sanction. If the administrative sanction is disproportionate and therefore illegal, it should mean that the sanction disrespected a pre-existing rule. Where this standard could be found? The matter is easy for most classical sanctions, for civil service for example, because the case-law of the Council of State provides an abundant collection of *exempla*. In these cases, the French administrative judge does not apply a pre-existing formalistic legal methodology, but works rather on a case-by-case comparison.

[87] CE Sect., 22 juin 2007, M. Arfi, n° 272650, Rec. p. 263 ; CE Ass., 16 févr. 2009, société Atom, n° 274000, Rec. p. 25 ; CE Ass., 13 nov. 2013, M. Dahan, n° 347704, Leb.

The exercise is more difficult in legal areas which are not so well covered by case-law, or where the standard of proportionality needs to evolve, for instance, in the field of economic regulation. In these cases, the control is closer to a discretionary power of the court panel. Some regulation authorities have tried to rationalize their scale of sanctions by issuing guidelines, trying to state objectively the elements they take into account to fix the amount of the sanction – something that the administrative case-law does not do. Though they are not legally binding, especially for the judge, such guidelines may influence the jurisdictional appreciation of proportionality.

It is interesting to note that even if it does not take a large place, French administrative law knows a reverse control of proportionality, when the judge is seized by a third party to control if the sanction is not severe enough.

4. Exercise of jurisdictional powers

Finally, I will briefly evoke how the French administrative judge evaluates the proportionality of the exercise of its own jurisdictional powers. In other words, the judge tries himself to not use a steam hammer to crack an administrative nut, if a nutcracker would do it.

The methodology of the decision "*Ville Nouvelle-Est*", which encountered poor success in administrative substantial law, became prosperous in administrative litigation law.

I will give three examples.

In classical administrative law, the annulment of an administrative act was necessarily retroactive, the cancelled act being supposed to have never existed. The consequences could be harsh and threaten legal security. In the grand decision "*association AC!*" of 2004[88], the Council of State finally recognised the power to modulate in time the effects of the annulment of an administrative act. In principle, the annulment starts *ab initio*, like in the past; but the administrative judge can exceptionally balance the public and private interests in presence to determine the period during which the administrative act will be considered invalid.

[88] CE Ass., 11 mai 2004, association AC ! et autres, n° 255886, Rec. p. 197

The idea is, *mutatis mutandis*, the same in my two other examples: the injunction to move or demolish a public work[89], and the illegality of an administrative contract[90]. In such cases, the judge proceeds to a balance of interest to determiner the consequences to draw of an illegality.

In conclusion. French administrative law has not formally recognised a principle of proportionality as such. The expression "principle of proportionality" is absent from French case-law, and it is not stated as a general principle of law guiding the action of the administration. The key points I developed are only loosely related to one another. Proportionality is rather an instrument, a tool into the hands of the French administrative judge, who adopts a pragmatic approach and relies heavily on its own jurisprudence. Proportionality is a good illustration of the judge-made character of French administrative law, often compared to common law. Another paradox in the country of the Civil Code.

[89] CE Sect., 29 janv. 2003, syndicat départemental de l'électricité et du gaz des Alpes-Maritimes et commune de Clans, n° 245239, Rec. p. 21

[90] CE Ass., 16 juil. 2007, société Tropic Travaux Signalisation, n° 291545, Rec. p. 360 ; CE Ass., 28 déc. 2009, commune de Béziers, n° 304802, Rec. p. 509

THE IDEA OF PROPORTIONALITY IN FRENCH LEGAL SYSTEM

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Abstract: The French system is particularly interesting with regard to the principle of proportionality and judicial review over administrative actions. So far the French administrative courts have been applying a *contrôle maximum* (maximum control) adhering to the principles of eligibility, necessity, and proportionality. This is a wide-ranging approach focused on an in-depth doctrinal legal elaboration, although this principle is not explicitly aknowledged.

Key words: principle of proportionality, judicial review, administrative act, French legal system, discretionary power, doctrinal elaboration.

It is well known that, according to the principle of proportionality, a proportional relationship must exist between the aims pursued by the state action and the means put in place to achieve those aims such as to involve the least possible sacrifice of the interests involved, whether public or private ones. It is also widely known that both its genesis and analysis are strictly linked to principles relating to administrative discretion and merit. In particular, this link is based on the fact that the discretionary actions may occur by balancing and comparing primary interests to other fundamental interests, according to the principle of reasonableness. The latter contains the principle of proportionality and, in case of non-compliance with it, the acts of the authority would be illegal because they are vitiated by abuse of discretionary power and, therefore, are against the principles of logic and congruence. In the EU context[91], the French legal system is particularly interesting with regard to the role of proportionality in the judicial review of administrative decisions. Unlike other European countries, such as

[91] As to the EU Community dimension of this principle, see ex multis G. Martinico, Il principio costituzionale di proporzionalità nella "complessa" dialettica comunitaria, in Dir. pub. comp. ed eur., 2005, n. 3, 1476-1477.

Italy[92], the French legal system, for example, takes a broad approach to this issue attributable to an in-depth legal doctrinal analysis.

Although not expressly recognized by French law, the principle of proportionality is used to mediate in the decisions of the *Conseil d'Etat* (Council of State)[93], as well as in those of the *Conseil Constitutionnel* (Constitutional Court)[94]. This proves the substantial

[92] Both in the Italian and the French systems, the birth and the development of the principle of proportionality are linked to the judicial review on legitimacy and to the abuse of power. However, the differences between these two systems are clear, although both in Italy and in France the control on proportionality is increasingly oriented towards verifying the compliance with the tripartite meaning of the principle, in line with the Community approach. While the Italian approach focuses on the legal data, the French one appears to be of a wider scope because it is supported by a higher doctrinal analysis. Both systems followed the path of the European Community Law which at the initial stage (when the judge practices a "partial" review) leads to a greater definition and use of the principle of proportionality according to the tripartite approach, towards a "complete" or "total" review. Anyway, this occurred in many different ways and with different results. There is no doubt that Italy was influenced more by France than by the Community law. Indeed, since the 1970s the Italian law was mainly oriented towards the application of this principle and it practices a review inspired to the standards of justice, such as reasonableness, fairness and suitability. However, since the 1990s, both legal systems have been applying the principle of proportionality in the narrow sense. For an overview of the principle of proportionality in the Italian legal system, see: A. Sandulli, La proporzionalità dell'azione amministrativa, Cedam, Padova, 1998; D.U. Galetta, Principio di proporzionalità e sindacato giurisdizionale nel diritto amministrativo, Milan, 1998; Idem, Principio di proporzionalità e giudice amministrativo nazionale, in Foro amm., 2007, n. 2, 603.

[93] M. Waline, Le pouvoir discrétionnaire de l'administration et sa limitation par le contrôle juridictionnel, in RPD, 1930, 197; A. Cocatre-Zilgien, Préface R. Cassin, Pouvoir discrétionnaire et contrôle de l'administration. Considérations sur le Conseil d'Etat statuant au contentieux, LGDJ, Paris, 1958; J.C. Venezia, Le pouvoir discrétionnaire, LGDJ, Paris, 1959; P. Heut, Le pouvoir discrétionnaire et le juge administratif. Débat, 53, in Cahiers de l'IFSA, n. 16, éd. Cujas, Paris, 1978; J. Kehn, Le pouvoir discrétionnaire et le juge administratif, in Le pouvoir discrétionnaire et le juge administratif, in Cahiers de l'IFSA, n.16, 10 e 74, éd. Cujas, Paris, 1978; A. Bockel, Contribution à l'étude du pouvoir discrétionnaire de l'administration, in AJDA, Juillet-Août, 1978, 355; E. Picard, Le pouvoir discrétionnaire en droit administratif français, in RIDC, n.3, 1989, 295.

[94] V. Goesel-Le Bihan, Le contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel: figures récentes, in Rev. franç. de dr. constit., n.70, 2007, 269-295

impact of the practices of administrative law on constitutional law[95]. Actually, since the 1970s, the *Conseil d'Etat* laid the basis for a progressive expansion of the judicial control over the discretionary power of Public Administration. It censured the administrative acts, first for incompetence and procedural defects[96] and then for abuse of discretionary power through *les moyen de légalité* (legal means)[97], thus applying the proportionality test[98].

According to this doctrine[99] the first weak manifestation of the proportionality review can be found in the *contrôle de l'exactitude matérielle des faits possède* (fact-checking process), that is, the so-called minimum control[100]. This allows the court to assess the relationship between the situation and the resolution, without investigating the legal characterization of the facts. It appears in a negative way, as the result of a simple deduction only when the link between the act and the rule completely misses. However, the *erreur manifeste d'appréciation* (manifest error of assessment), the so-called limited control[101], is the type of control to which the proportionality review is more strictly linked.

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[95] M. Fromont, Le principe de proportionnalité, in AJDA, 1995, n. spécial, 156 ss.

[96] . Cass. Criminelle, arrêt 5 décembre 1983, Précis Dalloz, 1984, 217.

[97] Cass. Civile, arrêt 22 avril 1986, Thorn Emy Vidéo France c. Fédération nationale française, in Gazette du palais, 1986, 219.

[98] P. Martens, L'irrésistible ascension du principe de proportionnalité, in Présence du droit public et des droits de l'homme, in Mélanges offerts a Jacques Velu, Bruxelles, 1992, t.1er, 51 ss.; M. DelperÉ-V. Boucqey Remion, Liberté, égalité, et proportionnalité, in Adm. pub., 1980, 287.

[99] As for an in-depth analysis of the Conseil d'Etat in a comparative key with the Italian Council of State, see D. Amirante, Consiglio di stato e «Conseil d'Etat» nell'ordinamento giurisdizionale, in Y. Mény (edited by) Il Consiglio di Stato in Francia e in Italia, Il Mulino, Bologna, 1994, 113-176.

[100] For the first time, the decision of 2nd November 1973, Société Anonyme «Librairie François Maspero» (CE, Rec. Lebon, 11), included manifest errors in procedural defects of an administrative act; it was then extended to other sectors, see CE 3 février 1975, Ministeur intérieur c. Pardov, in Rec. Lebon, 83; CE 19 février 1975, Fouéré, in Rec. Lebon, 1177. Sul punto cfr. la completa trattazione di D. Lagasse, L'erreur manifeste d'appréciation en droit administratif. Essai sur les limites du pouvoir discrétionnaire, Bruylant, Bruxelles, 1986; X. Philippe, Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative française, éd. Economica, Paris, 1990, 166-179

[101] On the evolution of this legal norm, see J.P. Bourgois, L'erreur manifeste d'appréciation (La décision administrative, le juge et la force de l'évidence), in

The proportionality review has been introduced to remedy the shortcomings of the *contrôle de l'exactitude matérielle des faits possède*, in which there was no legal characterization of the facts of a certain number of subjects. It mainly focuses on the analysis of the facts, the legal characterization of the facts, the error of law and the misuse of power. It involves the annulment of the act only if the error is judged to be obvious and gross, that is, manifest[102]. So, since the 1980s, in France even the Constitutional Court can ratify the *erreur manifeste d'appréciation* and use the principle of proportionality, when applying the principle of equality, to censure the legitimacy of the bills submitted to it. Therefore, if at first the manifest error and the manifest disproportion are used to deny the unreasonable feature of the legal choice, the same become the "motivational basis that may lie behind a censor's action"[103].

However, only in the 1990s the constitutional and administrative law started to resort to a true judicial review based on the rationality of the choice made by legislators and public authorities. So, it went from a minimum and exceptional control to an ordinary control on the fairness of the legislative decisions. That is to say that, if at first the court could only ratify a manifest error, now the review is applied

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L'espace juridique, 1988; R. Chapus, Droit administratif général, op.cit., 946 ss.; B. Pacteau, Le juge de l'excès de pouvoir et les motifs des actes administratifs, Travaux et recherches de la Faculté de Science politique de l'Université de Clermont I, Paris, 1977, 236 ; C. Debbasch - J. Ricci, Contentieux administratif, Dalloz, Paris, 1990, 726.

[102] There are two major theories. A first traditional classification proposed by Laferriére, that identifies four legal defects: incompetence, violation of the law, violation of rules of form, excess of power. A subsequent legal theory distinguishes them into two groups: internal legal acts (incompetence, violation of form and violation of procedure), and external legal acts which can be further distinguished in relation to the content of the act (violation of the law) or to the reasons and to the purposes of the act. Cfr. C. Eisenmann, Le droit administratif et le principe de légalité, in Études e documents du Conseil d'Etat, 1957, t. XII, 25 ss.; R. Chapus, Droit administratif général, Montchrestien, Montchrestien, Paris, 15° éd., 2001, t. I, 759 ss.; D. Amirante-F. Rosi, La giustizia amministrativa in Francia, in G. Recchia (edited by), Ordinamenti europei di giustizia amministrativa, Trattato di diritto amministrativo diretto da Giuseppe Santaniello, Cedam, Padova, 1996, vol. XXV, chpt. VI, 170-178.

[103] See F. Dreyfus, Les limitations du pouvoir discrétionnaire par l'application du principe de proportionnalité: à propos de trois juge mentes du Tribunal administratif de l'OIT, in RDP, 1974, 691.

to all the other hypotheses of erroneous assessment of legislators. This occurs through the assessment of a true proportional relationship between the aims sought to be achieved, the means employed and the sacrifices imposed on individual interests.

Therefore, the rationality review of the decision taken is the most widespread means to control proportionality, both in admnistrative and constitutional law. It can be compared to a minimum proportionality test, in the negative form, where it is evaluated if the facts that led to a certain decision fall within the case envisaged by the law; and if the facts are not manifestly disproportionate to the objectives pursued by the legislation.

From this point on, the *erruer manifeste d'appréciation* can be invoked by the French court if it is deemed that the decision based on the discretionary power of the public administration is clearly unfair[104]. Therefore, at the beginning the court censures the decisions which show a significant imbalance between the facts and the decisions taken. Afterward the manifest error is definitively used as a general limit to the use of a discretionary power by the public administration. It is nothing more than the most flexible and negative expression of a proportionality test. Indeed, this is the first tool aimed at controlling proportionality through the recognition of a misuse of power[105].

This type of control was followed by much more explicit types of reviews, such as the *bilan coût-avantages* (cost-benefit inquiry) and the *plein contrôle de proportionnalité* (proportionality test). The *bilan coût-avantages* is the most complete employment of this

[104] See X. Philippe, Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative française, op.cit., 166-179; J.M. Galabert-M. Gentot, Le contrôle de l'erreur manifeste par le juge de l'excès de pouvoir, in AJDA, 1962, 522; J.Y. Vincent, L'erreur manifeste d'appréciation, in Rev. adm., 1971, 401; J. Rouviere, Réflexions sur l'erreur manifeste, in Études et Documents du Conseil d'Etat, 1988, n.39, 65 ss.; R. Chapus, Droit administratif général, op.cit., 946 ss.

[105] As for the relationship between the French administrative law and the UE Community law, see B. Genevois, Le Conseil d'Etat et l'ordre juridique communautaire, in EDCE, 1979-1980, 73; J.C. Bonichot, Le droit communautaire et le droit administratif français, in AJDA, 1996, n. spécial, 15 ss.; D. Amirante-F. Rosi, La giustizia amministrativa in Francia, op.cit., chpt. II, 33-44.

principle by the French doctrine[106]. It is based on the comparative analysis of the results of the decision, for the first time it is aimed at searching coherent relationships between facts, decisions and aims pursued[107]. While the minimum or restricted control only verifies the correctness of the decision taken, the latter, nameable a normal review, goes beyond the normal characterization of the facts. And it carries out a more in-depth evaluation, based on the comparative analysis of the advantages and disadvantages deriving from it[108]. Therefore, in about twenty years, the theory of the *"bilan coût-avantages"*, despite the problems and the innovations that characterize it, laid out the basis for the *plein contrôle de proportionnalité*. The latter, under the influence of the UE Community system, directed the French court towards proportionality test in judicial review, inspired by the criteria of suitability, necessity and proportionality in the narrow sense. Indeed, the *contrôle de la nécessité de l'acte* or *contrôle maximum* is a normal review exercised "within the limits of the merits review"[109,110]. It arises from the need to balance the satisfaction of the public interests with the protection of the rights and freedoms of citizens[111]. It is the highest control of proportionality, exercised by a

[106] J.P. Costa, Le principe de proportionnalité dans la jurisprudence du Conseil d'Etat, in AJDA, 1988, 435.

[107] M. Fromont, Le principe de proportionnalité, op.cit., 156; V. Goesel-Le Bihan, Réflexion iconoclaste sur le contrôle de proportionnalité exercé par le Conseil constitutionnel, in Rev. franç. de dr. constit., 1997, 227 ss.

[108] The doctrine traces back this analysis to the case of 1455, in which the Parliament of Grenoble ruled that the exercise of the right to flood lands belonging to other people for enlarging ponds was subjected to the fact that the benefits enjoyed by pond owners and the community were greater than the damages caused to the owners of the lands affected by flooding. For a historical reconstruction of the application of the above mentioned theory, see J.L. Mestre, Introduction historique au droit administratif français, Presses Universitaires de France, Paris, 1985, 136-137.

[109] CE 19 mai 1933, Benjamin, in Rec. Lebon, 541. Sul punto cfr. M. Long-P. Weil-G. Braibant-P. DelvolvÉ-B. Genevois, Les grands arrêts de la jurisprudence administrative, 13° éd., Dalloz, Paris, 2001, 300-307.

[110] CE 20 juillet 1971, Mehhu e altri, in Rec. Lebon, 568; CE 5 mars 1948, Jeunesse indépendante chrétienne déminée, in Rec. Lebon, 121.

[111] This principle is applied in many sectors: freedom of movement (CE 8 décembre 1972, Ville de Dieppe, in Rec. Lebon, 794), freedom of speech (CE 24 janvier 1975, Ministre de l'information c/Stè Rome–Paris Film, in Rec. Lebon, 57),

court in a logical manner aimed at verifying the compliance of the means with the aim. That is, it is a logical analysis of the facts with the aim of ascertaining the proportionality and the legitimacy of the decision.

The development of the principle of proportionality concerning the discretionary choices of the public administration, culminating in the *contrôle maximum*, has a legal basis. However it has also been helped by a number of doctrines that, since the 1950s, have tried to clarify its meaning. They represent a significant contribution in a system that refers to this principle implicitly. The aforementioned doctrines are based both on the empirical analysis and on the research and the theoretic reconstruction of the principle of proportionality.

Since the first French doctrines, the content of the principle of proportionality has been defined in the logical relationship between the objectives and the means used to achieve them. On the basis of this initial theoretical framework the doctrine distinguishes three models of judicial review: the one that censures any form of disproportionality (enhanced proportionality); the one that censures only the clear or manifest disproportionality (limited proportionality); the one that does not apply any control (absence of the proportionality review)[112]. A more complex theory is instead the so-called "Theory of the objective purposes", which analyses the proportionality starting from the characteristics of administrative acts, in particular from its purposes. It distinguishes two types of aim: the subjective one, from which it detects the agent's will, and

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freedom of trade and industry (CE 13 mars 1968, Ministre de l'Intèrieur c/Epx Leroy, in Rec. Lebon, 179), freedom of strike (CE 7 juillet 1950, Dehaene, in Rec. Lebon, 426), financial freedom (CE 21 novembre 1958, Sindacato nazionale dei trasporti aerei, in Rec. Lebon, 673; CE 16 novembre1962, Sindacato intercomunale di elettricità della Niévre e altri, in Rec. Lebon, 612).

[112] See M. Fromont, Le principe de proportionnalité, op.cit., 161-165; J.P. Costa, Le principe de proportionnalité dans la jurisprudence du Conseil d'Etat, op.cit., 434-436 ; G. Braibant, concl. CE Ass. 28 mai 1971, Ministère de l'équipement et du logement c. Fédération de défense des personnes concernée par le projet actuellement dénommé "Ville nouvelle Est", in Rec. Lebon, 410, in AJDA, 1971, 463.

the objective one, which corresponds to the aim of the general interest established by the legislator[113].

Many approaches also link the proportionality review to the breach of law. In this case, the assessment concerning the adequacy between the aim pursued and the means would be ascribable to the violation of the regulatory provisions[114]. Other theories place proportionality in the context of the excess of powers.

Anyway, the main problem is to identify the main concept of the principle of proportionality. Some scholars disregard the unitary concept of this principle while others, although highlighting some of its own features, explore the problem on an application-level approach, which is essential for a concrete investigation of administrative acts[115].

Finally, according to this approach, the most recent doctrines try to provide a clearer picture and classify the principle of proportionality into two main categories: general principle or standard review[116]. Proportionality falls within the first category due to some specific reasons: first, the court, when rebuilding a principle, regardless of whether it starts from the rule or not, should be inspired by the principles of fairness, justice and protection of opposite interests, which lead to the principle of proportionality[117]. secondly, some general principles include the

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[113] See M. Fromont, Le principe de proportionnalité, op.cit., 165; C. Eisenmann, Cours de droit administratif, LGDJ, Paris, 1983, t. II, 275- 278.

[114] X. Philippe, Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative française, op.cit., 163-166.

[115] M. Letoumeur, L'apparition de nouveaux éléments subjectif dans le recours pour excès de pouvoir, in EDCE, 1953, 66; M. Fromont, Le contrôle de appréciation des faits économiques dans la jurisprudence administrative, in AJDA, 1966, 588; D. Amirante-F. Rosi, La giustizia amministrativa in Francia, op.cit., chpt. VI, 155-191.

[116] X. Philippe, Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative française, op.cit., 94-118; J.M. Maillot, La théorie administrative des principes généraux du droit. Continuité et modernité, Dalloz, Paris, 2003, 303-307. It should be noted that while Philippe recognizes and justifies both possibilities, Maillot, instead, makes his position even clearer by identifying proportionality with the standard.

[117] J. De Soto, Recours pour excès de pouvoir et interventionnisme économique, in EDCE, 1952, 76 ; M. Letoumeur, Les principes généraux du droit dans la jurisprudence du Conseil d'Etat, in EDCE, 1951, 20; B. Jeanneau, op.cit., 8; R. Chapus, Droit administratif général, 454; J. Riviero, Rapport sur les notions

principle of proportionality, so facilitating its application, albeit mediated. This is the case of the principle of equality and those which protect the fundamental rights. Some authors speak of "*égalité proportionnelle*"[118]. This definition was also evoked in some decisions of the *Conseil d'Etat* according to which the principle of proportionality is included in the principle of equality, as a parameter of discrimination that takes place if a decision is not adequate in relation to the purposes. Instead, the opposite theory identifies proportionality as a standard of review[119].

In particular, it states that the principle of proportionality is already inherent in some elements of the standard of review, whose aim is to find out an ideal and achievable conduct based on measure and balance. Indeed the standard of review distinguishes "normal" from "abnormal" and it naturally aims at verifying the absence of disproportionality between what the regulation requires and the actions[120]. Therefore, basing the link between proportionality and standard of review on these assumptions, part of the doctrine recognizes the existence of new categories, that is, the so-called implicit standards of proportionality found in the concepts of "imbalance" or "abnormality" and in the terms "excessive", "exaggerated", "abusive"[121].

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d'égalité et de discrimination en droit public français, Tav. de l'assoc. H. Capitant, Paris, 1965, t. XIV, 343 ss.; M. De Villiers, Le principe d'égalité dans la jurisprudence du Conseil constitutionnel-logique d'une jurisprudence, in Rev. adm., 1984, 39; D. Amirante, Giudice costituzionale e funzione legislativa, Cedam, Padova, 1991, 120-125.

[118] R. Chapus, Droit administratif général, op.cit. 455.

[119] X. Philippe, Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative française, op.cit., 251 ss. As for the notion of standard, see S. Rials, Le juge administrative et la technique du standard, in BDP, LGDJ, Paris, 1980, t. 135, 66; M.Y. Gaudemet, Les méthodes du juge administratif, op.cit., 47; P. Orianne, Rubrique "standard", in A.J. Arnuad (dir.), Dictionnaire encyclopédique de théorie et de sociologie du droit, LGDJ, Paris, 1983, 581.

[120] X. Philippe, Le contrôle de proportionnalité dans les jurisprudences constitutionnelle et administrative française, op.cit., 254.

[121] M. Guibal, De la proportionnalité, in AJDA, 1978, 477; G. Braibant, Le principe de proportionnalité, in Mélanges Waline, LGDJ, Paris, 1974, t. II, 297 ss.; J.P. Costa, Le principe de proportionnalité dans la jurisprudence du Conseil d'Etat, op.cit., 435 ss.; R. Chapus, Droit administratif général, op.cit., 1071-1085 ; S. Rials, Le juge administrative et la technique du standard, op.cit., 66 ss.

The judicial review of administrative acts has got a significant influence in France. The French legal system has long been implementing the *plein contrôle de proportionnalité*, inspired by Community standards. However, the flexible nature of the principle does not always make it easy to identify proportionality as a clear and autonomous principle, such as to go beyond the abuse of discretionary power, as illustrated by several doctrines. However, some recent cases have shown a trend of the Conseil d'État towards a more express reference to this principle[122].

[122] CE, 28 mars 2020, n.420244; CE, 30 mai 2020, n. 35155; CE, 28 mai 2014, n.350095; CE, 21 juin 2013, n. 345500.

THE PRINCIPLE OF PROPORTIONALITY IN RUSSIAN ADMINISTRATIVE LAW: PROBLEMS AND DEVELOPMENT PROSPECTS

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Abstract. The article analyzes the general issues of the formation of the principle of proportionality in European legal systems. The reflection of this principle in the legislation of the Russian Federation and other CIS countries is shown. The development of this principle in the practice of the Supreme Court of the Russian Federation and the Constitutional Court of the Russian Federation is revealed on the example of decisions taken as part of the verification of the legality of restrictive measures used in Russia as part of countering the spread of coronavirus infection in 2020-2021.

Keywords: principle of proportionality (proportionality), administrative act, administrative discretion, administrative proceedings, coronavirus infection (COVID-19).

1. The principle of proportionality as a fundamental principle of administrative law in Europe and the CIS countries

According to German researchers Armin von Bogdandi and Peter M. Huber, the constitutionalization of administrative law began in many respects from the principle of proportionality. Laid down already in the Prussian police law, over time it "broke free", embraced all administrative law, and then began its victorious march through other branches of public law, and also entered the concept of fundamental rights; through the European Convention on Human Rights and the practice of European courts was transferred to other European legal systems[123]. Moreover, this principle clearly shows the

[123] Bogdandi A. von, Huber P. M. State, public administration and administrative law in Germany // Public Law Digest. 2014. No. 1. P. 46.

inverse dependence of constitutional law on administrative law; this is what J. Wedel called "the administrativeization of constitutional law"[124]. Perhaps the principle of proportionality at the present time can be attributed to one of the most important universal principles. This is a synthesis of the principles of legality and expediency (rationality). If judicial practice is a "great conciliator" of the legislation and law principles, then proportionality is a universal balance of all basic legal phenomena, including the principles of law in relation to each other.

It seems, the main idea of the principle of proportionality is the possibility of internal differentiation of management impact. In other words, an administrative act is viewed as a synthetic (and not syncretic) legal phenomenon that can be subject to external verification.

The concept of proportionality can (and even should) be multidimensional. An attentive legislator listens to this postulate. However, this principle is of the greatest practical importance, of course, for judicial control over enforcement discretionary administrative acts.

It seems that it will not be an exaggeration to say that the origin of the modern concept of the principle of proportionality is rooted in the practice of the Council of State of France, which in the 19th century began to check administrative acts for their deviation from the purpose of the law. This step of the French legal order not only immediately attracted close attention, but also caused very strong feelings among some researchers of that time. Thus, the outstanding L. Dugi categorically asserted: since then in France "there are no more discretionary acts of government"[125]. Time has shown the idealism of such judgments. The principles of law in general, and the principle of proportionality in particular, can be an extremely powerful tool for “breaking” discretionary acts by courts. However, even the strongest onslaught of the courts is sooner or later suspended by the principle of separation of powers, and in each legal

[124] Op. cit.

[125] Duguit, L. Les transformations. P. 208.

Cit. from: Elistratov A.A. Basic principles of administrative law. 2nd ed., rev. and add. M., 1917. P. 267.

system in its own way. Consequently, with the seeming universalism of such tools, the determination and sophistication of applicators of law in using the above-mentioned principle is very different in different legal systems.

The German interpretation of the proportionality test includes three main criteria: first, the means intended to achieve the goal of the government must be suitable for achieving this goal (relevance); secondly, out of all the suitable, the one that least restricts the right of a private person (necessity) should be chosen; thirdly, the harm to a private person from the restriction of his rights should be proportional to the benefit of the government in relation to the achievement of the set goal (proportionality in the narrow sense)[126]. The principle of proportionality applies in cases where the legislation allows for administrative discretion.

It is noteworthy that many CIS countries that have adopted general laws on administrative procedures have consolidated a similar understanding of this principle. So, according to Art. 17 of the Law of the Republic of Azerbaijan 21.10.2005 No. 1036-II "On Administrative Procedures", "measures providing for any interference with the legal status of individuals or legal entities ... must be proportionate to the legitimate aim pursued by the administrative body, necessary and appropriate to achieve this goal in terms of its content, place, time and the circle of people covered"[127]. More laconic is Art. 8 of the Law of the Republic of Armenia of 18.02.2004 “On the Bases of Administration and Administrative Procedures”: “Administrative activity should be aimed at the goal pursued by the Constitution and laws of the Republic of Armenia; the means to achieve them must be suitable, necessary and moderate"[128]. The classical triad of "applicability", "necessity" and "expediency" in Art. 9 of the Law of the Kyrgyz Republic of 29.06.2015 "On the Bases of Administrative Activities

[126] Cohen-Eliya M., Porat I. American method of weighing interests and the German test for proportionality: historical roots // Comparative Constitutional Review. 2011. No. 3 (82). P. 61.
Sometimes this "test" is formulated somewhat differently: the legitimacy of the goal, the suitability of the means for achieving it, proportionality in the narrow sense.
[127] Collection of laws on administrative procedures. Moscow, 2016. P. 9–10.
[128] Op. cit. P. 52.

and Administrative Procedures" is supplemented by an obvious, in essence, thesis about the balance: "The principle of proportionality is designed to guarantee the consideration of a specific case by an administrative body with a reasonable balance between the aim pursued and the means used"[129]. It is noteworthy that Art. 7 of the General Administrative Code of Georgia of 1999, linking proportionality with discretion (which one cannot disagree with), departs from the canonical formulations, concentrating on the human rights aspect, thanks to which the principle of proportionality becomes a kind of analogue of the urgent need for public administration: in the exercise of discretionary powers, an administrative act cannot be issued if the harm caused to the rights and interests of a person protected by law significantly exceeds the benefit for which it was issued"[130]. Finally, the approach of the Latvian legislation, which combined the previous concept of minimizing harm with a detailed model of the appropriateness of the act, is quite original. According to Art. 13 of the Latvian Administrative Procedure Law of 2001, "the benefit that society receives from the restrictions imposed on the addressee must be greater than the restriction of his rights or legal interests... Substantial restrictions on the rights or legal interests of a person are justified only by a significant benefit to society"[131].

2. The principle of proportionality in Russian legislation

For the Russian legal system, the principle of proportionality is new and, it seems, is still underestimated. The fact is that Soviet law denied the idea of judicial control over administrative discretion (for which there were many political and even ideological reasons).

Post-Soviet legislation is characterized by some ambiguity. On the one hand, this principle was enshrined in the current Constitution of the Russian Federation in 1993. According to Part 3 of Art. 55 of the Constitution of the Russian Federation, "the rights and freedoms

[129] Op. cit. P. 269.
[130] Op. cit. P. 190.
[131] Op. cit. P. 320.

of man and citizen can be limited by federal law only to the extent necessary in order to protect the foundations of the constitutional order, morality, health, rights and legitimate interests of others, to ensure the country's defense and security state"[132]. However, one must understand that many provisions of the 1993 Constitution were adopted for the long term and subsequently received unequal development.

References to proportionality can be found in some legislative acts of the Russian Federation. So, according to Art. 18 of the Federal Law of December 29, 2008 N 294-FZ "On the Protection of the Rights of Legal Entities and Individual Entrepreneurs in the Exercise of State Control (Supervision) and Municipal Control", officials of the control agencies during the inspection are obliged “to take into account, when determining the measures taken on the facts of the violations identified, the compliance of these measures of the severity of violations, their potential danger to life, human health, for animals, plants, the environment, cultural heritage (historical and cultural monuments) of the peoples of the Russian Federation, museum items and museum collections...state security, for emergencies of natural and man-made nature, as well as to prevent unjustified restriction of the rights and legitimate interests of citizens, including individual entrepreneurs, legal entities"[133].

This principle is even more extensively enshrined in Art. 9 of the Federal Law of July 31, 2020 N 248-FZ "On State Control (Supervision) and Municipal Control in the Russian Federation"[134]. Firstly, this article also emphasizes the need to ensure the proportionality of the measures chosen to the nature of violations of mandatory requirements, harm (damage) that has been caused or may be caused to values protected by law. Secondly, the requirement to

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[132] The Constitution of the Russian Federation (adopted by popular vote on 12.12.1993) (taking into account the amendments introduced by the laws of the Russian Federation on amendments to the Constitution of the Russian Federation 30.12.2008 No. 6-FKZ, 30.12.2008 No. 7-FKZ, 05.02.2014 No. 2-FKZ, 21.07.2014 No. 11-FKZ, 14.03.2020 No. 1-FKZ) // Rossiyskaya Gazeta - 1993. -- 25 Dec. - No. 237.

[133] On the protection of the rights of legal entities and individual entrepreneurs in the exercise of state control (supervision) and municipal control: Federal Law of December 29, 2008 No. 294-FZ // SZ RF. - 2008. - No. 52 (part 1). - Art. 6249.

[134] Rossiyskaya Gazeta. - 2020. - 5 Aug. - No. 171.

limit state and municipal control only to those control (supervisory) measures and actions that are necessary to ensure compliance with mandatory requirements is enshrined. Finally, the third aspect of proportionality in the interpretation of this law comes down to the following: when organizing and exercising state control (supervision), municipal control, it is not allowed to cause unlawful harm (damage) to controlled persons, their representatives, or property in their possession, use or disposal or their business reputation. Here one can recall the gradual introduction of a risk-oriented approach into Russian public law[135]. However, the real law enforcement practice in the control and supervisory sphere is often very far from the normative wishes[136].

However, in general, unfortunately, in Russian public law the requirement of proportionality is mentioned not so much in positive, as in protective, jurisdictional procedures (for example, for resolving issues of deportation, administrative expulsion of foreign citizens). Thus, the principle of proportionality has not yet become a guiding star for Russian administrative legislation.

3. The reflection of the principle of proportionality in the practice of Russian courts

Thus, the main role in the perception and development of the principle of proportionality belongs to judicial practice. Several trends should be noted here.

First, of all the branches of the judiciary in Russia, the most loyal to the idea of the principle of proportionality is the branch of constitutional proceedings, specifically the Constitutional Court of

[135] On this issue, see, for example: Martynov A.V. Risk-oriented control and supervision: concept, content and main directions of implementation in existing practice // Actual issues of control and supervision in socially significant spheres of society and the state: materials of II All-Russian scientific-practical conference (Russia, Nizhny Novgorod, June 9-10, 2016). Nizhny Novgorod, 2016. P. 50-85.

[136] It is enough to remember the activities of the Russian Federal Agency of Supervision in the Education and Science Sphere, based on the fact that any, even the slightest violation of the requirements in the educational sphere may entail a variety of negative consequences, including suspension, deprivation or refusal to issuance of accreditation to an educational institution.

the Russian Federation. Courts of general jurisdiction and arbitration courts are more restrained in such experiments. A more particular pattern is manifested here: lower and middle-level courts apply the principle of proportionality, as a rule, only after it is "legalized" by the Supreme Court of the Russian Federation for specific categories of cases (for example, administrative expulsion of foreign citizens).

The second regularity lies in the truncated nature of the applied proportionality principle. The German three-step test is either not applied at all, or the courts are content with some of its elements. As an illustration, we present two high-profile decisions of the highest-level courts (the Supreme Court of the Russian Federation and the Constitutional Court of the Russian Federation) to verify the legality of measures to counter the spread of COVID-19.

Lets get started with the decision of the Supreme Court of April 1, 2021 on a class action lawsuit challenging the provisions of a regulatory administrative act adopted by the Chief Sanitary Doctor of the Russian Federation. This act in May 2020 established general requirements for wearing masks and gloves in public places, and also introduced the obligation to maintain a social distance of 1,5-2 meters. The plaintiffs insisted, on the one hand, on the illegality of such restrictions (including appealing to constitutional rights). The second main argument was the lack of a scientific justification for these measures.

Having established the constitutionality and legality of the goal of protecting the health of citizens, as well as the presence of the powers of the sanitary authorities to adopt the relevant legal norms, the Supreme Court of the Russian Federation recognized the contested provisions as legal and dismissed the claim. Without questioning the legality and expediency of such a decision, we note: the court in this case limited itself *only to analyzing the first stage of the test for proportionality (the purpose of the restrictive measure); the establishment of the suitability of measures and their proportionality (in the narrow sense) were not carried out*[137].

[137] Decision of the Supreme Court of the Russian Federation 1.04.2021 N AKPI21-78 "On the refusal of a claim for recognition of clause 4.4 of the Sanitary and Epidemiological Rules SP 3.1.3597-20 "Prevention of a new coronavirus infection

The second analyzed decision was made by the Constitutional Court of the Russian Federation on December 25, 2020 as part of the verification of the constitutionality of the regulatory administrative act of the governor of the Moscow region. The contested provisions have introduced a number of rather strict restrictions within the framework of the lockdown since March 2020 in the specified region, including a ban on leaving places of residence without good reason. The Constitutional Court first predictably ascertained the constitutionality of the goal of protecting publicly significant values (including the health of citizens). *And then there was a "mutation" of the proportionality test: the Court actually avoided analyzing the suitability of the contested measures and immediately proceeded to analyze their proportionality in the narrow sense.*

Regarding the latter, the Court stated: restrictions within the framework of the lockdown do not contradict the Constitution of the Russian Federation for the following reasons. Firstly, in view of "the objective need for a prompt response to the extraordinary (unprecedented) danger of the spread of coronavirus infection (COVID-2019)". Secondly, the introduced measures were not of the nature of an absolute prohibition, allowing the possibility of movement of citizens in the presence of valid circumstances. Finally, thirdly, the Court emphasized the short duration of these measures (canceled already in June 2020)[138].

It is noteworthy that at the same time, the Constitutional Court of the Russian Federation emphasized: *the implementation of discretion is not only a right, but also an obligation of both law enforcement bodies and the legislator* (because the legislator cannot evade regulation of the problem that has arisen, citing the lack of

(COVID-19)", approved by the decree of the Chief State Sanitary Doctor of the Russian Federation of 05/22/2020 N 15"// SPS "ConsultantPlus".

[138] Decision of the Constitutional Court of the Russian Federation of December 25, 2020 N 49-P "In the case of checking the constitutionality of subparagraph 3 of paragraph 5 of the resolution of the Governor of the Moscow Region "On the introduction in the Moscow Region of a high alert regime for the management bodies and forces of the Moscow Regional emergency prevention and response system and some measures to prevent the spread of a new coronavirus infection (COVID-2019) in the Moscow region"in connection with the request of the Protvinsky City Court of the Moscow Region" // SPS "Consultant-Plus".

necessary legal provisions). Thus, the Court actually introduced into Russian administrative law the idea of refusing of discretion as a variant of the error of discretion.

4. Closing remarks

So, the Constitutional Court of the Russian Federation, verifying the legality of restrictive lockdown measures, went further than the Supreme Court of the Russian Federation along the path of applying the proportionality test. However, the depth and completeness of judicial review of discretionary acts, even in this case, is inferior to the best foreign practices. In fact, the courts predominantly argue about fairness, reasonableness, acceptability (or, accordingly, unfairness, unreasonableness, unacceptability) of certain measures. Paradoxically, Russian courts are now closer to the Anglo-Saxon concept of "natural justice" (rationality, "Wednesbury test"). The reason for this is not the similarity of our legal systems (as the Russian legal system belongs to the continental European legal tradition), but the underdevelopment of the administrative and legal doctrine and judicial practice on this issue.

Russian courts (and to an even greater extent, the public administration) should use all legal tools designed to ensure the legality, validity and clarity of decisions made for citizens. The need for this has become extremely aggravated in a situation of uncertainty caused by the increasingly complex and large-scale challenges faced by both humanity in general and Russian society in particular. The COVID-19 coronavirus epidemic continues to raise many questions that do not have obvious answers (for example, related to the appropriateness and limits of possible coercion in the framework of vaccination). Studying the latest scientific data, weighing opposing interests, proper justification of administrative and judicial acts should be covered and systematized within the framework of the implementation of the principle of proportionality. Thus, it is this very principle that should play an important role in the rationalization and humanization of public administration. Which, of course, will require a lot of effort, including the Russian doctrine of administrative law.

THE PRINCIPLE OF PROPORTIONALITY IN ADMINISTRATIVE PROCEDURES, IN ACCORDANCE WITH THE NORMS OF ADMINISTRATIVE PROCEDURAL AND PROCESS-RELATED CODE OF THE REPUBLIC OF KAZAKHSTAN

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The Constitution of the Republic of Kazakhstan, approved by the republican referendum on August 30, 1995, ensures universally recognized human rights and freedoms while also guarding citizens' and legal entities' legitimate interests. Solving concerns of legal control of administrative procedures is a vital task at the moment.

Thus, on 29 June 2020, the Administrative procedural and process-related code of the Republic of Kazakhstan (APPC) was enacted, which comes into force on July 1 of this year to provide more effective protection of citizens and legal entities rights and freedoms in their interactions with executive authorities.

The purpose of APPC is to determine the legal status of subjects participating in administrative procedures and the administrative process, including the necessity for the legal regulation of administrative procedure stages and defining their fundamental principles.

Because the subject of APPC regulation encompasses such a broad spectrum of legal relationships, let us get straight to the basics of administrative procedures. The following 12 principles of administrative procedures and administrative proceedings are established in Chapter 2 of the APPC: Principle of lawfulness; Principle of fairness; Protection of rights, freedoms, and legitimate interests; Principle of proportionality; Restrictions of the exercise of administrative discretion;

Principle of the primacy of the rights; Protection of the right to trust; Prohibition of abuse of formal requirements; Presumption of

credibility; The active role of the court; Reasonable time for administrative proceedings; Binding nature of judicial rulings.

Due to time constraints, I would like to go through the proportionality concept in greater depth.

According to Article 10 of the APPC, when using administrative discretion, an administrative body or an official must establish a fair balance between the interests of the administrative procedure participant and society. In this case, the administrative act, administrative action (inaction), must be proportionate, that is, it must be appropriate, necessary, and proportional.

The principle of proportionality requires a comparison of the administrative measures implemented with the actual circumstances. This idea is applicable at all stages of the administrative procedure, including the proving stage.

The principle of proportionality asserts, as a general principle of balancing, that «the subjective and public rights of a citizen are restricted only if these limits are required to accomplish the aim of the law and to the extent that citizens are not unduly burdened»[139]. That is, the proportionality principle basically indicates the possibility of limiting an individual's rights and freedoms in highly exceptional cases, provided that such limits are not excessive.

Every sovereign authority is legally required to follow the principle of proportionality. It must find a balance between conflicting interests and freedoms, providing that none is diminished more than necessary.

Human rights should be seen not only as a means of accomplishing any benefit but also as a value in and of itself, provided that adequate living conditions and assurances are provided. In this instance, the involvement of the state is not only significant but perhaps most considerable and crucial.

Rights and liberties cannot be absolute; they exist within a free framework that is set by the state. Mutual freedom of people inherently involves reciprocal limits, without infringing on citizens' equality.

The principle of proportionality of constraints on people's rights is recognized as the principle of proportion or the balancing principle

[139] B. Reinhold Zippelius, Das Wesen des Rechts, 6. Aufl., Kap. 8 d.

in scientific literature. According to some, the content of the principle of proportionality as a universal instrument of fundamental rights and freedoms preservation comprises three core elements for balanced limitation of human rights:

1) the validity of the restrictions - the presence of rights and interests that must be protected, as well as a clear indication of the correlation between the aims and means of the restrictions;

2) the importance of the restriction's objectives - the significance of the protected rights is that they are fundamental rights, human freedoms, and related interests;

3) compliance with the degree of restriction of rights and public awareness of the importance of the purposes of the restriction or the significance of the protected rights.

Furthermore, according to Part 2 of Article 10 of the APPK, administrative actions and administrative action (inaction) are appropriate, necessary, and reasonable in the following cases:

- administrative acts are acceptable to accomplish the goal formed by the laws of the Republic of Kazakhstan;

- administrative acts, administrative action (inaction), are considered necessary if they restrict the rights, freedoms, and legitimate interests of administrative procedure participants to the least extent possible.

- administrative acts, administrative action (inaction) is deemed proportionate if the public benefit obtained as a result of restrictions on a participant's rights, freedoms, and legitimate interests is higher than the damage caused by these restrictions;

- administrative acts, administrative action (inaction) is considered proportional if the public benefit obtained as a result of restrictions on the rights, freedoms and legitimate interests of a participant in the administrative procedure is greater than the damage caused by these restrictions[140].

Currently, one of the most crucial «cross-cutting» principles, including when used in administrative proceedings, is the principle of proportionality. The principle of proportionality can be defined as a combination of the legality and expediency principles (rationality).

[140] Administrative Procedural and Process-related Code of the Republic of Kazakhstan dated June 29, 2020 No. 350-VI

Subject to the principle of proportionality, the administrative operations of state bodies in their interactions with individuals and legal entities should be limited to the objectives mentioned in the Constitution and legislation. In this case, officials' decisions and acts are legitimate and publicly essential only if the harm to private property, treasury expenses, and social repercussions of their commission do not exceed the effect they should generate. For instance, if an executive, when making a decision, fails to consider citizens' fundamental rights and freedoms, as well as the norms established by the Constitution, and makes a decision that breaches citizens' rights and violates the fundamental principles of the rule of law, the decision can be decided to cancel by a court. So, when the local executive body decides on which streets and at what time period a rally or demonstration should take place, the purpose of the law is, on the one hand, to ensure public safety and the normal operation of road transport during such events, and, on the other hand, it must necessarily promote the implementation of citizens' constitutional right to freely express their will. In other words, it is vital to consider not only the aims of the law that benefit the state (for instance, the protection of public order), but also those that benefit citizens or legal entities (for example, the right of citizens to freely express their will).

When implementing the principle of proportionality in administrative law, three stages must be followed (steps).

The first step is to determine the legality of the selected funds.

As a result, according to paragraph 1 of Article 39 of the Constitution of the Republic of Kazakhstan, human and civil rights and freedoms can be restricted only by laws and only to the extent required to protect the constitutional order, public order, human rights and freedoms, public health and moral values.

At the second stage, the appropriateness and need of these means to accomplish the purpose must be verified. That is, measures intended at restricting individuals' or legal entities' rights and freedoms must be appropriate and required to achieve this purpose.

The third stage (proportionality in the restricted sense) establishes the proportionality of actions performed to the achieved goal, their importance, and the absence of an undue burden on an individual or legal entity.

In this respect, the administrative body must guarantee that the actions are neither too «severe» nor too «gentle». That is, on the one hand, they do not impose undue limits on people's rights, but on the other hand, they allow for the intended outcome.

Furthermore, it is vital to highlight that the proportionality principle only applies in circumstances where the legislation provides for administrative discretion. In national legislation, in contrast, administrative discretion is frequently represented by the terms «may», «perhaps», «has the right», etc.

The principle of proportionality can be traced back to the beliefs of the ancient Greeks, who related the concept of justice with the category of uniformity[141]. Hence, in this case, you might quote Aristotle, the great Greek philosopher, who said, «The just is proportional, and the unjust is what breaches proportionality».

In foreign states, the principle of proportionality plays an important role in the decision's reasoning and is commonly applied in international judicial practice.

The European Court of Human Rights, which frequently alludes to it in its practice, was significantly responsible for the propagation of the principle of proportionality across the European continent.

The European Constitutional Courts have adopted the European Court's reasoning and have started to systematically use the principle of proportionality to defend human rights at the national level.

Nowadays, the proportionality principle is used by administrative and judicial authorities in the majority of European countries (Germany, Austria, Belgium, Greece, Denmark, Great Britain, Ireland, Italy, Spain, Luxembourg, Netherlands, Portugal, Russia, France, and Switzerland), as well as the European Union Court of Justice.

Comparable methods are utilized at the highest courts of Argentina, Brazil, Israel, India, Canada, Colombia, Mexico, Peru, USA, Chile, South Africa, South Korea, and other countries, as well as the Inter-American Court of Human Rights[142].

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[141] https//onlinezakon.kz/document/doc_Id39242397

[142] Bazhanov A.A. Problems of implementing the principle of proportionality in judicial practice 2018. Proceedings of the Institute of State and Law, No. 3. P. 63-64

As a corollary, the principle of proportionality is now one of the fundamental constitutional principles as well as a principle of international law.

However, despite its broad use, the principle of proportionality is increasingly being questioned in practice. Moreover, the application of the proportionality principle is plagued with a variety of issues induced by both the nature of the verification procedure itself and its inadequately accurate implementation.

In general, the principle of proportionality or proportionality in the course of administrative actions of public entities in interactions with citizens and private legal entities should try to accomplish the objectives specified by the Constitution and legislation.

Simultaneously, these decisions and actions are only legitimate and required if the damage to private property, the expenses to the government budget, and the social repercussions of their implementation do not outweigh the effect they should bring.

If a decision was made by an official who did not sufficiently consider the constitutionally enshrined fundamental rights and freedoms of citizens and therefore made a decision that disparately violates a citizen's rights and contravenes the fundamental principles of the rule of law, the decision should be forced to cancel by the court.

As an example, if an executive, when making a decision, fails to consider citizens' fundamental rights and freedoms, as well as the norms established by the Constitution, and makes a decision that breaches citizens' rights and violates the fundamental principles of the rule of law, the decision can be decided to cancel by a court. Thus, when the local executive body decides on which streets and at what time period a rally or demonstration should take place, the purpose of the law is, on the one hand, to ensure public safety and the normal operation of road transport during such events, and, on the other hand, it must necessarily promote the implementation of citizens' constitutional right to freely express their will.

In other words, it is vital to consider not only the aims of the law that benefit the state (for instance, the protection of public order), but also those that benefit citizens or legal entities (for example, the right of citizens to freely express their will).

In the case of a judicial appeal, the court will only be able to ascertain that the decision was made with the proper use of administrative discretion if the weight and importance of each of these considerations are properly considered[143].

Summarizing the findings of a comparative analysis of the application of the principle of proportionality in administrative processes in the legislation of the Republic of Kazakhstan and overseas nations, it tends to follow that this principle, codified in the APPC, is ushered into line with the general progressive provisions of international practice.

[143] Gabbasov A. Administrative discretion and administrative justice in the Republic of Kazakhstan // https://online.zakon.kz/Document/?doc_id=31153141#pos=6;-106

PROPORTIONALITY AND REASONABLENESS REVIEW OF ADMINISTRATIVE ACTION: COMPARATIVE LAW REMARKS

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Abstract. The principle of proportionality is one of the criteria guiding the exercise of administrative discretionary powers and, at the same time, one of the limits set on these powers. Together with proportionality, another fundamental principle of administrative law is reasonableness, which plays a key role for judicial review of administrative discretion. The following paper provides a general comparative overview of these two principles.

Keywords: principles of administrative law, proportionality, reasonableness, administrative discretion, judicial review.

The theme of proportionality in administrative law is related to the wider issue of discretion of the public administration[144]. Indeed, proportionality is one of the criteria guiding the exercise of administrative discretionary powers and, at the same time, one of the limits set on these powers. Consequently, before focusing on proportionality, it is appropriate to briefly address the concept of administrative discretion[145].

One way of approaching this concept is to analyze the administrative decision-making process. In this last regard, it is not superfluous to remember that administrative procedures can be divided in four phases[146]. The first one is the initiative phase, which opens the administrative procedure. The second phase is the investigative one, during which the administrative body ascertains

[144] See: Galetta D. U. Discrezionalità amministrativa e principio di proporzionalità // Rivista italiana di diritto pubblico comunitario. 1994. No. 1. P. 142-155.
[145] See: De Falco V. Administrative Action and Procedures in Comparative Law. The Hague: Eleven International Publishing, 2018. P. 251-319.
[146] Ferrari G. F. Introduction to Italian Public Law. Milan: Giuffrè, 2008. P. 109-110. For an excellent comparison of Russian and foreign approaches to this topic see: Давыдов К. В. Административные процедуры: российский и зарубежный опыт. Новосибирск: Академиздат, 2020. С. 176-214.

and evaluates the elements of fact upon which its decision will be grounded. The third phase is the constitutive one, in which the administrative body adopts its decision. Finally, the fourth phase is the integrative one, and it takes place only if additional requirements must be met so that an administrative decision can legitimately produce its effects. These additional requirements range from control by another body (for example, an accounting court), to particular means of making the knowledge public (for example, the publication of a legal normative act) or to the obligation of communicating the decision to its addressee.

The issue of administrative discretion concerns specifically the third phase, that is to say, the constitutive phase, in which the decision is taken. In taking their decisions, administrative bodies can be granted with either non-discretionary or discretionary powers. In the first case, the power is of a bounded nature, and the administrative body must only ascertain the facts foreseen by the law as grounds for taking the decision. In other words, the administrative body has no possibility of choosing the contents of its decision.

On the contrary, in the case of discretionary powers, administrative bodies must not only ascertain the facts foreseen by the law, but also choose the contents of their decisions. More precisely, they must establish what is the best choice in view of the public interest. Indeed, each discretionary power is conferred to a specific administrative body in order to satisfy a specific public interest, and this interest is the scope to which the discretionary power must aim. This means that the fundamental nature of administrative discretion consists in choosing, amongst many potential decisions, the one that better suits the public interest[147].

The main question is what happens, if the addressee of the administrative decision challenges it in court. Is the court empowered to review the choice of the administrative body? And if so, what are the limits of this judicial review?

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[147] Despite the specificity of national approaches, administrative discretion is generally seen as a margin of choice that is limited by the law, including general legal principles. In the Italian legal experience, this margin of choice is specifically conceived as the balance of public and private interests. See: Ченерелли А. Административные процедуры в итальянском праве // Вестник Университета им. О. Е. Кутафина (МГЮА). 2019. № 6 (58). С. 168-169.

Before answering these questions, we should clarify a point that may be confusing. From administrative discretion we have to distinguish what in some countries is called "technical discretion". Despite the name, this concept has nothing to do with discretion, and refers to cases in which the grounds for the administrative decision are factual circumstances that must be evaluated through recourse to technical or scientific knowledges, such as for instance medicine, biology, economics, etc. Here there is not a choice, but only an evaluation of facts.

While administrative discretion concerns the constitutive phase, that is to say, the phase in which administrative body chooses the contents of its decision, technical discretion concerns the investigative phase, that is to say, the phase in which the administrative body ascertains and evaluates the factual grounds for that decision. This means that, despite its name, technical discretion is not a real discretion. Nevertheless, in many countries, courts must respect the expertise of administrative bodies and are not empowered to fully review technical discretion and to substitute their evaluation of facts to the evaluation of facts made by administrative bodies[148].

With regards to administrative discretion, as we said, the main question concerns the limits of judicial review. Perusing the comparative panorama, it is possible to note that, in most countries, courts cannot fully review administrative discretion or, more precisely, the choice taken by the administrative body granted with a discretionary power. There are certain aspects that fall outside of the court's remit: they concern the expediency of administrative choices. In other words, courts cannot review the expediency of administrative decisions: the judge cannot put himself in the place of the administrator and decide whether the challenged administrative decision is actually expedient, or what should be the most expedient administrative decision. The reason resides in the nature of judicial

[148] It should be noted that the Russian case is partially different, because here, according to the Code of Administrative Court Proceedings and to the Commercial Procedure Code, the burden of proving the grounds of the challenged administrative decision falls to the organ that issued it. See: Ярковой С. В. Законность и обоснованность административной правоприменительной деятельности // Вестник Омской юридической академии. 2017. № 1 (14). С. 85.

review, which is usually a legal review, that is to say, a review based on the law, while expediency is not a legal concept.

Courts can review only the legality of administrative decisions. However, the concept of legality includes not only legal norms of a specific and punctual nature, but also general legal principles such as proportionality, reasonableness, impartiality, etc.

These principles are often implicit or can be derived from constitutional provisions on equality, non-discrimination or fundamental rights of the citizens through the interpretation of these provisions. For instance, the legal basis of the principle of reasonableness is usually found in those constitutional provisions that foresee the principles of non-discrimination and equality of the citizens before the law. Not by chance, for example, a typical violation of the principle of reasonableness is the disparity of treatment[149].

Reasonableness and proportionality require an administrative body to take in account not only the specific public interest that is the scope of its administrative power, but also the private interests the administrative decision can affect. In this regard, it should be noted that administrative legal relationships are often bilateral, because there are only two parts, i.e. the administrative body and the private addressee of the administrative decision. This is the case of administrative sanctions and disciplinary measures: here, the administrative body must take into consideration the interest of the private addressee, compare it with the public interest and take the decision that affects the interest of the addressee only to such an extent to which it is necessary for the satisfaction of the public interest.

In other cases, however, the situation appears more complicated, because the administrative legal relationship is multilateral and there are more than two parts. This happens when the administrative decision can affect more than one private person. For instance, this is the case of certain licensing administrative procedures, because the administrative decision may be favorable for the applicant and, at the same time, negatively affect other persons. In these situations, the

[149] See: Eccesso di potere e altre tecniche di sindacato sulla discrezionalità. Sistemi giuridici a confronto / ed. by S. Torricelli. Turin: Giappichelli, 2018. P. 106.

administrative body must find that solution which is the best compromise between all these different and potentially conflictual interests.

Finally, it is not superfluous to spend few words on the connection between the principles of proportionality and reasonableness, on one side, and procedural guarantees such as the right to participate in administrative proceedings and the duty to motivate administrative decisions, on the other side. In most countries, even before enacting a general statute on administrative procedures, these guarantees were recognized by courts on the basis of the principles of proportionality and reasonableness. For instance, the motivation of an administrative decision is the most important mean to review its proportionality and reasonableness and to prevent misuse of discretion. On these grounds, courts began to hold contrary to aforementioned principles, and therefore unlawful, all the administrative decisions that lacked motivation. Thus, judicial practice created a general duty to motivate administrative decisions, deriving it from the principles of proportionality and reasonableness, even before the existence of a general legislative framework regulating administrative procedure. This is only another example of the enormous relevance of proportionality and reasonableness for administrative law and its development[150].

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ADMINISTRATIVE DISCRETION AND THE PRINCIPLE OF PROPORTIONALITY IN RUSSIA (IMMIGRATION ISSUES)

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Abstract. The principle of proportionality is part of the Constitution of Russia, it is used by the Constitution Court and sometimes the Supreme Court. However, this principle is still not common in our legal system and the lower courts still rarely apply it. Nevertheless, there are some spheres where proportionality was implemented more than other ones and immigration stands out among them. Actually, Russian judges prefer not to apply the test of proportionality in its strictly German manner, most likely proportionality is understood as a balance of competing interests. It should be added that the three-stage test is gradually taking root in practice, and in the future, it may become a general rule.

Keywords: administrative law, proportionality, immigration, removal of foreign citizens.

Russian administrative law has two faces. On the one hand, there is a pretty solid base including old imperial traditions with their French and especially German administrative law doctrines[151] which were preserved even in the Soviet period and that have survived to nowadays. On the other hand, politics has always been important and has defined the administrative law content. For example, there were two times when administrative law was prohibited by the Soviet authorities (1918 – 1921 and 1929 – 1938)[152]. As a result, many administrative law constructions have come into our legal system later than elsewhere. The principle of proportionality is a good

[151] It is so seen in Russian old study books where German legal concepts were an ordinary situation. For instance, prof. Ivan Tarasov used these terms as Polizeistaat, Polizeistadt, inner Verwaltungsrecht, Verwaltungslehre, sociale Verwaltungslehre). Тарасов И.Т. Очерк науки полицейского права. М.: Печатня С.П. Яковлева, 1897. С. 2 – 4.

[152] Бахрах Д.Н. Административное право России. М.: Изд-во Норма (ИГ Норма-Инфра-М), 2000. С. 54.

example of this conclusion and the relationship between proportionality and administrative discretion is a very important issue now. Immigration cases are very sensitive for officials and judges, as they are entangled in a political web of mutual agreements and political opinions. This article consists of several parts: (1) general opinion on administrative discretion in Russian legal politics, (2) how Constitutional Court judgments on immigration issues influenced the implementation of proportionality, (3) proportionality between judicial practice and legislation, (4) the principle of proportionality in immigration cases now.

1. Administrative discretion in Russian legal politics

Russian official opinion on administrative discretion concentrates on the negative dimension of this administrative phenomenon. Politicians announced the main idea that discretion is not useful for the authorities as it is a cause of corruption. So, our legal policy has to be constructed to exclude discretionary powers from sources of administrative law. For instance, the anti-corruption law (2008. N 273-ФЗ) has presented this opinion clearly[153]. Among the anti-corruption measures in Art. 6 of the Law have been envisaged anti-corruption expertise in relation to all laws, regulations and also their draft projects. This requirement has been disclosed by the government decree (2010. N 96) on the anti-corruption expertise methodology[154], which demands the exclusion of broad discretionary powers; and the non-use in legal norms of the phrase that some public bodies have the right to do anything relating to persons and organisations. As a result, our state spent a lot of energy opposing administrative discretion. However, to be honest, the official term

[153] Федеральный закон от 25.12.2008 № 273-ФЗ (ред. от 26.05.2021) «О противодействии коррупции» // Собрание законодательства РФ. 2008. № 52 (ч. 1). Ст. 6228.

[154] Методика проведения антикоррупционной экспертизы нормативных правовых актов и проектов нормативных правовых актов, утверждена Постановлением Правительства РФ от 26.02.010 № 96 (в ред. 10.07.2010) «Об антикоррупционной экспертизе нормативных правовых актов и проектов нормативных правовых актов» // Собрание законодательства РФ. 2010. № 10. Ст. 1084.

has been understood as a huge or extraordinarily broad discretion of the executive bodies. This is what our legislator decreed that all other bodies should fight against. Actually, now Russian rule-makers are often rooting out any form of discretion among officials. Of course, this work is very hard and unrewarding because it is like fighting the windmills of Don Quixote (a famous character from Cervantes). Fighting with discretionary powers, they can never win.

If public policy has removed administrative discretion from the legal system, Parliament does not aim to establish laws on discretionary administrative powers. But these powers exist, and this situation does not depend on the will of the state. There are a lot of cases in which administrative bodies must apply discretion, but then these cases will be contested in the courts, and the judges do not have clear legal norms to make their decisions against discretionary administrative acts. To a certain extent, a way out of this situation was found using the principle of proportionality, and immigration issues are a good example to demonstrate it. This will be especially noticeable if the cases of immigration deportation are analysed.

2. The Constitutional Court and the principle of proportionality in immigration cases

Proportionality was not a well-known principle in the Soviet legal system, some academics knew about it, but rule-makers preferred not to note this principle; their favourite principle of administrative law was legality, and only legality. After the Constitution of 1993 was established, the Russian legal system was changed and courts had to look for new ways of making judgments. My opinion is that administrative discretion and deportation have become the first step on a long path of implementation of proportionality into Russian administrative law. The first word was announced by the Constitutional Court, because several of its decisions on immigration cases contained proportionality.

The very first immigration opinion of this Court was announced in the case of Yahya Dashti Gafur on 17th of February 1998[155]. This

[155] Постановление Конституционного Суда РФ от 17.02.1998 № 6-П «По делу о проверке конституционности положения части второй статьи 31 Закона СССР

non-citizen appealed, as his immigration detention lasted two months, and then he was deported to Sweden. Mr. Gafur protested against the rule allowing the period of immigration detention which would be sufficient for the organisation of his deportation. This means that he made a declaration against the legal uncertainty of the term and unjustified discretionary power. At the time, the word "proportionality" was absent from the court's vocabulary, but the judges' reasoning was close to the sense of proportionality. As a result, the Court noted Art. 55 (3) of the Constitution and came to its conclusion on the balance between the constitutional goal and restrictions of human rights. There were a few statements for this legal position: (1) the immigration detention term required for the removal of an illegal foreigner should not be the grounds for uncertainty; (2) this conclusion is right even if such a removal is delayed due to no state allowing the admission of this foreigner; (3) otherwise, immigration detention turns into a form of punishment that would be unauthorised and unconstitutional.

The next judgment of the Constitutional Court on an immigration issue was taken only in 2006; it was the case of a citizen of Georgia, Mr. Kakhaber Todua (the judgment N 55-O)[156]. Mr. Todua was in Saint Petersburg and had a wife and a small child, who were Russian citizens. He asked the police about a temporary residence permit, which is an official document giving the right to reside for three years, and the police officer rejected his request due to the fact that Mr. Todua had been fined for the violation of immigration rules earlier. In addition, he also broke the legal limit for applying for such a permit. In these circumstances, Todua's removal from Russia could be a reality because he was deprived of the ability to have a legal document in order to stay in the country, and he was a violator of immigration rules. This case was in all the

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от 24 июня 1981 года "О правовом положении иностранных граждан в СССР" в связи с жалобой Яхья Дашти Гафура"» // Собрание законодательства РФ. 1998. № 9. Ст. 1142.

[156] Определение Конституционного Суда РФ от 02.03.2006 № 55-О «По жалобе гражданина Грузии Тодуа Кахабера на нарушение его конституционных прав пунктом 7 статьи 7 Федерального закона "О правовом положении иностранных граждан в Российской Федерации"» // Собрание законодательства РФ. 2006. № 20. Ст. 2213.

courts and it even appeared in the Constitutional Court. The Court confirmed that the power of the police officer was a matter of administrative discretion, as the law did not have any norms for similar cases; Mr. Todua was a violator of immigration rules, but there were the interests of his family, which should be protected by the Constitution. The main part of the legal position was proportionality, which was based on Art. 55 (3) of the Constitution and Art. 8 of the European Convention on Human Rights. Besides the principle of proportionality, the Court referred to the principle of fairness.

In fact, the Constitutional Court weighed the public interest and individual interests of both Mr. Todua and his family. Russian judges also used some judgments of the European Court of Human Rights (Beldjoudi v. France, 1992, Berrehab v. Netherlands, 1991, Moustaquim v. Belgium, 1998, Dalia v. France, 1996 and others). It should be noted, that the Court did not apply the classic three (or four) -tiered proportionality test; the Court only limited itself to weighing the interests. This judgment included reasoning similar to that in the Mr. Gafur case, but it was more developed and Russian official opinion on the principle of proportionality in immigration matters was finally formed.

Thereafter, this legal position became the basis for all courts and officials. In part, this was a success for many foreign citizens with Russian families. There was another side; the Court showed just one version of proportionality for one case, but it did not show a simple way for all future cases which would be suitable and understandable for all judges and officials. As a result, the gates were opened for abuse of the right. The presence of a Russian family made it possible for a foreign citizen to stay in Russia, even if he violated immigration rules. This has become the background for a large number of fictitious marriages[157].

[157] Some scholars noted that there were no effective legal measures against fictitious marriages in Russia and in any case, it is very difficult to fight them. See, Сандугей А.Н. Фиктивный брак как способ незаконной миграции // Международный журнал конституционного и государственного права. 2018. № 3. С. 39 – 45; Рязанцев С.В. Брачное поведение женщин-мигранток из стран Центральной Азии // Женщина в российском обществе. 2021. № S. С. 145 – 146.

Hereinafter, the Constitutional Court adhered to this position, the three-tiered proportionality test was never applied, but sometimes the content of this principle was changed. So, the case of a Ukrainian citizen H. was very interesting and important for the implementation of proportionality in both the courts and the executive bodies (judgment of 2006 N 155-O)[158]. This foreign citizen lived in Moscow with his wife and child, contracted AIDS, and according to the law in force at that time, he had to leave Russia. The Constitutional Court took into account the following circumstances: (1) this man had a Russian family; (2) this man had a very dangerous illness, but he was not a threat to other people; (3) he was checked by the hospital and he followed the doctor's recommendations; (4) he had not been punished before by the Russian authorities. Reasons 1 and 4 have already been known and used by the authorities for a relatively long time, but reasons 2 and 3 have been presented for the first time. Finally, this Ukrainian citizen stayed in Russia and this legal position became the main one for courts and officials, and was developed by them.

For example, another person got AIDS and he was allowed to remain in Russia. The regional court remarked that this person was young (21 years old) and he was not a threat to people, and it is important that he did not have any place of residence outside Russia. The court noted that if the foreigner appeared in his homeland, where he had no relatives, he would find himself in a much worse position than in Russia. And he needed the care of relatives living in Russia, so he was allowed to remain in Russia and deportation was not possible[159]. This case was one of the successful examples showing

[158] Определение Конституционного Суда РФ от 12.05.2006 № 155-О «По жалобе гражданина Украины Х. на нарушение его конституционных прав пунктом 2 статьи 11 Федерального закона "О предупреждении распространения в Российской Федерации заболевания, вызываемого вирусом иммунодефицита человека (ВИЧ-инфекции)", пунктом 13 статьи 7 и пунктом 13 статьи 9 Федерального закона "О правовом Положении иностранных граждан в Российской Федерации"» // Вестник Конституционного Суда РФ. 2006. № 5.

[159] Определение Свердловского областного суда от 02.10.2008 по делу № 33-7811/2008.

how the principle of proportionality can be implemented by lower courts.

By the way, in 2010, the Constitutional Court also clarified its position on the AIDS-infected foreigners living in the country. The Court mentioned that executive bodies and courts should have the discretionary power to review the circumstances of each case based on humanitarian considerations, if there was a conflict between equal values (judgment of 2010 N 1244-O-O)[160]. This decision included the legal opportunity to use any humanitarian circumstances which would be able to overcome negative statutory requirements, and not only the family situation. The principle of proportionality should be a due diligence measure in these cases and not allow officials to be unjust. In 2013, the Court returned to the AIDS issue and confirmed this position again[161]. The finale and more detailed legal opinion of AIDS-infected foreigners was made in the judgment of 2015 N 4-П[162], and then extended to cases with other dangerous diseases[163].

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[160] Определение Конституционного Суда РФ от 30.09.2010 N 1244-О-О «Об отказе в принятии к рассмотрению жалобы Барышевой Татьяны Васильевны, Леонтьевой Ирины Александровны, Малетиной Раисы Владимировны и Мельника Игоря Николаевича на нарушение их конституционных прав положениями пункта 1 статьи 7 и пункта 1 статьи 9 Федерального закона "О правовом положении иностранных граждан в Российской Федерации", а также Указа Президента Российской Федерации "О дополнительных мерах социальной поддержки лиц, осуществляющих уход за нетрудоспособными гражданами"» // Вестник Конституционного Суда РФ. 2011. № 2.

[161] Определение Конституционного Суда РФ от 04.06.2013 № 902-О «По жалобе гражданина Республики Молдова Х. на нарушение его конституционных прав положениями частей третьей, четвертой и седьмой статьи 25.10 Федерального закона "О порядке выезда из Российской Федерации и въезда в Российскую Федерацию"»

[162] Постановление Конституционного Суда РФ от 12.03.2015 № 4-П «По делу о проверке конституционности положений части четвертой статьи 25.10 Федерального закона "О порядке выезда из Российской Федерации и въезда в Российскую Федерацию", подпункта 13 пункта 1 статьи 7 Федерального закона "О правовом положении иностранных граждан в Российской Федерации" и пункта 2 статьи 11 Федерального закона "О предупреждении распространения в Российской Федерации заболевания, вызываемого вирусом иммунодефицита человека (ВИЧ-инфекции)" в связи с жалобами ряда граждан» // Собрание законодательства РФ. 2015. № 12. Ст. 1801.

[163] Определение Конституционного Суда РФ от 29.09.2015 № 1848-О «Об отказе в принятии к рассмотрению жалобы гражданина Украины Токара Ивана

Around 2012-2013, the Constitutional Court began to consider a more complex proportionality construction including two elements of this test. Thus, the Court announced that there was the principle of proportionality, which required the adequacy and proportionality of the legal means used. The state should use only necessary measures based on constitutional values[164]. But the Court often put a shorter formula into its judgments; it has pronounced the "necessity and proportionality" of the restriction of human rights of foreign citizens[165]. In this situation, the Court followed a stricter framework of the proportionality doctrine and, although not clear, demonstrated the two- and possibly three-tiered test. Actually, the Court still did not describe what it means by the "necessity" and "proportionality" of restriction; there is only a position of "legitimate purpose" for negative administrative acts, which is a relatively clear concept, and the correlation between legitimate purpose and legal measure can also be seen in the court's judgments.

It could seem that there are all of the stages of the proportionality test, as they are presented in German public law, that is, the checking of legitimate purposes, of suitable measures, of

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Ивановича на нарушение его конституционных прав положением части четвертой статьи 25.10 Федерального закона "О порядке выезда из Российской Федерации и въезда в Российскую Федерацию"»

[164] Определение Конституционного Суда РФ от 25.01.2012 № 179-О-О «По жалобе гражданки Республики Таджикистан Алиевой Мавлюды Алиевны на нарушение ее конституционных прав подпунктом 14 пункта 1 статьи 7 и пунктом 2 статьи 31 Федерального закона "О правовом положении иностранных граждан в Российской Федерации"»

[165] Определение Конституционного Суда РФ от 05.03.2014 № 628-О «Об отказе в принятии к рассмотрению жалобы гражданина Китайской Народной Республики Чжэн Хуа на нарушение его конституционных прав частью 1.1 статьи 18.8 Кодекса Российской Федерации об административных правонарушениях»; Постановление Конституционного Суда РФ от 17.02.2016 № 5-П «По делу о проверке конституционности положений пункта 6 статьи 8 Федерального закона "О правовом положении иностранных граждан в Российской Федерации", частей 1 и 3 статьи 18.8 Кодекса Российской Федерации об административных правонарушениях и подпункта 2 части первой статьи 27 Федерального закона "О порядке выезда из Российской Федерации и въезда в Российскую Федерацию" в связи с жалобой гражданина Республики Молдова М. Цуркана» // Собрание законодательства РФ. 2016. № 9. Ст. 1308.

necessity, and of proportionality in its narrow meaning. However, such a conclusion would be premature. It would be more correct to say, probably, there is the balancing idea (the balancing between legitimate purpose and administrative measures; the balancing between constitutional values which are contradicting to each other) rather than the proportionality doctrine in its strict sense; however, separate elements of this doctrine started to form. Although, the lower the court or executives, the fewer signs of proportionality which appear when judgments or administrative acts are taken. The legislative position is still popular among judges and officials, and they are waiting for legal rules with directions about what the principle of proportionality is.

3. Proportionality between judicial practice and legislation (immigration examples)

The legislature has taken note of proportionality and has tried to partially provide an answer to questions about the balance between several immigration issues. Firstly, it touched on the question of foreigners infected with AIDS living in Russia. Some judgments of the Constitutional Court, and especially its decision of 2015 N 4-П, engendered a legislative reaction and new rules were incorporated into the Law on the prevention of the spread of AIDS in Russia[166]. Since these rules have prohibited the deportation of foreigners with AIDS, if they have Russian families or their relatives are residents of Russia, and these foreigners have not violated Russian legal rules[167]. Certainly, this decision of Parliament should receive only a positive assessment; however, when the AIDS-cases passed into the hands of

[166] Ст. 1 Федерального закон от 30.12.2015 № 438-ФЗ «О внесении изменений в отдельные законодательные акты Российской Федерации в части права иностранных граждан и лиц без гражданства, страдающих заболеванием, вызываемым вирусом иммунодефицита человека (ВИЧ-инфекцией), на пребывание и проживание в Российской Федерации» // Собрание законодательства РФ. 2016. № 1 (часть I). Ст. 58.

[167] Пп. 2, 3 ст. 11 Федерального закона от 30.03.1995 № 38-ФЗ (ред. от 08.12.2020) «О предупреждении распространения в Российской Федерации заболевания, вызываемого вирусом иммунодефицита человека (ВИЧ-инфекции)» // Собрание законодательства РФ. 1995. № 14. Ст. 1212.

the legislature, their original meaning changed. The main idea of the Court was that proportionality, with its balance between public and individual interests, should be observed. This legal position is suitable for different cases and can protect all immigrants, both those infected with AIDS and other dangerous diseases. It is important that there should not be one or more reasons allowing illegal foreigners to remain in Russia on a mandatory basis; each case must be unique. In these circumstances, judges must review the interests, weigh them, check administrative decisions and legitimate purposes, assess discretionary powers and executive measures, and their necessity. Otherwise, the idea of balance would lose its meaning, and violators would obtain a gateway to stay in Russia. Parliament took only one part of the Court's legal position and included it into the Law, and the full value of the proportionality test was not part of these legal norms.

In other words, if a judge must decide the case of a foreigner with AIDS, he or she will review the family situation and whether this person is a violator of the law, then apply the Law and give a judgment, and there will be no balance applied. This is good, but just for one kind of foreigner, and for the rest of them there is the legal position of the Court on proportionality. And the Law has narrowed the judge's discretion, since courts have reviewed some simple facts without complex reasoning. It is interesting that judges agree with this opinion, which has been even more manifested in the cases of illegal foreigners with Russian families. The judges often preferred not to apply the principle of proportionality, attaching value to only two facts, (1) whether there is a Russian family, (2) how often the foreigner committed a violation of immigration rules. If there is such a family and one violation has been committed, this person will probably be allowed to remain in Russia; if one of these two circumstances are not presented, the foreigner will probably be removed from the country.

Thus, in 2019, in the Court of the Central District of Novosibirsk, there were 142 cases of administrative expulsion and 11 cases of restriction of entry of illegal foreigners. Deciding the cases of the first type, the judges most often evaluated circumstances such as the marital status of the violator of immigration rules, whether he or she has any real estate in Russia, or is studying in any Russian

educational establishment. They mentioned the marital status in 139 cases, and of these, 65 judgments contained references to the European Convention on Human Rights, property was noted 78 times, Russian education was tagged 40 times, a number of immigration and other violations were presented in all the judgments. In 65 of 143 cases, the judges concluded that their decisions were made "to ensure the purpose of achieving a fair balance between public and individual interests".

Actually, only five violators were allowed to stay in the country, with Russian close relatives living in Russia being the main reason in four cases[168], in the other case, the reason was student status[169]. Moreover, the foreigners who could stay in the country had children who were Russian citizens (3 cases) or had a Russian spouse (1 case). The judges and officials did not pay attention to other types of family relationships. For example, one foreign violator had a father who was a Russian citizen, living in Russia, and this person was expelled from the country because he, as the judge noted, did not live with his father and there was no close family relationship between them[170]. In two cases, the judges observed that foreigners had Russian children, but the right of respect for family status was not assessed, and this fact was only articulated in the judgments. However, it was not disclosed where these children lived and whether these violators had any relationship with their families[171]. It is probable that the children were in Uzbekistan or, maybe, in another version, that the judges did not evaluate these cases with due diligence. There was the case where the judge decided that the foreigner created a fictional family, whereas he was actually not living with his official Russian wife and they did not have a common household[172]. Two foreigners (women) were expelled from the country, although their husbands had the opportunity to live and

[168] The case of N 5-170/2019, N 5-116/2019, N 5-329/2019, N 5-112/2019 // The State e-Service "Justice" (Государственная автоматизированная система «Правосудие») // https://bsr.sudrf.ru/bigs/portal.html
[169] The case of N 5-378/2019.
[170] The case of N 5-63/2019.
[171] The case of N 5-335/2019, N 5-339/2019.
[172] The case of N 5-131/2019.

work in Russia under official permission[173]. All the rest of the judgments have been fairly standard, and they demonstrate the absence of a Russian family, property, Russian-student status, and then demand that the violators be expelled from the country.

The majority of the judges giving their judgments used terminology which considers the principle of proportionality. However, they have not determined the balance of interests and have not weighed the constitutional values, and often these terms have been applied technically, that is, as part of legal texts without the original meanings which the Constitutional Court intended. In fairness, it should be noted that most cases were relatively simple and did not demand the application of this principle in its entirety. Also, using the terminology of proportionality suggests that proportionality has potential, and if the legal doctrine is developed, this principle will be more important than it is now.

The cases of restriction of entry are more interesting than the cases of expulsion. However, there are only eleven such cases, but in deciding them, the courts based their decisions to a large degree on the position of the Constitutional Court. As a result, six foreigners achieved the abolition of the entry restriction, five did not. All the judgments contained references to decisions of the Constitutional Court and the European Court of Human Rights, as well as the Russian Constitution, the European Convention on Human Rights and other international treaties. All the judges who lifted the police orders on the restriction noted that this measure was disproportionate. In one of the six cases, the foreigner was allowed entry into Russia because he had violated immigration rules only once, and his second violation was not confirmed by the regional court; his marital status was not taken into consideration, although he had a son living in Russia[174]. The main cause in three cases was a Russian family, especially with children, and in two cases the court noted respect for the privacy of foreign citizens living and working in Russia for a long time, and they also had lost all relationship with their homeland.

[173] The case of N 5-339/2015, N 5-279/2019.
[174] The case of N 2a-6276/2019.

Among the circumstances influencing the courts' opinions were the presence of a Russian family, and the judges also took into consideration a Russian family, including not only relatives of Russian citizens but also relatives of foreigners living in Russia. For example, a citizen of Tajikistan was admitted to Russia due to the fact that he had a wife and children living in Russia, and the children were born in this country; he had his own flat in Novosibirsk and he had been living in this city for ten years[175]. The judge's reasoning included several stages: (1) a description of the situation of the foreign violator in Russia and mention of the reasons that could be positive for this person, (2) a description of this foreigner's situation in his homeland, (3) a comparison of both situations and making a conclusion, as to what will happen if such a person is expelled from the country and returns to his homeland, (4) determining the balance of interests. Thus, courts paid attention to the fact that the foreigner did not have any place of residence in his own country and did not pose any a threat to the people around him and Russian legal order[176]. This opinion is important because it shows the idea of balance and a way of weighing competing interests. However, the judges often replicated the position of the Constitutional Court and did not try to understand what this position means.

4. Conclusion

The principle of proportionality is part of the Russian constitutional system, and the judgments of the Constitutional Court have become an important stage in its implementation in the practice of Russian executive authorities and courts. The opinions of the European Court of Human Rights have been a good base and, at least as the beginning of the journey, they were the benchmarks for the Constitutional Court. This way is well demonstrated by the experience of the removal of foreign citizens. However, the lack of developed doctrine did not allow Russia to form the three- or four-tiered test, similar to that operating in the German legal system. Actually, some judgments indicate that the Constitutional Court is

[175] The case of N 2a-675/2019.
[176] The case of N 2a-2659/2019, N 2a-3025/2019, N 2a-675/2019.

sometimes ready to apply all levels of proportionality, but in the majority of its cases, proportionality is understood as a balance between two or more interests, which compete with each other. The Court has tried to find a reasonable balance and determine the interest that should prevail in the case. That is, the Russian version of proportionality, which is still forming, may be described as "reasonable proportionality" or "reasonable balance". However, we have a good chance that the German version will be implemented at some stage in the future.

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TAX POWER AND THE PRINCIPLE OF PROPORTIONALITY: A BALANCE BETWEEN THE VALUE OF THE PUBLIC (TAX INTEREST) AND THE VALUE OF THE PRIVATE INDIVIDUAL

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The principle of proportionality may be defined as an European key criterion on which public action is based, towards weighting of opposing interests and the preference of the minimum instrument capable of achieving the result required by the legal system. The application of this principle involves a process of internal verification which necessarily involves comparing one's own experience with those gained in the pilot systems (German and European), which have developed the systematic categories of proportion.

The principle of proportionality originates from public law and, precisely, from German police law of the nineteenth century. German constitutional case-law placed the principle of proportionality among the general principles of the order, pointing out that it is the result of the union of three different elements, namely suitability, necessity and proportionality in the strict sense.

Proportionality in the wording thus outlined, by virtue of the so-called spill over effect, also begun to operate in national law. This principle, in fact, found full recognition in the case law of the Court of Justice which, since the early 1960s, elevated it to the rank of general principle of the European legal order.

The principle affects the activities of the European institutions, both as regards acts restricted to fundamental freedoms at the time of their legislative formation and as regards the assessment of legality, when they are to be effectively applied. It always concerns both regulatory interventions and administrative measures. European case law, however, focused more on the proportionality of regulatory interventions and only later on its compatibility with the rules of the

Member States, which provide for derogations from the application of European law.

Although influenced by the reconstruction carried out by German law, the European court draws up an autonomous concept of proportionality, by means of which to provide the best protection in view of the objectives of the Treaties.

However, the protection provided by the European court is objective judicial protection which essentially takes account of the interests at stake without giving decisive weight to the extent of the sacrifice suffered by the individual. Unlike the German courts which draw up broad and detailed reasoned judgments, the European courts adopt a more gaunt style from which the essential features of their legal reasoning can be deduced.

The Court of Justice applies the principle of proportionality laid down in the Treaty (Article 5 TFEI) to the laws of the individual Member States. In Community case-law, the same reasonableness does not have its own autonomy, closely linked to the proportionality test. That is why the role played by proportionality, understood as an autonomous category, in relation to other principles of the European legal order such as subsidiarity, legitimate expectations and free competition is fundamental, since the legislature is obliged to combine proportionality with the principles listed above in order to define its content, make them effective and apply them to a reasonable extent with regard to the case under assessment.

The application of proportionality to the national legislature is strongly linked to tax harmonisation and its limits. The subjective legal situations recognized by European law (freedom of establishment, movement, right to reimbursement of taxes unlawfully collected in breach of Community law, right to reimbursement and deduction of VAT, etc.) cannot therefore be affected by the procedural autonomy of States in tax matters. There is no doubt that the more discriminatory a measure appears, the more difficult it will be to consider it in accordance with the principle of proportionality.

The Court of Justice used, in particular, proportionality as a decisive criterion for the implementation of the rule of reason. The restrictive requirements on the basis of national measures restricting fundamental freedoms must always be assessed taking into account

proportionality, according to which it is possible to limit only what is necessary for the ate of achieving the objective.

With regard to the balance of economic freedoms and fundamental rights, the Court of Justice noted in particular that measures having a fundamental freedom must not necessarily be based on a concept shared by all Member States as to how to protect the fundamental right involved.

The requirement of proportionality requires the national legislature not to establish absolute presumptions of danger of tax evasion or avoidance. In practice, national law can never in any way assume that the alleged exercise of a European subjective right always has an abusive purpose and necessarily entails a risk of fraud. Compliance with the principle of proportionality of the anti-circumvention or anti-abuse rule makes it possible not to extend its scope excessively through the discretion of the judge and the Financial Administration and not to invade the sphere of legitimate tax savings, thus causing unjustified restrictions on economic freedoms and hindering legal certainty and correct tax planning by the taxpayer.

The use of simple presumptions or in any case related legal presumptions would represent the "fair balance" between the effectiveness of taxpayer protection and the tax interest in tax collection. Ultimately, with regard to proportionality, the EU Court of Justice accepts that Member States can adopt safe harbours applicable to situations with a high probability of abuse: the definition of reasonable presumptive criteria is in the interests of legal certainty for taxpayers and is practical for administrations. The very exercise of fundamental freedoms and rights recognised by the Constitution and the Treaty on European Union cannot be restricted for tax reasons. Abuse and fraud constitute, in fact, the misuse of the power offered by European law to choose between several alternatives in the exercise of fundamental freedoms.

The need to adopt uniform and coordinated fiscal policies at EU level requires that the national legislator comply with common European principles that should be placed as a guarantee to the taxpayer. The principle of proportionality informs several provisions of the Italian Constitution relating to various areas of the legal system which implicitly or explicitly refer to it. The principle of proportionality as an instrument for containing the function of public

authority becomes a yardstick on which to calibrate legislative and administrative measures, so that the pursuit of general interests does not lead to an unacceptable compromise of the opposing fundamental rights and freedoms that fall to the person to whom the measure affects.

The Italian legal system does not mention the principle of proportionality in any provision of the Constitution: the implicit basis of that principle can, however, be found in a plurality of constitutional provisions, some of which are general, others sectoral, and others can be defined as transversal. It is precisely with regard to general provisions that reference should be made to Article 3 of the Constitution, which makes it clear that treatment should be proportionate to the diversity of situations. The concept of substantial equality refers to this proportioning of treatment insofar as it is necessary to adopt all those actions aimed at eliminating economic and socio-cultural imbalances from the starting situations.

The fact that the principle of proportionality is also immanent to Italian constitutional law does not, however, make it an unnecessary duplication. In fact, in addition to presenting an incisive autonomous value, for its ductility and for its functions (interpretative, integrative and programmatic) it allows the different values and principles constitutionally guaranteed to materialize without any of them prevailing by absolutely compressing other values or principles of constitutional rank.

It is therefore of interest to focus on the need for Member States to comply with the principle of proportionality in their legislative and administrative activities, including in matters or individual areas of subject matter which do not come within the scope of European competence.

Although, as previously explained, the origins of the principle refer to German law, certainly undeniable are the effects of "spill-over" within Italian law especially with reference to administrative law and L. no. 241/1990, as amended by Law No 15/2005 and art. Article 1(1), in recognising the general principles of administrative activity, inspired and governed by criteria of economy, effectiveness, impartiality, openness and transparency, also refers expressly to the "general principles of community law" and, therefore, also to the principle of proportionality.

From this point of view, it is clear that Article 1 of Regulation (241/90) has been played in the same way as amended by Law 15/2005, which, although it does not expressly mention the principle at issue, refers to "the principles of Community law" among those based on administrative action.

There is, therefore, a link between the recalled provision of Article 1 of Law 241 and the procedural rights which the law itself provides for and regulates. This makes it more significant to stress the relationship between the principle of proportionality and the administrative procedure, since the principle of proportionality is intended to bring out the weight of secondary interests by calibrating the exercise of administrative power; therefore, the administrative procedure is the place for the emergence and weighting of those interests. Considering Article 1, 1st paragraph of Law No 241/1990 reformed by Law No 15/2005, the application of the principle of proportionality (as a general principle of the European legal order) regulates the exercise of administrative action regardless of whether or not it is carried out in implementation of European legislation. European principles have become, in fact, principles of our internal order not only, as was the case previously, in application of European law but also, important innovations, in application of national law.

In the Italian legal system, proportionality is increasingly assuming the function of principle which imposes procedural rules of conduct on the PA, tending to be a principle imposed to guarantee the effectiveness of other principles and rights enjoyed by citizens vis-à-vis the PA, ensuring their substantive application and not merely formalistic application.

Thinking about the use of the principle of proportionality by national courts also in cases of no direct relevance to EU law should, therefore, be supported in accordance with the general principle of equality, the extension of the scope of operation of the EU proportionality principle within the laws of individual Member States, beyond the only issues relevant to EU law.

Part of the tax doctrine sharedly read Article 1 Law No 241/90 as productive of the effect of extending the operation of European principles also in respect of proceedings with a non-European object. The Court of Cassation, the Tax Section, also, in its judgment of 13

February 2009, gives the principle of proportionality the nature of a general principle of the law and, consequently, also applicable in tax matters. It is, in fact, an immanent principle also in the legal system and made explicit by Law No 241 of 1990.' Proportionality would therefore work in the dialectic between authority and freedom, which traditionally characterises tax law with a view to achieving an ever-increasing balance with a view to full compliance with the national and European principles mentioned above.

In the interpretative practice of the Constitutional Court, proportionality is reduced to reasonableness, but in the latest judgments (Robin Hood Tax, Constitutional Court, sent. 11 February 2015, n. 10) the latter principle is increasingly enriched by elements that require an investigation into the suitability and extent of the tax measure identified with respect to the purpose. Reasonableness, unlike proportionality, does not, however, take account of a purely quantitative or measurement assessment. Furthermore, reasonableness neglects the necessary screening, not by making a comparison, but by making the principle of proportionality between advantages and disadvantages.

In view of the fact that proportionality acquired its own autonomy and renewed consideration in all areas of the legal system, it is therefore all the more necessary to make an appropriate distinction between the two concepts referred to, in order to prevent an inappropriate terminological approximation from interfering between the principles and criteria. It is therefore important to carefully consider the guidelines of the Constitutional Court, which represent an indisputable element in assessing the degree of constraining of the principle of proportionality for the legislator and the interpreter. Precisely from this point of view it is significant to appreciate, in particular for the purposes of this investigation, the tendency of the Italian Constitutional Court, certainly under the pressure of European judges, to put to the object of its judgments the so-called balance of values, in terms similar to the phase of "proportionality in the strict sense", especially in cases concerning fundamental rights.

The principle of proportionality and balancing shall constitute techniques for resolving conflicts between fundamental rights. If public and private represent two fundamental values of our

democracy, proportionality is the instrument that balances them, in the sense that the principle of proportionality requires those exercising regulatory (fiscal) power to choose the least invasive instrument by making a reasonable balance between the 'public' and 'private' values. The principle of proportionality requires the exercise of an action for a tax on fundamental rights to the extent that it is necessary and not exceeding the objectives set. Proportionality means not excess in the exercise of the power of taxation, which must be exercised against those who demonstrate a specific ability to contribute.

The proportionality of the sacrifice of the law becomes essential so as not to make freedom unsuccessful in the name of the "fiscal interest". The tax interest can be defined as "the (constitutional) principle that justifies those tax rules that strengthen the position of the tax authorities vis-off with that of the taxpayer according to the achievement of the tax duty". A strong tendency of the Constitutional Court to identify reasonableness as the preferential criterion for balancing ability to pay and fiscal interest has emerged in our legal system; however, the idea that the composition between tax interest and ability to pay and tax interest and other fundamental values should be sought according to reasonableness techniques should be overcome precisely by implementing the application of proportionality, which best allows to moderate conflicts between different values, by regarding not only quality standards but also quantitative standards.

Indeed, in some constitutional rules, proportionality becomes a further and subsequent yardstick than that of reasonableness, allowing "a quantitative assessment" aimed at the implementation of the right proportion: think of Art. 53 COST, which is a limit to the legislative power of taxation, which must be based not only on reasonableness, but also on proportionality.

In particular, taking into account the tax relationship, the satisfaction of the general interest in finding the means necessary for the functioning of the State requires, on the basis of the principle of proportionality, a settlement with the system of values and constitutional freedoms referring to the person as well as with the right of ownership and with that of free economic initiative.

THE PROBLEM OF CONSOLIDATING THE PRINCIPLE OF PROPORTIONALITY IN THE LAW OF THE REPUBLIC OF UZBEKISTAN ON ADMINISTRATIVE PROCEDURES AND ANALYSIS OF JUDICIAL PRACTICE

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New elected President of the Uzbekistan Sh. Mirziyoyev started to build New Uzbekistan and introduced several administrative law reforms according to the Strategy Action 2017-2021[1]. As a result of this there were introduced administrative court system [2], adopted Concept of administrative reforms [3], adopted Law on administrative procedure (hereafter APL) [4] and Code of administrative litigation (hereafter CAL) [5]. Accordingly, Uzbekistan achieved enormous progress in the field of administrative law reform due to adopting administrative court system, adopting Law on administrative procedure and Code of administrative litigation.

This article will give brief analyses of how this reform accepted in practice, what are difficulties of introducing new administrative law reforms in example of principles of administrative procedure.

The above reforms and legislative changes created the basis for a major breakthrough in administrative law in the Republic of Uzbekistan. Many scientific discussions and proposals on the development of administrative law have not yet seen their practical implementation [6]. The legislative reforms carried out over a short period of time brought these long-awaited ideas to life. But it must be borne in mind that with the adoption of the relevant laws it is impossible to achieve a major breakthrough in the development of modern administrative law in the Republic of Uzbekistan. In this article we will try to conduct a brief scientific analysis of the problems of administrative law using the example of the problem of applying the principles of administrative procedures in the light of the new stage in the development of administrative law in the Republic of Uzbekistan.

The basic principles of APL are legality; proportionality; reliability; the opportunity to be heard; openness, transparency and clarity of administrative procedures; priority rights of interested parties; inadmissibility of bureaucratic formalism; meaningful absorption; implementation of administrative proceedings in a "single window"; equality; protection of trust; the legality of administrative discretion (discretion); research.

Article 19 of the APL establishes that administrative acts and administrative actions must comply with the principles of administrative procedures. Non-compliance with the principles of administrative procedures entails the revocation or revision of administrative acts and administrative actions.

In the course of questioning the employees of the relevant ministries and departments within the framework of scientific work, it was revealed that many of the above principles are incomprehensible to them. In particular, principles such as proportionality, meaningful absorption, protection of trust, legitimacy of administrative discretion (discretion), the principle of research, raise many questions not only in the sense of these principles, but also related to their practical implementation.

Based on the above, there is a need to disclose the essence and rules for the application in practice of the principles of administrative procedures.

Here is an analysis based on the principle of proportionality.

I. Legislative framework and interpretation

According to the Article 7 of the LAP of Uzbekistan the principle of proportionality determines that the measures of influence on individuals or legal entities, exerted in the course of administrative proceedings, must be suitable and sufficient to achieve the legitimate aim pursued by the administrative body, and the least burdensome for the persons concerned.

In the course of the survey of employees of the relevant ministries and departments within the framework of scientific work, the following practical example from judicial practice was presented, in which the principle of proportionality can be applied.

II. Case study

Case № 1[7].

Case No. 1. Plaintiff: manufacturer "D", defendant: khokimiyat (administration) of the city of Gulistan

The plaintiff, the manufacturing company "D", applied to the regional economic court with a claim to invalidate the decision of the city khokimiyat No. 351 of January 11, 2017. the manufacturer "D" acquired land for the construction of a three-storey residential building with an area of 30x40 (1200 sq. m.) with trade and public services on the ground floor. Firm "D" carried out all the necessary measures and acquired the necessary building permits: topographic survey, the conclusion of the (authorities) of geology, design estimates from the regional architectural council for urban planning. However, the khokimiyat of the city of Gulistan made a decision No. 351 of January 11, 2017 to cancel the decision of the khokimiyat of the city of Gulistan No. 1754 of December 25, 2015 due to untimely construction and improper use of land. The Regional Economic Court, having considered the arguments and evidence, found no violations of the requirements of Art. 36, 38 of the Land Code of the Republic of Uzbekistan, as well as the arguments of the khokimiyat that the corresponding building (structure) was not built within three years was not proved. Based on this, the regional economic court satisfied the claim and invalidated the decision of the khokimiyat of the city of Gulistan No. 351 of January 11, 2017.

A question arises from the above case. Is it possible to apply the principle of proportionality in this case?

In this case, it can be seen that the measure of influence of the khokimiyat of the city of Gulistan in the form of seizure of land against the manufacturer "D", rendered in the course of administrative proceedings, may seem appropriate and sufficient to achieve the legitimate aim pursued by the administrative body, but it is not the least burden manufacturing firm "D".

Case № 2[8].

Case No. 2. Applicant: JV LLC "NOK", defendant by the khokimiyat of the city of Tashkent.

The applicant JV LLC "NOK" applied to the court with a statement to the defendant, the khokimiyat of the city of Tashkent to invalidate the decision of the khokim of the city of Tashkent dated May 27, 2019 No. 763 to cancel paragraph 8 of the annex to the decision of the khokim of the city of Tashkent No. 85 dated January 18, 2018 and to impose the obligation on the khokim of the city of Tashkent to make a decision to cancel the decision No. 763 of May 27, 2019 and uphold the decision of the khokim of the city of Tashkent No. 85 dated January 18, 2018 in the previous version.

By the decision of the Chilanzar District Administrative Court of the city of Tashkent dated September 12, 2019, the application of JV LLC "NOK" to the defendant khokimiyat of the city of Tashkent to invalidate the decision of the public administration body was denied.

Disagreeing with this court decision, JV LLC “NOK” filed an appeal, in which they asked the court to cancel the decision and make a new decision in the case to satisfy the stated requirements.

As seen from the materials of the case, by the decision of the khokim of the city of Tashkent dated January 18, 2018, No. 85 of OLCHA LLC was allocated a building located next to the non-residential premises at the address: Tashkent city, Mirabad district, M str., 27/10, adjacent territory (Liter 0001, 0002) as compensation for the building demolished for state and public needs.

On the basis of agreement No. 427 dated February 15, 2018 between LLC "OLCHA" and the Department for the use of buildings and structures of the khokimiyat of the city of Tashkent, as well as the aforementioned decision of the khokim of the city of Tashkent, buildings located next to house No. 27/10 on M. Street on an area of 0.3000 hectares under a single cadastral number 10110102020590000 1-letter 0001 one-storey building with a total area of 342 sq.m., and letter 0002 one-storey building with a total area.

91.0 sq.m. transferred to the ownership of LLC OLCHA, about which a certificate for TS 0351191 was issued.

According to the sale and purchase agreement of June 11, 2018, concluded between OLCHA LLC and NOK JV LLC, the specified object was sold to NOK JV LLC.

Further, on May 15, 2019, the prosecutor's office of the city of Tashkent lodged a protest about the cancellation of paragraph 8 of the decision of the khokim of the city of Tashkent No. 85 dated

January 18, 2018 regarding the allocation of a building located next to non-residential premises at the address: Tashkent city, Mirabad district, M. street, house 27/10, with adjoining territory (Letter 0001, 0002).

In pursuance of this protest, on May 27, 2019, the khokim of the city of Tashkent made a decision # 763 to satisfy the protest of the prosecutor of the city of Tashkent and cancel paragraph 8 of the annex to the decision of the khokim of the city of Tashkent # 85 dated January 18, 2018.

Disagreeing with the above decision of the khokim of the city of Tashkent, the applicant applied to the court with this statement.

The court of first instance, referring to the fact that the area of the building located next to the non-residential premises at the address: Tashkent city, M. district, M. street, house No. 27/10 is 440 sq.m., did not pass state registration at the State Enterprise "Services of land management and real estate cadastre" of the city of Tashkent and the fact that there is a bomb shelter on this land plot, which is currently used as a warehouse and construction work can lead to the resolution of its integrity, came to the conclusion that the application of JV LLC "NOK »To the defendant, the khokimiyat of the city of Tashkent on invalidating the decision of the state administration body.

As seen from the materials of the case, by the decision of the khokim of the city of Tashkent No. 763 of May 27, 2019, the protest of the prosecutor of the city of Tashkent on the abolition of paragraph 8 of the annex to the decision of the khokim of the city of Tashkent No. 85 of January 18, 2018 was satisfied.

The grounds for the cancellation of clause 8 of the annex to the decision of the khokim of the city of Tashkent No. 85 dated January 18, 2018 indicates that the area of the building located next to the non-residential premises at the address: Tashkent city, Mirabad district, M. street, house No. 27/10 is 440 sq.m., which has not passed state registration at the State Enterprise "Land Management and Real Estate Cadastre Services" of the city of Tashkent. In addition, the allocated building did not have an adjacent territory. When allocating a building with an adjoining territory, it was not taken into account that there was no adjoining site to the building on this territory, the area of the allocated land plot was not indicated,

and an underground facility "bomb shelter" was also located at the border of the building. Thus, when allocating a building with an adjacent territory, the requirements of the then-effective Regulation "On the procedure for granting land plots in settlements for the implementation of urban planning activities, design and registration of construction projects, as well as the acceptance into operation of facilities", approved by the Resolution of the Cabinet of Ministers of the Republic of Uzbekistan, were violated. of February 25, 2013 under No. 54 and the Resolution of the Cabinet of Ministers of the Republic of Uzbekistan dated August 22, 2008 No. 189 "On measures to further improve the procedure for the provision of land plots in the city of Tashkent and their intended use."

In addition, in accordance with the letter of the Emergency Situations Department of the city of Tashkent No. 730 dated April 8, 2018, OLCHA LLC is prohibited from dismantling the structures above the bomb shelter due to the fact that construction work may lead to the destruction of the integrity of the bomb shelter.

According to the Consolidated Expert Opinion of the Tashkent City Branch of the State Unitary Enterprise "Urban Planning Expertise" under the Ministry of Construction of the Republic of Uzbekistan No. 311 dated May 1, 2019, the location of the bomb shelter next to the constructed apartment building does not create any obstacles for construction, which does not touch the boundaries of the bomb shelter.

A question arises from the above case. Is it possible to apply the principle of proportionality in this case?

In this case, it can be seen that the measure of influence of the khokimiyat of the city of Tashkent in the form of seizure of land against JV LLC "NOK", provided in the course of administrative proceedings, may seem appropriate and sufficient to achieve the legitimate goal pursued by the administrative body, but is not the least burdensome for the JV LLC "NOK". Since the location next to the constructed apartment building of the bomb shelter does not create any obstacles for construction, which does not touch the boundaries of the bomb shelter. Therefore, the khokimiyat of the city of Tashkent had to find other measures that would be the least burdensome for JV LLC "NOK".

III. Conclusion

Undoubtedly, one can argue for a long time and give an interpretation of the principles of APL. But in the course of a survey of employees of the relevant ministries and departments as part of the scientific work on the above examples, several problems arose. Firstly, to what extent are government officials competent in interpreting APL norms and its principles. Secondly, there were many discussions on issues such as "are there any standards for interpretation", "how can we unify the different interpretations of the norms and principles of APL", "will not the general norms and principles of APL be interpreted in the dishonest interests of or persons."

The question of the interpretation of APL is really very relevant. Unfortunately, the doctrinal foundations of APL in Uzbekistan have not been developed so far.

Of course, this was hindered by the lack of law and specialized administrative courts. But today these problems are absent. Therefore, it is necessary to develop evidence-based foundations of issues related to the norms of APL [9].

Let us return to the question of the principles of administrative procedures. It should be noted that in countries with developed administrative law, there is a generally accepted procedure for interpreting the provisions of the APL. That is, employees of state bodies interpret and apply the norms and principles of APL on a concrete example. Then, if there is a dispute about the meaning or lawful application of these norms and principles, a private person files a lawsuit (complaint) (sometimes after applying to a higher administrative authority) in court. The court considers the case and makes a decision on the legality of the decision, in which an employee of the state body gave an interpretation of the norms and principles of the APL [10]. Further, after a certain period, judicial practice is unified by the Supreme Court [11]. In this whole process, the science of administrative law develops scientifically based theories, arguments for the interpretation of various norms and principles of the APL. All this shows that a lot of time is required to establish certain values of the norms and principles of APL [12]. Since it is impossible to blindly copy interpretation models from

other countries, each country should develop its own model of understanding administrative law [13], in particular, APL [14].

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4. Закон Республики Узбекистан от 08.01.2018 № ЗРУ-457 «Об административных процедурах». Дата вступления в силу 10.01.2019 (Национальная база данных законодательства, 09.01.2018. № 03/18/457/0525).
5. Закон Республики Узбекистан от 25.01.2018 № ЗРУ-462 «Об утверждении Кодекса Республики Узбекистан об административном судопроизводстве». Дата вступления в силу 01.04.2018 (Национальная база данных законодательства, 26.01.2018. № 03/18/462/0626).
6. See.: Shigeru Kodama. Reform of Administrative Procedure in Uzbekistan and Japanese Legal Assistance.// Administrative law reform in Uzbekistan experiences and problems from the legal viewpoint. Collection of seminar papers. Nagoya, 2008. P. 5; Katsuya Ichihashi. Japanese approach to legal assistance to administrative procedure law in Uzbekistan// Administrative law reform in Uzbekistan experiences and problems from the legal viewpoint. Collection of seminar papers. Nagoya, 2008. P 35; Hiroto Tokuda. Cooperation between Japan and Uzbekistan in the sphere of implementation of administrative procedure law// Administrative law reform in Uzbekistan experiences and problems from the legal viewpoint. Collection of seminar papers. Nagoya, 2008. P 47; Muzraf Ikramov. Administrative procedures in Japan: opportunities for implementation into the legislation of Uzbekistan// Administrative law reform in Uzbekistan experiences

and problems from the legal viewpoint. Collection of seminar papers. Nagoya, 2008. P 81.

7. См.: Пуделька Й., Деппе Й. Общее административное право в государствах Центральной Азии – краткий обзор современного состояния. Ежегодник публичного права-2014: Административное право: сравнительно-правовые подходы. М.: Инфотропик Медиа, 2014. С. 4; Хамедов И.А., Цай И.М. Институт административных процедур в свете реформирования административно-процессуального права в Узбекистане. Ежегодник публичного права-2014: Административное право: сравнительно-правовые подходы. М.: Инфотропик Медиа, 2014. С. 395.
8. Решение Хозяйственного суда Сырдарьинской области Республики Узбекистан от 10.05.2017 (Извлечение).
9. Постановление апелляционной инстанции Ташкентского городского административного суда от 06.11.2019 года (Извлечение).
10. See.: Bernardo Sordi. Revolution, Rechtsstaat, and the Rule of Law: historical reflections on the emergence of administrative law in Europe. Susan Rose-Ackerman, Peter L.Lindseth. Comparative administrative law: an introduction. // Comparative Administrative Law. Susan Rose-Ackerman, Peter L.Lindseth. Edward Elgar 2010. P 28.; *Пуделька Й.* Право административных процедур и административно-процессуальное право в государствах Центральной Азии – краткий обзор современного состояния. Ежегодник публичного права-2015: Административный процесс. М.: Инфотропик Медиа, 2015. Стр. 41.; *Пуделька Й., Деппе Й.* Общее административное право в государствах Центральной Азии – краткий обзор современного состояния. Ежегодник публичного права-2014: Административное право: сравнительно-правовые подходы. М.: Инфотропик Медиа, 2014. С. 3.
11. Articles 220 and 244 of the CAL establish that one of the grounds for changing or canceling a decision of a court of first instance is a misinterpretation of the law or other legislative act.
12. Article 158 of the CAL establishes that the reasoning part of the decision may contain references to the decisions of the Plenum of the Supreme Court of the Republic of Uzbekistan.
13. Пуделька Й. Право административных процедур и административно-процессуальное право в государствах Центральной Азии – краткий обзор современного состояния.

Ежегодник публичного права-2015: Административный процесс. М.: Инфотропик Медиа, 2015. С. 53.

14. See.: Tom Ginsburg. Written constitutions and the administrative state: on the constitutional character of administrative law. Susan Rose-Ackerman, Peter L.Lindseth. Comparative administrative law: an introduction.// Comparative Administrative Law. Susan Rose-Ackerman, Peter L.Lindseth. Edward Elgar 2010. P 117.
15. Unfortunately, the courts do not always refer or are based on the basic principles of not only administrative law, but also on the norms of the Constitution in the consideration of public law disputes when making its decision. Most often, the courts only state the existence of certain norms and principles and do not apply them in their interpretation. См.: Постановление Пленума Высшего хозяйственного суда Республики Узбекистан от 17.06.2016 № 298 «О некоторых вопросах применения актов законодательства при разрешении споров о признании недействительными актов государственных органов и органов самоуправления граждан, незаконными действий (бездействия) их должностных лиц, не соответствующих законодательству, нарушающих права и охраняемые законом интересы организаций и граждан».

APPLICATION OF THE PROPORTIONALITY PRINCIPLE AT PROCEEDINGS OF ADMINISTRATIVE OFFENCES IN THE FIELD OF ELECTORAL RELATIONS

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Abstract. In the electoral process, as in any other activity, situations arise when the goal laid down in a normative act upon its adoption and the goal realized by an individual participant in the electoral campaign may contradict each other. In this case, the law enforcement officer should choose the most significant of them in specific legal relations. This can be achieved through the use of the principle of proportionality, the application of which is characteristic of the legal systems of European states. In legal literature, its origin is often associated with the traditions of German constitutionalism, and its origins are seen in the doctrine of Prussian administrative law. This principle, which includes three elements - adequacy, necessity, proportionality, sometimes understood as degrees of control, is deduced by judicial practice from the provisions of the constitution and is applied mainly in the field of human rights protection. Active development of modern electoral law, when many essential changes are made, and form fundamental principles, defining their further refinements. Development of modern electoral system in direction of guarantee of the electoral rights and freedoms, consolidation of imperative elections hold, is the only legal way to handover people authority to representative body and bodies of local self-government. The increase of this topic's actuality is connected with the amendments that were put forward in electoral law over the last few years, especially the influence of the inclusion of decisions of international jurisdictions in the legal system of Russia, European countries and the US. Also, one of the key researches of

this article is the ECHR judgments and the Russian legal system through the prism of the principle of proportionality, as the decisions of ECHR influence directly on the development of Russian Electoral Law.

Key words: electoral law, electoral legislation, electoral system, administrative electoral offences, principle of proportionality, ECHR decisions.

Introduction

In the electoral process, as in any other activity, situations arise when the goal laid down in a normative act upon its adoption and the goal realized by an individual participant in the electoral campaign may contradict each other. In this case, the law enforcement officer should choose the most significant of them in specific legal relations. This can be achieved through the use of the principle of proportionality, the application of which is characteristic of the legal systems of European states. In legal literature, its origin is often associated with the traditions of German constitutionalism, and its origins are seen in the doctrine of Prussian administrative law[177]. This principle, which includes three elements - adequacy, necessity, proportionality, sometimes understood as degrees of control, is deduced by judicial practice from the provisions of the constitution and is applied mainly in the field of human rights protection.

The modern content of the principle of proportionality was largely formed under the influence of the practice of the ECHR, the decisions of which are binding both for the countries of the continental legal family and for the UK. The ability to restrict human rights in accordance with the requirements of the limitation clause reflects the specific nature of the relationship between a person and a state. The individual and the state are bound by mutual rights and obligations.

The literature notes that in the United States the principle in question in the European sense is not used, but American courts are examining the balance of the goal of legal regulation and the means

[177] Шерстобоев О.Н. Принцип пропорциональности как необходимое условие высылки иностранных граждан за пределы государства их пребывания: пределы правоограничения // Российский юридический журнал. 2011. № 6 (81). С. 52.

of achieving it, including in the field of electoral relations, and scientists, through its application, determine the directions for further development of legislation[178]. Thus, according to American legal scholars, the problem of determining the balance in the financing of election campaigns between parties and candidates, on the one hand, and private corporations, on the other, is relevant in modern American political and legal practice. According to their assumption, the state should choose as its priority the financing of election campaigns at the expense of the financial resources of political parties and candidates. If large non-state corporations participate in the financing of election campaigns, the elections lose their essence and turn into a struggle of "money bags"[179].

ECHR judgments and the Russian legal system through the prism of the principle of proportionality

The inclusion of decisions of international jurisdictions in the legal system of Russia occurs by virtue of constitutional norms. In accordance with Art. 15 of the Constitution of the Russian Federation, the norms of international law and international treaties of Russia are an integral part of the domestic legal system. If an international treaty of Russia establishes rules other than those provided for by law, then the rules of the international treaty are applied. In Art. 79 stipulates that the Russian Federation can participate in interstate associations and transfer to them part of its powers in accordance with international treaties of Russia, if this does not entail restrictions on human and civil rights and freedoms and does not contradict the foundations of the constitutional system of the Russian Federation. Decisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation in their interpretation, contrary to the Constitution of the

[178] Cohen-Eliya M., Stopler G. Probability Thresholds as Deontological in Global Constitutionalism // Columbia Journal of
Transnational Law. 2011. Vol. 24. №1. P. 77.

[179] Restoring electoral equilibrium in the wake of constituonalized campaign finance // Harvard Law Review. 2011. Vol. 124. № 6 // http://www.harvardlawreview.org/media/pdf/vol124_restoring_electoral_ equilibrium.pdf

Russian Federation, are not subject to execution in the Russian Federation.

The ECHR not only resolves the case, but also attempts to determine the goals pursued by the law enforcement officer in resolving a particular case, to identify its motives. So, he was satisfied with the statement of Yu.I. Skuratov, who was denied registration as a candidate for deputies of the State Duma of the Russian Federation of the fourth convocation on the basis that as a place of work, position he was indicated "the position of the acting head of the department of constitutional, administrative and international law" of one of the Moscow universities, but at the same time, the status of the professor of the department was not indicated. The electoral legislation in force at that time contained a provision according to which the grounds for refusal to register could be the inaccuracy of the information submitted by the candidate for registration and the absence of the necessary documents. According to the ECHR, the conclusions of the Russian law enforcement authorities were not based on the norms of the Law or the practice of its interpretation: "It cannot be seriously argued that the difference between the position of professor of a department and the acting head of the same department could mislead voters."[180]

ECHR, motivating its legal position with the provision of Art. 3 of Protocol No. 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4, 1950)[181], attempted to determine the “legitimacy of the goal” sought by the Russian authorities when deciding to remove Yu.I. Skuratova from participation in the elections. As noted in the literature, in fact, when considering this case, the European Court of Human Rights did not determine the compliance of the decision made with the norms of the

[180] Постановление ЕСПЧ от 19 июля 2007 г. Дело «Краснов и Скуратов (Krasnov and Skuratov) против Российской Федерации» (жалоба N 17864/04 и 21396/04) // Бюллетень Европейского суда по правам человека. 2008. № 4.

[181] Международные избирательные стандарты. Сборник документов / Отв. ред. А.А. Вешняков. М.: Издательство «ВЕСЬ МИР», 2004. С. 536.

substantive law applicable to these legal relations, but tried to determine and assess the motives and intent of the decision.[182]

It should be noted that the ECHR sometimes adopts decisions that were found to be inconsistent with the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, constitutional norms or legislative provisions, which were denied by the Constitutional Court of the Russian Federation for compliance with the Constitution of the Russian Federation due to the lack of jurisdiction of cases[183]. Of particular importance is the case related to the appeal to the ECHR of Russian citizens S. Anchugov and V. Gladkov, who, due to the ban on participation in elections to persons held in places of imprisonment by a court sentence, enshrined in Part 3 of Art. 32 of the Constitution of the Russian Federation, could not take part in the parliamentary and presidential elections (Anchugov and Gladkov v. Russia)[184].

The ECHR noted that participation in elections in modern society is not a privilege, but a presumed right. The state has a wide discretion to restrict the right to vote, but it must be proportionate. The deprivation of the right to vote upon imprisonment for any term is not. In this regard, the Court considered that the prohibition provided for by Art. 32 of the Constitution of the Russian Federation, violates Art. 3 Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms. The decision to revoke voting rights should be made by a judge, taking into account all the specific circumstances.

On the one hand, one can agree with the provisions justifying the decision of the ECHR: in fact, the deprivation of the electoral rights of persons who are in places of imprisonment by a court sentence for committing crimes of any gravity is not a sanction provided for by the Criminal Code of the Russian Federation. The approach linking the possibility of restricting electoral rights with the terms of convictions was reflected in one of the decisions of the

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[182] Борисов И.Б., Ивайловский Д.А. Соотношение отдельных позиций Европейского суда по правам человека с национальным избирательным законодательством // Конституционное и муниципальное право. 2009. № 3.

[183] Definitions of the Constitutional Court of the Russian Federation dated January 15, 2009 No. 187-O-O, dated May 27, 2004 No. 177-OY.

[184] Бюллетень Европейского Суда по правам человека. 2014. № 2.

Constitutional Court of the Russian Federation: the terms of restrictions on passive suffrage introduced by federal law, as a general rule, should be established in accordance with the differentiation of the terms of convictions provided for by the Criminal Code of the Russian Federation[185].

On the other hand, when considering the case "Anchugov and Gladkov v. Russia", it was necessary to take into account that the approach associated with the restriction of the electoral rights of persons in places of deprivation of liberty by a court decision is traditional not only for Russian legislation, but also for Russian legal science. Back at the beginning of the XX century. V.M. Gessen wrote about the need to restrict the electoral rights of persons who "have committed criminal acts of a defamatory nature or are sentenced to defamatory punishment by the court."[186] The ECHR did not take into account Russia's argument about the complexity of the procedure for changing the second chapter of the Constitution of the Russian Federation, justifying this by the fact that its role is to assess the compliance of the ban with the requirements of the Convention.

As noted in the literature[187], with regard to the binding nature of the judgments of the ECHR, the Constitutional Court of the Russian Federation has repeatedly noted the following. First, the Convention is an integral part of the legal system of Russia, the competent authorities of which are obliged to execute the judgment of the ECHR rendered against it on the basis of the Convention provisions on the complaint against the persons involved in the case and in the framework of a specific dispute (case). Secondly, the implementation of the measures provided for by the ECtHR ruling should be carried out in accordance with Art. 15 (part 4) of the Constitution of Russia on the basis of recognizing this resolution as having law enforcement priority over national law. Thirdly, the execution of the final

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[185] See Resolution of the Constitutional Court of the Russian Federation of October 10, 2013 No. 20-P // Official Internet portal of legal information http://www.pravo.gov.ru, 15.10.2013.

[186] Гессен В.М. Основы конституционного права. Издание второе. Пг., 1918. С. 265.

[187] Арановский К.В., Князев С.Д. Исполнение актов ЕСПЧ в позициях российского конституционного правосудия: любой ценой или с нюансами // Закон. 2019. N 6. С. 36 - 51.

judgments of the ECHR in cases against Russia in the part that establishes a violation of the convention rights of a person with the award of just compensation, leave this person the opportunity to apply to the competent Russian court for a revision of the judicial act that gave rise to the complaint to the ECHR. Fourth, the impact of the ECHR on the Russian legal system is not limited to its direct role in protecting human rights and freedoms in specific cases; the interests of a common European understanding and observance of human rights objectively predetermine the need and significance of its activities to identify structural deficiencies and propose ways to eliminate them, which obliges the Russian Federation to respond thoughtfully and constructively to general measures that the ECHR considers necessary.[188]

Subsequently, the Constitutional Court of the Russian Federation established additional guarantees for ensuring the implementation of Russian laws on the territory of Russia, and mechanisms aimed at harmonizing and interacting international and Russian law within the framework of the national legal order. According to his legal position, the fact that the ECHR questioned the compliance of the Russian norm of the law with the European Convention allows the Constitutional Court of the Russian Federation to re-check this norm. If, based on the results of consideration of this request, the Constitutional Court of the Russian Federation decides that the norm preventing the execution of the judgment of the European Court of Human Rights does not contradict the Constitution of the Russian Federation, then it may indicate possible ways of implementing the judgment of the European Court of Human Rights[189].

In January 2017, Article 53.1 of the Criminal Code of the Russian Federation came into force, which enshrined this type of punishment as forced labor. According to the Committee of Ministers of the Council of Europe, within the meaning of the

[188] See: Resolution of the Constitutional Court of the Russian Federation of February 26, 2010 // Collected Legislation of the Russian Federation. 2010. No. 11. Art. 1255, etc.

[189] See Resolution of the Constitutional Court of the Russian Federation of December 6, 2013 No. 27-P.

Convention, this type of punishment can be interpreted as deprivation of liberty, although it was recognized that in Russian legislation it is considered as an alternative one. This gave grounds to the Committee of Ministers of the Council of Europe to recognize the judgment in the case "Anchugov and Gladkov v. Russia"[190] as fulfilled, since the total ban on the participation in elections of persons held in places of deprivation of liberty by a court verdict was eliminated.

The principle of proportionality as a means of maintaining a balance of interests in resolving electoral disputes

The use of proportionality is most often characteristic of electoral disputes related to the cancellation of the registration of a candidate (electoral association), when a judge evaluates an offense committed by a candidate (electoral association) and its possible impact on the voting results. In this respect, the case related to the election of the head of the Kargatsky district of the Novosibirsk region is interesting. The Municipal Election Commission of the Kargatsky District of the Novosibirsk Region applied to the court to cancel the registration of the candidate for the post of the head of the Kargatsky District of the Novosibirsk Region P., referring to the fact that the latter bribery of voters during the election campaign: On November 29, 2008, during a public election event in the village of Marshanskoye in the rural house of culture, P. personally handed out flowers and sweets free of charge, accompanying these actions with calls to come to the polls and vote for him. The Kargatsky District Court satisfied the request of the municipal election commission.

The Novosibirsk Regional Court did not agree with the conclusions of the first instance court. The cassation decision noted that the fact of bribery of voters was not established in the court

[190] 1355-е заседание КМСЕ проходило с 23 по 25 сентября 2019 года. См.: Notes of the Committee of Ministers of the Council of Europe on the Agenda. H-46-17 Anchugov and Gladkov group v. Russian Federation (Application no. 11157/ 04). 1355th meeting, 2019 (CM/Notes/1355/H46-17). URL: https://search.coe.int/cm/Pages/result_details.aspxPObjectID=0900001680972e12

session. The witnesses questioned by the court testified that P. did not give flowers and sweets to all voters, but only to some mothers with many children, congratulating them on Mother's Day[191]. The decision of the cassation instance actually expanded the content of paragraph 2 of Art. 58 of the Federal Law "On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation". In accordance with it, candidates, electoral associations, their proxies and authorized representatives, as well as other persons and organizations during the election campaign are prohibited from bribing voters, including handing them money, gifts and other material values. According to the court, as a general rule, a candidate does not have the right to present gifts, but the exception is holidays on which candidates can present gifts and other material values as a congratulation. In fact, the court took these relations out of the scope of the election campaign. When deciding that there was no bribery in the candidate's actions, the court actually recognized that the action committed by the candidate could not significantly affect the voting results in a particular election campaign.

At the same time, the problem of financing activities related to the delivery of gifts remained outside the scope of the court decision. If they are purchased from the electoral fund, then the presentation of gifts is an integral part of the candidate's election campaign, since in accordance with paragraph 2 of Art. 59 of the Federal Law "On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation", electoral funds may be used by candidates, electoral associations only to cover the costs associated with their election campaign. If the gifts were purchased not from the electoral fund, then in fact we are removing the activities related to their presentation by the candidate during the election campaign and aimed at forming a positive opinion about the candidate, outside of the election campaign.

The qualification of a possible bribery of voters, in the case when the candidate is a deputy of a representative body, causes difficulty. So, during the election campaign for the election of deputies of the Council of Deputies of Novosibirsk in 2020,

[191] The cassation ruling of the Novosibirsk Regional Court of December 16, 2008

candidate L. applied to the court with an application to cancel the registration of candidate D. due to the fact that he at his own expense acquired elements of improvement, the placement of which was carried out during the election campaign in the territory where the voters of the corresponding constituency lived. As confirmation of the violation of the requirements of the law, the applicant cited records from the pages of social networks D. In turn, the representative of the latter, arguing for the need to refuse the stated requirements, noted that "the improvement elements were ordered before the start of the election campaign," D. "reports on the designated pages about his work, as he is a current deputy of the Council of Deputies of the city of Novosibirsk of the sixth convocation ... " The fact that D. is an active deputy was also confirmed in his administrative claim by candidate L.: "In addition, it is obvious that the connection of the administrative defendant with this account on the social network is indicated by a special issue of the periodical" Delo i lyudi. D. The results of the deputy's work for the 6th convocation "(2015-2020))". The court dismissed the administrative claim[192], which was confirmed in the decision of the appellate instance[193].

The applicant, justifying his claims, drew attention to the fact that D. had paid for the production of the improvement elements from his own funds, which, as noted in the administrative claim, contradicts the public nature of the deputy's status and his activities. In our opinion, this argument could not justify the offense, but it allows us to actualize the need for a more complete legal regulation of the status of deputies of representative bodies of municipalities. In fact, using the example of such electoral disputes, we see that their resolution is based on a comprehensive analysis of the circumstances of the case, only on the basis of the norms suffrage is impossible. The provisions of the electoral legislation can be applied only in conjunction with the norms of municipal law, which should regulate

[192] The decision of the court of the Pervomaisky district of Novosibirsk dated August 14, 2020 Case No. 2a-1334/2020 // Archive of the court of the Pervomaisky district of Novosibirsk.

[193] The decision of the court of the Novosibirsk region of August 22, 2020 Case No. 2a-1334/2020 // Archive of the court of the Novosibirsk region.

in sufficient detail the forms of activity of the acting deputies of representative bodies, and consolidate the principles of its financing.

Russian electoral practice shows that the use of the principle of proportionality allows, in the course of the law enforcement process, not only to identify the main goal of a legal norm, but also to avoid its substitution for a secondary or intermediate one, which allows not to lead to the diminution of electoral rights.[194] Of particular importance is the assessment of the design, the peculiarities of filling out the subscription list, its purpose is: to reflect the will of the voter regarding support for the nomination of a particular candidate (list of candidates). It is from this that the election commissions proceed when deciding on the registration of a candidate on the basis of the submitted signatures. However, this approach does not always fully comply with legislation. An example would be a case considered by the Pervomaisky District Court of Novosibirsk. One of the candidates filed an administrative claim to cancel the decision of the relevant District Election Commission of July 30, 2020 No. 9/12 "On the registration of K. as a candidate for deputies of the Council of Deputies of the city of Novosibirsk of the seventh convocation in single-mandate constituency No. 42"[195].

The administrative plaintiff indicated in the application that there were unspecified corrections in the signature lists in the date of the candidate's signature, in the date of issue of the passport to the person who collected the signatures. It was also noted that one signature sheet does not contain the date of issue of the passport to the person who collected signatures. The representative of the election commission noted in the court proceedings that when checking the signatures, the members of the working group considered the facts that the plaintiff assessed as corrections as blots. According to sub. 7, paragraph 3.2, part 3 of the Resolution of the

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[194] Черепанов В.А. К вопросу об умалении избирательных прав граждан // Российский юридический журнал. 2012. № 1. С. 69.

[195] Decision of the District Election Commission of electoral district N 42 on the election of deputies of the Council of Deputies of the city of Novosibirsk of the seventh convocation of July 30, 2020 N 9/12 2O registration of K. as a candidate for deputies of the Council of Deputies of the city of Novosibirsk of the seventh convocation in single-mandate electoral district No. 42 ". URL: http://www.novosibirsk.izbirkom.ru/news_tik/29/29.

CEC of Russia dated June 13, 2012 No. 128 / 986-6 "On methodological recommendations for the reception and verification of signature lists with voter signatures in support of the nomination (self-nomination) of candidates in elections held in the constituent entities of the Russian Federation "[196] can not be considered as corrections, blots that do not impede the unambiguous interpretation of the information.

Regarding the absence of the signature collector's passport data in one of the signature lists, the representative of the election commission, noting some fairness of the requirements, explained the position of the commission when making a decision on registration. He noted that the information contained in the subscription list about a candidate, voter and signature collector is aimed at identifying them as participants in the electoral process. In this regard, the absence in one of the signature lists of the date of issue of the passport to the person who collected the signatures did not interfere with the identification of the latter, since all other signatures were collected by the same person. At the same time, as the election commission considered, recognizing the signatures on this sheet as invalid would diminish the rights of voters who signed in support of the nomination. Having considered the circumstances of the case, the court declared the signatures on this sheet invalid. But due to the fact that the number of signatures that were recognized as valid was sufficient for registration, the decision of the election commission was upheld.[197] The higher court refused to overturn the decision of the first instance court.

A case that arose during the election campaign for the election of deputies to the Legislative Assembly of the Irkutsk Region is connected with the violation of the rules for issuing a subscription list. The candidate for single-mandate constituency No. 11 K., in his application for self-nomination, submitted to the election commission on July 17, 2013, indicated that he belonged to one of

[196] URL: http://www.cikrf.ru.

[197] Decision of the Pervomaisky District Court of Novosibirsk dated August 7, 2020 in case No. 2a-1292/2020. URL: https://pervomaisky--nsk.sudrf.ru/modules.php?name=sud_delo&srv_num=1&name_op=doc&number=194798867&delo_id=1540005&new=0&text_number=1.

the political parties. On July 19, his membership in the political party was terminated. Checking the subscription lists submitted on July 24, the election commission found a violation of the discrepancy between the information in the statement of consent to stand for election and the subscription lists: there was no indication of membership in a political party in the subscription lists. This circumstance, along with others, became the basis for the election commission's decision to refuse registration, which was appealed by K. in court.[198]

Assessing the circumstances of the case, the court noted that the notification of the change in the previously submitted information, which is of a declarative nature and carried out on the initiative of the candidate, was not received by the election commission from K. within the time frame established by law. Since the applicant was knowingly aware of the termination of his membership in a political party, the court finds untenable the argument that first the candidate should have learned from the election commission about the inconsistency that had arisen between the statement of consent to stand for election and the subscription lists, and then inform the commission about the reasons for such inconsistency.

The inconsistency that arose in this case between the statement of consent to run for office and the signature lists regarding the indication of party affiliation has significant legal significance. After the election commission has received an application from the candidate about his consent to run for office, the electoral commissions inform the voters about the nominated candidates. This information, as a mandatory element, includes information about the candidate's affiliation with a political party. Consequently, the content of the candidate's statement of consent to run, in terms of belonging to a political party, could affect the will of the voter when he entered his signature on the subscription list in support of the candidate's nomination. In this regard, the court refused to satisfy K.'s application.

An electoral dispute on a similar subject arose in 2020 during the election campaign for the elections of the Council of Deputies of the city of Novosibirsk, but in fact received a different resolution.

[198] The decision of the Irkutsk Regional Court of August 16, 2013 No.

The court received an administrative claim from candidate B. to annul the decision of the District Election Commission on a single-mandate electoral district No. 47 of the Council of Deputies of the city of Novosibirsk of the seventh convocation No. 7/11 dated June 29, 2020.[199] "On the registration of a candidate for deputies of the Council of Deputies of the city of Novosibirsk, nominated by the electoral association" Novosibirsk regional branch of the political party P. " According to the applicant, the election commission, when checking the sheets, did not take into account the violation related to their registration. In clause 9 of Art. 37 of the Federal Law "On Basic Guarantees of Electoral Rights and the Right to Participate in a Referendum of Citizens of the Russian Federation" it is stipulated that if the candidate, information about which is contained in the subscription list, indicated his affiliation with a political party in the statement of consent, information about this is indicated in the subscription sheet. Candidate S., in his statement on his consent to run, indicated that he was a member of P.'s party. Despite this, the signature list of his party affiliation did not indicate what was justified by his resignation from the party on the day of his nomination. When submitting documents for registration, he did not specify information about himself in this part.

The representative of the election commission noted that it found itself in a difficult situation when considering the issue of registering a candidate. Based on the formal requirements, it was necessary to make a decision to refuse registration. But with this decision, she would have recognized the possibility of bringing to voters during the collection of signatures inaccurate information: about the presence of membership in the party in its absence. The administrative plaintiff argued that there was a form of communicating information about the change in data to the election commission. But it should be noted that the legislation provides for

[199] The decision of the District Election Commission for a single-mandate electoral district No. 47 of the Council of Deputies of the city of Novosibirsk of the seventh convocation No. 7/11 dated June 29, 2020 "On registration of a candidate for deputy of the Council of Deputies of Novosibirsk, nominated by the electoral association" Novosibirsk regional branch of the political party P. " in a single-mandate constituency №N 47 C. ". URL: http://www.novosibirsk.izbirkom.ru/news_tik/29/29.

the provision of this document, the form of which is absent in the legislation and is approved at the subordinate level when submitting documents for registration.

The content of the administrative claim showed the need to literally follow the letter of the legislation and simplify its interpretation. And this is possible only under ideal conditions for the formation and functioning of the legal system.[200] Candidate S. justified his position by the fact that, not being a party member, he did not want to mislead voters about his party affiliation. In support of his information, he submitted an extract from the minutes of the Central Committee on his expulsion from the party.

The fact that the court canceled the registration of a candidate would justify the fact that the main goal of the election commission in organizing and holding elections will be literal observance of the law, and not observance of the voters' rights to receive reliable information. Unfortunately, at the present time we cannot find out the position of the court in this case, since its proceedings were terminated.[201] The reason for the termination of the proceedings was the decision of the relevant election commission of August 10, 2020 to annul the registration of a candidate who was an administrative claimant due to his withdrawal by the electoral association.[202]

Conclusions

In the context of resolving electoral disputes, the principle of proportionality can be considered as one of the legal means to guarantee the implementation of public interest in a democratic state, to reflect in the process of law enforcement the balance of interests of its various participants. The application of the principle of

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[200] Шерстобоев О.Н. Защита законных ожиданий - основополагающий принцип административного права // Административное право и процесс. 2019. № 2. С. 22.

[201] Determination of the Soviet District Court of Novosibirsk dated August 10, 2020 in case No. 0-1838 / 2020. URL: http://sovetsky.nsk.sudrf.ru

[202] Decision of the District Election Commission for a single-mandate electoral district No. 47 of the Council of Deputies of the city of Novosibirsk of the seventh convocation "On canceling the registration of candidate B." URL: http://www.novosibirsk.izbirkom.ru/news_tik/29/29.

proportionality allows us to understand the logic of the law enforcement officer, which is reflected in the decision he made. Having weighed all the circumstances of the case, the law enforcement officer chooses the main, socially significant goal. In our opinion, in electoral relations, such a goal is the formation of public authorities on the basis of democratic, fair elections, which make it possible to take into account the opinion of the majority of voters who took part in the voting. At the same time, the interests of individual subjects of electoral law, manifesting themselves in the process of achieving the main goal, may not coincide, and sometimes even contradict it.

In this regard, it becomes necessary to consolidate in the normative legal acts regulating electoral legal relations, the goals of their adoption. This will provide the law enforcement officer with the opportunity to correctly determine for himself the purpose of legal regulation, on the basis of which the interpretation of regulatory provisions will be carried out. This requirement should be reflected in acts that determine the procedure for the adoption and content of regulatory legal acts of both federal, and regional and local levels.

THE CONCEPT OF THE ADMINISTRATIVE ACT: THE EXPERIENCE OF THE CIS COUNTRIES

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Annotation. The article analyzes the concept of an administrative act that is emerging in the CIS countries through the prism of three dimensions: scientific theory, legislation and judicial practice. It is concluded that the doctrine of administrative law of the CIS countries is largely based on the Soviet legacy and Russian modern experience. Moreover, the Russian theory is based on French and German concepts. In part of the second component (legislation), many CIS countries are ahead of the Russian Federation, adopting westernized laws on administrative procedures that establish substantive rules on administrative acts. It is substantiated that in terms of judicial practice, the Russian legal system retains its advantage over many legal orders of the CIS countries. The conclusion about the need to integrate the positive achievements of the legal systems of the CIS countries for their further harmonious development is made.

Keywords: administrative act, administrative procedure, administrative proceedings, legal systems of the CIS countries.

An administrative act is one of the central phenomena of administrative law. Almost all "classical" administrative law began precisely with the theory of an administrative act, in the mighty shadow of which many other administrative-legal phenomena remained for a long time. The colossal changes that have taken place in developed legal systems have not been able to shake this gigantic institution. As Professors I. Richter and G. F. Schuppert justly and somewhat poetically note, “sometimes they ask themselves what would happen if there was no administrative act. And then there would be an administrative procedure with enforcement, and then there would be judicial protection against administrative decisions and protection of legal expectations in relation to the validity of

administrative decisions. But all the same, if there was no administrative act, it would have to be invented"[203].

One of the historical paradoxes is that it was the Soviet legal system that at one time gave the administrative-legal methods and administrative acts an unprecedented scale for its era. However, here it would be appropriate to recall the thesis of E. Schmidt-Assmann about the duality of the goals of administrative law: not only rationalizing public administration, but also protecting the rights of citizens[204]. From this point of view, the wealth of experience accumulated during the Soviet period is one-sided. This was aimed exclusively at strengthening the public administration, by denying the human rights principle.

As well known, the Soviet legal reality in Russia ceased to exist three decades ago. On its fragments appeared a mosaic of relatively young state and legal phenomena, on the one hand, characterized by a certain genetic relationship, and on the other hand, overcoming (I must say, with different speed and unequal efficiency) their undemocratic heritage. All this is fully manifested in the example of the development of the phenomenon of an administrative act in the CIS countries.

We propose to consider the concept of such in three aspects:

1) firstly, the formation of the doctrine of the administrative act;

2) secondly, the development of legislation on administrative acts in the CIS countries;

3) finally, third, in the evolution of judicial practice on administrative acts in the post-Soviet legal systems.

1. The doctrine of the administrative act in Russia (as well as of other CIS countries) goes back, on the one hand, to the French, and on the other hand, to the German traditions.

As well known, one of the first concepts of an administrative act was developed by French doctrine. At the same time, within the framework of the latter, two main schools were formed: the

[203] Richter I., Schuppert G.F. Judicial practice in administrative law. M.: Jurist, 2000. P. 196.

[204] Schmidt-Assmann E. Codification of legislation on administrative procedures: traditions and models // Yearbook of Public Law 2017: Discretion and Valuation Concepts in Administrative Law. M., 2017. P. 336–337.

"organic" M. Hauriou and the "functional" L. Duguit. The first concept focused on the subject of decision-making (public administration), the second paid attention to the functional side of the act - the implementation of the "public service". As S. Braconnier justly remarked, at present, the understanding of an administrative act is usually based on a combination of these two theories: the adoption by a powerful subject in order to implement public administration[205]. However, this consensus concerns only the most general (albeit deep) features of this phenomenon. Further discussions, unfolding in various legal systems, concern other issues. One of which, for example, is whether to reduce administrative acts only to executive, administrative law enforcement activities, or to extend them also to the regulatory (rule-making) activities of the public administration.

It is noteworthy that the Russian theory of the administrative act is closer to the French approach, which extends to regulatory acts. At the same time, many CIS countries, which have embarked on a course towards the adoption of general laws on administrative procedures and administrative acts, are experiencing an ever-increasing German influence (at least at the level of theoretical and legislative structures). For example, in Art. 4 of the Law on Administrative Procedure of Kyrgyzstan 2015: "an administrative act is an act of an administrative body or its official, at the same time:

a) possessing a public law and individually defined character;

b) having external influence, that is, not having an intradepartmental character;

c) entailing legal consequences, that is, establishing, modifying, terminating the rights and obligations for the applicant and / or the interested person..."[206].

Abstracting from the details of various concepts of administrative acts, carefully studied in the Russian theory of administrative law, indisputably, the following signs can be attributed to the number of signs, recognized in the post-Soviet space: first, an administrative act is a legal means of external

[205] Braconnier S. Chapter 9. France, in Codification of Administrative Procedure. P. 159–160.

[206] Collection of laws on administrative procedures. M., 2016. P. 267.

expression of the will of a public administration; secondly, the internal volitional content of an administrative act is a management decision; thirdly, the administrative-legal act has a one-sided and imperious character; fourthly, the administrative act has a public-power character and is adopted by specially authorized subjects of public administration; fifth, the administrative act is aimed at the occurrence of legal consequences; sixth, the administrative act is of a subordinate (bylaw) nature[207].

Much attention is paid to the managerial and regulatory nature of the administrative act. One of the most important and complex features of an administrative act is its regulatory nature. And if in the case of normative acts the situation from the point of view of theory is more or less clear (it is necessary to diagnose the presence or absence of legal norms), then it is not always easy to distinguish individual administrative acts on this issue from other legal documents. This is especially true for registration, accounting, etc. actions. In each specific case, it is necessary to study the nature of the legal consequences of the measures taken by the public administration. If the latter are a mere statement that does not change anything in the legal status of a person, then their qualification as administrative acts will be erroneous (for example, registration at the place of residence, grading, etc.). On the contrary, if a specific action of the public administration entailed the emergence of new rights or obligations for citizens (organizations) (a decision on unsuitability for a position based on an examination assessment), this will be a clear confirmation of the existence of an administrative act[208]. However, in any case, the refusal to commit certain actions should be considered as an administrative act, with guarantees extended to it, including judicial appeal. A special case of this problem is intermediate actions (including approvals) within the framework of the decision-making procedure, especially when they are performed by subjects deprived of their powers; administrative acts will be only

[207] See: Andreev D.S. Defective administrative legal acts: dis. ...cand. jurid. sciences. M., 2011. P. 24–44.

[208] On this issue, the following works can be compared: Aedmaa A., Lopman E., Parrest N. and others. Guidelines for administrative proceedings. Tartu, 2004. P. 332–334; Richter I., Schuppert G.F. Op. cit. P. 205.

the final decisions of authorities, officials, other subjects of public law[209].

It must be admitted that, on the whole, this model is perceived, if not by Russian legislation, then at least by theory and judicial practice. So, in one of its Decision, the Constitutional Court of the Russian Federation noted that the regulation of the commission's activities as an advisory body in matters, referred to its competence by the Urban Planning Code of the Russian Federation, does not imply the exercise of its power, executive and administrative powers to issue special permits. Consequently, the norms of regional legislation, imposing on the commission the execution of the minutes of public hearings, cannot be regarded as allowing it to make authoritative decisions, since it involves only the compilation of powerless documentation[210]. Also, Russian courts rightly refuse to recognize the directly regulatory nature of various kinds of conclusions (for example, in the framework of public hearings): "The conclusion adopted on the basis of the results of public hearings is of a recommendatory nature and is not an immediate basis for the emergence, change, termination of the rights or obligations of any entity. Taking this into account, the contested conclusion on the results of public hearings, in the opinion of the court of appeal, cannot be considered as a non-normative legal act that can be challenged in a separate case…"[211].

As part of a brief overview of the signs of an administrative act, we propose to recall another of its signs – the possibility of judicial

[209] See, for example: Richter I., Schuppert G.F. Op. cit. P. 223–226.

[210] Determination of the Constitutional Court of the Russian Federation of 15.07.2010 No. 931-O "On the complaint of citizen Olga Olegovna Andronova about violation of her constitutional rights by the provisions of Articles 39 and 40 of the Urban Planning Code of the Russian Federation, Article 13 of the Law of St. Petersburg" On urban planning activities in St. Petersburg " , Articles 7 and 8 of the Law of St. Petersburg "On the procedure for organizing and conducting public hearings and informing the population in the implementation of urban planning activities in St. Petersburg" // "ConsultantPlus" [Electronic resource]. URL: http://www.consultant.ru/document/cons_doc_LAW_102769.

[211] Resolution of the Tenth Arbitration Court of November 27, 2012 in case No. A41-5222 / 12 // "ConsultantPlus" [Electronic resource]. URL: http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=MARB&n=440125#02444869528434694.

appeal. At first glance, this feature is very formal and secondary. On the other hand, from a practical point of view, it is one of the key (if not the most important) both for the institution of administrative acts and procedures, and a kind of test for the usefulness of administrative proceedings. According to the just remark of professor Y.N. Starilov, "where there is a possibility of adopting or issuing an act of management, the institution of judicial appeal of this administrative act must be established there. In other words, the latter initially (due to its "imperious" legal nature) contains the function of judicial protection…"[212]. Here we can also recall J. Wedel, who one of the essential differences between unilateral acts that are not "executive decisions", from the actual administrative acts, designated their "harmlessness" for citizens: "According to the term borrowed from the practice of administrative-legal dispute resolution, such decisions cannot cause damage "[213]. In other words, administrative acts are decisions that can cause harm, which means they can be appealed. To simplify somewhat, it turns out that the boundaries of the phenomenon of an administrative act are outlined not so much by the theory of the administrative act itself, as by administrative proceedings. What falls under judicial control, for the most part, can be recognized as an administrative act (or should fall under its legal regime by analogy). What is deprived of such protection is not an administrative act. This thesis implies not only a solid set of requirements for legislation on administrative acts and procedures, but also a kind of test for the maturity of the administrative court system. The more restrictions one or another legislator imposes on the possibility of judicial appeal against acts of public administration, the narrower and more "discharged" judicial control is, the further such a legal system is away from the requirements of modern development.

2. In the development of legislation on administrative acts in the CIS countries, two main trends can be distinguished.

[212] Starilov Y. N. Course of General Administrative Law. In 3 volumes. Vol. II: Public service. Management actions. Legal acts of management. Administrative justice. M., 2002. P. 279.
[213] Wedel J. Administrative law of France. M., 1973. P. 135.

The first (predominant) one is the adoption of laws on administrative procedures, including the establishment of substantive norms on administrative acts. Such laws are currently adopted in all CIS countries (with the exception of Russia and Ukraine). For their basis (with rare exceptions), the Federal Republic of Germany Law of 1976 "On Administrative Procedures" was taken. In its most detailed form, the relevant legislation establishes the following norms:

1) on the concept and characteristics of administrative acts;

2) on certain types of administrative acts;

3) on the requirements for administrative acts (including the justification for the decisions taken);

4) on the legal force of administrative acts (entry into force, suspension, termination);

5) provisions on the validity, defectiveness and invalidity of administrative acts;

6) rules for cancellation of administrative acts.

Examples of such detailed legal regulation are the laws on administrative procedures of Azerbaijan 2005, Armenia 2004, Kyrgyzstan 2015, Turkmenistan 2017. However, the effectiveness of their application, according to national researchers, remains low[214] (which is due, among other things, to the lack of doctrine and the lack of developed judicial practice in most CIS countries).

A different approach is demonstrated by the Russian legal system, which, unfortunately, avoids the adoption of a general law on administrative procedures and administrative acts. At the same time, the Russian legislator is trying to give some universality,

[214] Ametistova O. What is the advantage of modern legislative regulation of an administrative act for public administration? The point of view of a German lawyer on the example of the Code of Administrative Procedures of the Republic of Tajikistan // Yearbook of Public Law 2016: Administrative act. P. 500; Marifkhonov R. Conceptual problems of the development of administrative law in the Republic of Tajikistan // Yearbook of public law 2017: Discretion and evaluative concepts in administrative law. P. 462–464; Podoprigora R.A. Legal regulation of administrative procedures: Kazakhstanian experience // Administrative reform in the Republic of Uzbekistan: experience and problems of legal regulation. P. 74; Pudelka Y. The law of administrative procedures and administrative procedural law in the states of Central Asia – a brief overview of the current state // Yearbook of Public Law 2016: Administrative act. P. 445.

including to anti-corruption legislation, as a kind of "substitute" for the principles of administrative law. However, this legal "Excalibur", in the fight against illegal administrative acts, with all its will, cannot create a material legal basis for the institution of administrative acts.

It is curious that in Russian legislation there is not even a single notion of an administrative act. The deficiencies of substantive administrative legislation are attempted to be compensated by legislation on administrative proceedings. Thus, the Code of the Russian Federation on Administrative Proceedings 2015 actively uses, along with the term "normative legal act", the terms "decision" and "action" of public authorities and their officials. The understanding of the latter is revealed by judicial practice. And here the German concept of an administrative act (as an external law enforcement act affecting the legal status of citizens and organizations) is clearly traced.

3. The third element of the concept of an administrative act is **judicial practice**.

It should be noted that many post-Soviet legal orders are characterized by certain restrictions: for example, on appealing against normative legal acts (as is the case in Uzbekistan) or so-called "political acts".

The strong point of the Russian concept should be recognized as the widest possible approach to judicial appeal of administrative acts. For example, Code of the Russian Federation on Administrative Proceedings 2015 allows to appeal in court any normative and individual administrative acts (including acts of the President of the Russian Federation, federal executive bodies, etc.). Moreover, since 2016, the law allows appeals against acts of official interpretation of legal norms. The described broad understanding of an administrative act from the point of view of judicial appeal in Russia is the result of overcoming (denying) the Soviet undemocratic experience; here we are dealing with an extremely striking example of a human rights-based approach.

It should also be noted that due to the absence of a law on administrative procedures and acts in Russia, the main burden of the practical development and implementation of the concept of an administrative act had to fall on the shoulders of the courts. It is court decisions that develop the criteria for the validity of administrative

acts, gradually expand the scope of application of modern principles of administrative law (proportionality, protection of legal expectations etc.), form the idea of the defectiveness, invalidity of administrative decisions.

Thus, in spite of the apparent autarkism, it is possible to draw obvious parallels in the nature of the evolution of Russian administrative law in comparison with many European legal orders.

4. Conclusions.

The development of legislation on administrative acts makes it possible to single out the following "gold standard" of legal regulation:

1) norms on the notion and characteristics of administrative acts;

2) on certain types of administrative acts;

3) on the requirements for administrative acts (including the rationale of the decisions taken);

4) on the legal force and effect of administrative acts (entry into force, suspension, termination);

5) provisions on the validity, defectiveness and invalidity of administrative acts;

6) rules for cancellation of administrative acts.

This standard is reproduced in the laws on administrative procedures in many CIS countries. At the same time, an important problem of practically of all post-Soviet legal order is the lack of the relevant doctrine and judicial practice. The situation in the Russian Federation is somewhat different. The formation of theory and judicial practice on the issues of administrative acts has not yet led to a radical modernization of the relevant Russian legislation. At the same time, the strength of the Russian experience is the broadest possible approach to administrative acts (from the point of view of the scope of judicial review).

We believe the time has come to unite the achievements of related legal systems for the purpose of forming a single, harmonious concept of an administrative act in the CIS countries. For the Russian Federation this means the soonest adoption and comprehension of the modern law on administrative procedures.

THE PROTECTION OF THE RIGHTS OF INDIVIDUALS IN REFORMING THE ADMINISTRATION

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Preliminary remark: I have written this contribution from the **point of view** of a legal expert and planning officer of GIZ working for partner countries of the German development cooperation. So my job is to cooperate with our project teams for the establishment of new or the continuation of ongoing projects of administrative reform and/or prevention of corruption. Therefore my view has been influenced by the practice more than by theory. My impression is that the importance of the protection of citizens' rights is often being neglected. This experience is mainly based on the context of partner countries with a rather weak system of administrative justice. In this context, the streamlining of administrative procedures and the speedy introduction of elements of e-governance represents a general tendency. On the other hand, the legal and procedural safeguards for individual rights do not keep pace with this trend. Let me please give you a brief overview of my observations:

The reasoning for administrative reform often starts with objectives like the enhanced efficiency of administrative agencies and the good quality of public services. The state shall serve its citizens. The state administration shall contribute to the basic infrastructure for economic development and public welfare. In order to build the necessary service-orientation of administrative agencies, and to enhance the social competence of civil servants and public employees, the further qualification programs of national and international institutions provide for hard and soft skills training. Many projects of international development cooperation focus on **capacity development strategies** for the public sector. The aim is to reach out for all levels of state and to strengthen individual competencies. For better results, officers, policymakers and functionaries alike are trained in professional skills such as citizen

engagement and service delivery, defining policy problems and designing solutions, digital transformation and innovation through co-creation and networking. By the way, **digital competencies** would be less high-lighted by OECD competency profiles as compared to values and ethics, leadership, communication, loyalty, commitment and negotiation. Obviously, the public value framework for civil service skills entails the productive stages of administration, in view of developing a policy, working with citizens, collaborating in networks and commissioning and contracting[215].

At the same time, many projects engage in **e-governance**[216] **and streamlining** administrative procedures in order to achieve better quality of public services. The monitoring is often conducted by public surveys and showing statistics of improved processing times for public services. However, not so many projects try to complement effectivity and efficiency of advanced administrative agencies by elements necessary to ensure the rule of law[217]. For example, the principles of good governance like transparency, accountability and integrity do not find the same attention as speed and service-orientation. (True, it would be more difficult to measure the success in this regard.) It is worth mentioning that these three elements of administrative reform appear to be the foundations of corruption prevention. In order to be successful, they would have to be accompanied by measures to enhance the access to justice and improve the procedural rights of citizens in administrative

[215] Competencies highlighted in competency profiles, OECD Survey on Strategic Human Resources Management in Central/Federal Governments of OECD Countries, 2016, pages 1-6 and esp. 8/11.

[216] Definition of e-Governance: "E-governance is the application of information & communication technologies to transform the efficiency, effectiveness, transparency and accountability of informational & transactional
exchanges with in government, between govt. & govt. agencies of National, State, Municipal & Local levels, citizen & businesses, and to empower citizens through access & use of information." (Mrinalini Shah, E-Governance in India: Dream or reality? International Journal of Education and Development using Information and Communication Technology (IJEDICT), 2007, Vol. 3, Issue 2, pp. 125-137.

[217] Compare the rule of law problems in practice described by Bergling, Per/Bejstam, Lars/Ederlöv, Jenny/Wennerström, Erik/Zajac-Sannerholm, Richard, Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development, research report Folke Bernadotte Academy 2008, pages 11-19.

proceeding and participatory rights in decision-taking by state authorities.

In theory, these postulations are more or less clear[218]. Above all, the principle of legal protection has well been justified by European scholars[219]. But in practice, many administrative reform projects start with a rather technical approach. First of all, they screen the administrative procedures for the sake of **facilitation and simplification**. Better performance is key to better administration. De-bureaucratization is a legitimate goal of reforming the state administration. Correspondingly, the primary target groups are often economic actors, like private companies and foreign investors. (Compare the influential Doing Business rankings promoted by the World Bank Group with their emphasis on speed and ease of doing business – they have recently been strongly criticized as window-dressing, obviously sometimes even voluntarily falsified)[220]. Unfortunately, aspects of quality and of individual legal protection of the ordinary citizen do often not appear to be of equal importance.

In my view, the so-called streamlining (or re-engineering) of administrative procedures in a technical sense should not be supported without duly paying attention to further aspects, e. g. as regards the social impact, legal certainty and individual rights. For a sustainable public administration reform, it is not enough to be efficient and effective, it is also required to be inclusive, meaning that regular reality checks are necessary to find out whether or not

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[218] Please compare the rights based approach to development as it is formulated by the UNDP, in: Public Administration Reform - Practice Note, 2015, page 22 ("Enshrining the human rights approach"); see also UNDP, Users' Guide for Assessing Rule of Law in Public Administration, 2015.

[219] The principle of effective legal protection in administrative law – a European comparison, ed. by Zoltan Szente and Konrad Lachmeyer, 2017, pages 12-14. This comparative study gives an overview of many European administrative jurisdictions.

[220] See, for example, Chiara Mariotti, How many scandals will it take for the World Bank to start doing rights not rankings? 18 March 2021, https://www.eurodad.org/how_many_scandals_will_it_take_for_the_world_bank_to_start_doing_rights_not_rankings; https://www.reuters.com/business/external-review-finds-deeper-rot-world-bank-doing-business-rankings-2021-09-20/; WB group to discontinue Doing Business Report, https://www.worldbank.org/en/news/statement/2021/09/16/world-bank-group-to-discontinue-doing-business-report

the administrative progress equally benefits all citizens of a given country, including remote provinces and socially vulnerable groups of people. (This argument follows the Agenda 2030 principle to **"Leave No One Behind!"** and to integrate other sustainable development goals when building effective, accountable and inclusive public institutions at all levels)[221].

In other words, the input of administrative reform projects (capacity development and institution-building) should be in relation to the desired outcome (equal access of all citizens to public services, as well as to favorable administrative decisions like, for example, permits and licenses). The **outcome** should justify the efforts of reform[222]. The outcome can – and sooner or later will be – judged by looking at the true results of economic & ecologic progress, comprising the social welfare under the human rights perspective. All four dimensions[223] should be equally important for the assessment of the success of administrative reform. (According to the OECD-DAC, the main criteria for international development projects are: effectivity / efficiency, relevance / coherence, impact and sustainability. For the purposes of state and administrative reform, they should be enhanced by the criterion of effectively contributing to the sub-targets of SDG 16, which consist, among others, of access to justice and rule of law as well as the right to information[224] and the effective legal protection of basic individual rights[225]).

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[221] https://www.un.org/sustainabledevelopment/peace-justice/

[222] OECD, Value for money and international development, 2012.

[223] Unfortunately, in many countries, the National agendas to implement the UN Agenda 2030 speak of three dimensions, namely the economic, the ecologic and the social dimension, omitting or neglecting the human rights perspective.

[224] Toby Mendel, Freedom of Information: A Comparative Legal Survey, 2nd edition 2008, http://www.unesco.org/new/en/communication-and-information/resources/publications-and-communication-materials/publications/full-list/freedom-of-information-a-comparative-legal-survey-2nd-edition/ (download of a Russian version offered as well).

[225] Compare the cross-cutting nature of human rights protection in international development cooperation: Deutsches Institut für Menschenrechte: The Human Rights-Based Approach in German Development Cooperation, https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/E-Info-Tool/e-info-tool_human_rights_based_approach_in_German_development_cooperation.pdf

All of this sounds quite reasonable, but one may want to ask: "**How is reality?**" and "What can be done in order to ensure that the individual rights of the citizens will not be neglected in administrative reform?" In fact, the question is not only: "How to conceptualize the principle of effective legal protection in administrative law?"[226] but also "How to effectively implement it?" By asking these questions, I mean that the interconnection between the drafting of law and its application should be emphasized by looking forward and backwards: "How can the law be improved in view of its application?" and "What institutional requirements will be needed in order to apply the law?". These are two questions which are closely related to each other (in fact, it is the same question of practicability).

As regards our topic, when discussing the individual rights of citizens in administrative procedures, and the necessary reinforcement of these rights by possible pre-trial complaints to administrative authorities, and finally the question of fair trial in a court proceeding, it appears to be fruitful to analyze the **practice of application** of the existing National law before drafting new rules and procedures. This task seems to be not only of legal nature. Certainly there are many deficits and shortcomings in legal, administrative and judicial systems, esp. in countries where administrative justice cannot rely on a tradition of acknowledging individual subjective rights (=personal entitlement to make a claim) under public law.[227] Besides from this, we often observe that a *numerus clausus* of types of lawsuits, stipulated by procedural law, actually limits the scope of application of administrative justice, and thus restricts the general (constitutional or otherwise European) right to (quick, affordable, effective) recourse to the courts in case of illegal or disproportionate action by public authorities[228].

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[226] The principle of effective legal protection in administrative law – a European comparison, ed. by Zoltan Szente and Konrad Lachmeyer, 2017, pages 5 – 28.

[227] Compare Ulrike Giera, Konrad Lachmeyer, The principle of effective legal protection in Austrian administrative law, page 81, in: The principle of effective legal protection in administrative law – a European comparison, ed. by Zoltan Szente and Konrad Lachmeyer, 2017.

[228] Compare Art. 19 IV GG FRG or Art. 6, 13 ECHR or Art. 47 CFR of the EU.

Still, in addition to this, following the **definition** of the Van Vollenhoven Institute, of the University of Leiden,

'**Access to justice** exists if:

- People, notably poor and disadvantaged,
- Suffering from injustices
- Have the ability
- To make their grievances be listened to
- And to obtain proper treatment of their grievances
- By state or non-state institutions
- Leading to redress of those injustices
- On the basis of rules or principles of state law, religious law or customary law
- In accordance with the rule of law'[229]

we know that the access to justice can be impossible due to **factual circumstances**, which, at first glance, have nothing, or at least not much[230], to do with the legal system. Being unable to get access to justice may be due to the far distance of a village to the court, or due to the ignorance of uninformed and disadvantaged people, who just don't know the various ways to justice and legal remedies. Besides, a lack of legal aid offered by the state (or non-governmental service providers), or a number of other obstacles can cause the inability to claim one's rights. (For example, the research

[229] Adriaan Bedner, Jacqueline A.C. Vel, An analytical framework for empirical research on
Access to Justice, 2011, page 7,
https://www.researchgate.net/publication/239855859_An_analytical_framework_for_empirical_research_on_Access_to_Justice

[230] In some way and to some extent, the nine aspects of access to justice are mirrored by the procedural rights of citizens under administrative law, as described by Z. Szente, footnote 5, page 16:
the right to be a party (and right to intervention);
the right to be heard;
the right to access to the relevant documents;
the right to legal counsel;
the duty to give reasons (for administrative decisions);
the right to an administrative act within a reasonable time (as a guarantee against the 'silence' of the administrative body);
the right to access to the court;
the right to appeal.

report "Rule of Law in Public Administration"[231] has listed a lot of possible causes: unclear competences and responsibilities, arbitrariness of civil servants, ethnic or religious or gender discrimination, open or hidden corruption in public administration, or even the lack of written administrative decisions which could serve as a basis for individual complaint, and often simply the backlog of cases at court).

The wide spectrum of real obstacles to the access to justice leads us to the question of accountability and responsibility of the state in which frequent violations of rights happen[232]. Of course, in consideration of the scarcity of many state budgets for justice, we cannot expect a rapid increase of **legal aid** cases, and a sudden improvement of the quality of legal aid services offered by the state and by NGO.[233] (For example, the Republic of Georgia has just recently, a few years ago (2016/17), introduced legal aid for some administrative law cases, in addition to criminal and civil cases, and limited to people registered in the National social registry as poor people)[234].

Overall, the last evaluation of the European Commission for the Efficiency of Justice (CEPEJ, 2020) reports that between 2014 and 2018, there has not been an increase (on the average) in the implemented **budgets** allocated to legal aid in the participating European states[235]. At the same time, there appears to be a link between the level of wealth and the legal aid budget. On average, member States allocate 65% of judicial system budget to courts, 24% to prosecution services and 11% to legal aid. Wealthier countries spend more on legal aid by any parameter examined, which differs from the trends in budgetary spending on courts and prosecution services.[236] Now, given the fact that in less wealthy states, the population's percentage of poor people may be bigger, it should be

[231] See footnote 3.
[232] Please compare the Venice Commission Report on the Independence of the Judicial System. Part 1: the Independence of Judges, (2010, CDL-AD(2010)004-e about the implications of Art. 6 ECHR.
[233] European judicial systems CEPEJ Evaluation Report 2020 (2018 data), p. 34-42.
[234] http://www.legalaid.ge/en/p/4/legal-aid
[235] CEPEJ 2020 page 37.
[236] CEPEJ 2020 page 39.

the other way around… Just recently, in March 2021, the Committee of Ministers of the Council of Europe has adopted a set of guidelines for the 47 member states to help them improve the functioning of national systems of legal aid in the fields of civil and administrative law[237].

What is more, we may not hope that **corruption** will be rooted out soon.[238] The poor and socially vulnerable groups of people suffer the most, as they are usually unable to pay any bribes. Finally, we cannot presume that **e-governance** and electronic files will substantially change the actual information of poor and disadvantaged people in the short term, given the relatively low rate of digitalization and digital literacy in many states[239]. For the time being, hybrid systems of digital and analogue access to information and communication with state agencies appear to be the best way to reach out to all citizens, including the disadvantaged.

To say it bluntly, state legal aid is often quite weak, and e-governance can rather pose a threat to many citizens, instead of offering immediate advantages, esp. as far as the assertion of their legal rights is concerned. Therefore, my **thesis** for discussion would be that there is a need to permanently accompany administrative reform with ongoing adjustments and changes of public law in view of individual rights. After the introduction of new rules and procedures, the state should feel obliged to ensure the effective safeguarding of all individual rights in administrative law and procedures in the same manner as it had been guaranteed before, or even in a better way. Some states have started initiatives to launch a nationwide complaints management system and centralized quality

[237] The efficiency and the effectiveness of legal aid schemes in the areas of civil and administrative law, Guidelines adopted by the Committee of Ministers of the Council of Europe on 31 March 2021 and explanatory memorandum, https://rm.coe.int/guidelines-of-the-committee-of-ministers-of-the-council-of-europe-on-t/1680a39918

[238] World Justice Project 2021 Rule of Law Index, page 24: Overview of Eastern Europe and Central Asia. See also absence of corruption on page 29. – Similarly: https://www.transparency.org/en/news/cpi-2020-eastern-europe-central-asia

[239] See EU Justice scoreboard 2020, page 21: Availability of online information about the judicial system for the general public.

control for the public sector. I have come to know the examples of Uzbekistan and Kenya.

Consequently, the progress of **e-governance** depends on institutionalizing the necessary instruments, and especially on designing user-friendly and accessible applications.[240] They should not stop at the point of service delivery, but go one step further and offer legal information and redress in the same nice way as the services have been delivered. These new apps have to be coordinated and harmonized with the general rules of administrative procedures (and minimum standards of rule of law and good governance). This seems to be especially true for one-stop shops and their online-portals, which pass on many services of the so-called back-offices. The way of legal redress does not always seem to be clear.

At the same time, the rule of law principles have got a number of implications for the digitalization of administrative procedures and services. Experience has shown that many technically progressive innovations can result in the immediate curtailing of procedural rights of individuals and corresponding safeguards of material law. One striking example has been that of **electronic registries of real estate**. The state has to campaign for its proper implementation. In case of doubt, and poverty, it should even subsidize the survey of land and assist in clarifying ambiguous situations of land titles. The Georgian Republic has struggled for the full coverage of all real estate for some years now. Some citizens have lost their property due to their inability to properly take care of the electronic registration.

Another example is the recently introduced, very ambitious and complex Indonesian "Omnibus Law" for job creation, which, among many other topics and changes, centralizes and facilitates the **licensing** of palm oil and other plantations in the rain forest, possibly at the expense of a proper environmental assessment.

Still another example has been given by **automated proceedings**; they often appear as a black box. They are not transparent and endanger the legal protection of a person's personal rights (*Persönlichkeitsrechte*). According to the European General Data Protection Regulation of 2016 (GDPR), automation should be

[240] Please compare the Principles for Digital Development: https://digitalprinciples.org/ (EN, FR, GE, SP).

the exception rather than the rule, confined to standardized and simple procedures. In any case, the law must guarantee the right to request personal (human) intervention, the right to express one's point of view and to challenge the decision and make use of corresponding information rights. As it is well-known, the use of algorithms brings about many risks of (e.g. ethnic, gender, age, or other social) discrimination. Thus there appears to be a growing need for risk management systems and legal safeguards against automatic (or algorithm-driven) discrimination, and against decisions which again come without any reasoning, just because they are fabricated by a computer.[241].

To conclude and summarize, the predominant tendency to facilitate administrative procedures at the expense of individual rights often arrives at quick solutions which are not sustainable. Procedural and participatory rights of citizens in public administration are a precondition for the access to justice. And the easy access to justice is the basis for the protection of social and economic rights of the people. In addition to enhancing the free legal aid, the strengthening of legal positions in administrative procedures appears to be more important than ever.

[241] Mario Martini, David Nink, Wenn Maschinen entscheiden… – vollautomatisierte Verwaltungsverfahren und der Persönlichkeitsschutz, in: NVwZ 10/2017, pages 1-14 (13).

THE TREATMENT OF INVALID ADMINISTRATIVE ACTS BETWEEN SAFEGUARD OF PUBLIC INTEREST AND PROTECTION OF INDIVIDUAL RIGHTS

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Abstract. The theory of administrative acts contains several important problems, among them the issues of the invalidity of administrative acts stand out. These arise due to the fact that there is the presumption of the validity of acts adopted by administrative bodies, and invalidity can destroy the stable of governmental system. However, there are defects of administrative acts and they are so serious that they change the meaning of the act itself. In this case, these acts should be invalidated, but after that there will be problems of the legal consequences of such recognition. It is also important to determine which body can recognize the act as invalid, what procedure it will follow, recognizing the act as invalid.

Keywords: administrative act, invalid administrative act, administrative procedures, administrative discretion.

Introduction

The fact is that Russian doctrine has no clear concept of an invalid administrative act, due to the fact that among our lawyers there is an opinion that can be described as it was very well done by Charles Dickens in the first sentence of his novel "A Christmas Carol": "Marley was dead, to begin with. There is no doubt whatever about that". I allow myself to paraphrase this: "The administrative act was dead, to begin with. There is no doubt whatever about that". However, a few questions arise: (1) how can we understand that this act was dead, (2) what kind of acts can lose their validity, and (3) was this act stillborn or was its validity lost after a court's or an administrative decision? Of course, the third question is the most important, but I have to present all three. These questions will be presented via the prism of my topic, i.e. invalid administrative acts between the safeguard of the public interest and the protection of individual rights.

1. Nature of an invalid administrative act

The first problem is how to prove that the act is invalid. There is a traditional administrative law doctrine, which was formulated in the Soviet period and has its roots, apparently, in the Imperial era. This doctrine is based on the positivist theory, and it has a close relationship with the principle of legality in its simplest sense. Traditionally, there has been a presumption of legality in our doctrine. Thus, in 1968, Professor Vladimir Novosyolov wrote that unlawful administrative acts could give rise to rights and obligations *de facto*[242]. Such an opinion, based on the authority of the state, the idea of sovereignty, apparently has historical roots in the Middle Ages, when the will of the sovereign was not subject to challenge. Then the idea of stability of the governmental system was added to this argument, but the main result remained unchanged. The authorities have not allowed the invalidation of all unlawful administrative acts. In Russia, the first and most famous opinion about invalid administrative acts was presented by Arkady I Elistratov at the beginning of the 20th century. He wrote that there is a general rule – the presumption of legality, covering all administrative acts, and it is formulated due to the fact that the governmental sphere must be stable, thereby, an administrative act is invalidated if there are defects testifying to the unlawfulness of this act, and such illegality is obvious to everyone. On the contrary, the acts containing non-obvious defects are controversial and valid until they are cancelled by courts or administrative bodies[243]. This sentence was pronounced in 1917, and the author mentioned that this idea was new, and only recently some academic papers were published in Germany and France; they made "a small clearing" in "the dense thicket" of the unknown[244].

Now the same argument is well-known and has also been used in both Russian and foreign legal systems. It is interesting that some

[242] Новоселов В.И. Законность актов органов управления. М.: Юридическая литература, 1968. С. 104.
[243] Елистратов А.И. Основные начала административного права. Изд. 2-е, испр. и доп. М.: Изд-во Г.А. Лемана и С.И. Сахарова, 1917. С. 158 – 159.
[244] Ibid. P. 158.

characteristics of invalid administrative acts of the Russian doctrine and the doctrine of Common Law are similar, despite the fact that their general approaches are often radically opposed to each other. For example, the Russian legal system is usually not compared in the one of South Africa, because it does not make any sense, as many believe, but such a comparison is permissible regarding views on invalid administrative acts. It is easy to observe the same remarks on invalid acts in both countries, but, of course, this does not apply to the general legal reasoning used by judges. Thus, the Oudekraal paradox has been present in South Africa[245]. This principle was created by the Supreme Court of Appeal. The essence of this theory is that an unlawful administrative act is understood as a fact and continues to operate until it is invalidated by the court. This act can have legal consequences that are effective and constitutionally necessary; if an unlawful administrative act is not challenged by its addressee, this act will continue to operate and exist as a fact. It is important that this person agrees with the act and does not consider it necessary to protect his or her rights. Thus, the unlawful act in the Oudekraal case was applied for forty years, it was the basis for building up the village, but then the violation was observed, and the court did not agree that its validity would be lost and all its consequences were reconfirmed.

This legal opinion applies not only to South Africa, but to the entire Common Law system. For instance, T. Adams called it "the standard theory of administrative unlawfulness", which contains several sentences: (1) an administrative body does not have the power to break the law, (2) by adopting an unlawful administrative act this body is acting *ultra vires*, (3) this act is invalid from the very beginning, but it is applied until it is invalidated by the court, i.e. the attribute of invalidity seems to be asleep and simultaneously waiting for the judgment[246]. Actually, similar theories, which exist in the Common Law system, are heavily criticized by some researchers.

[245] Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd [2010] ZACC 26; 2011 (4) SA 113 (CC); 2011 (3) BCLR 229 (CC) (Bengwenyama) // http://www.saflii.org/za/cases/ZASCA/2011/109.html

[246] Adams T. The standard theory of administrative unlawfulness // The Cambridge Law Journal. 2017. Vol. 76 Issue 2. P. 289 – 310.

Such a paradox is labelled "mysterious"[247], "too broad"[248], "deceptive in its simplicity"[249], "uncertain"[250]. As a result, reasoning similar to the Oudekraal paradox is directed towards the interests of the public and individuals, which should not compete with each other. In fact, the principle of legitimate expectations has to be the main one for these cases, because the interests of individuals are more important than legality in its purest sense.

Thus, the authorities must find ways to determine what kinds of administrative acts are invalidated. For instance, most of the post-Soviet countries have chosen the German way and have implemented the norms of the Law of Administrative procedures, which contains the list of grounds for invalidity of administrative acts. In this regard, I mean § 44 of this Law[251]. Interestingly, no country has fully implemented the German list, and at least they refused to accept "the good morals standard" (die guten Sitten) as a basis for invalidating the act. This concept is the continuation of the principle of the Basic Law, Art. 2 (1), that "every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law". The good morals standard is well-known in legal doctrines around the world, and many legislatures have used this term since ancient times[252]. Good morals are often presented as the general opinion of all people about how to commit legal actions, which are deemed to be fair, and they can be thought of as the most common expectations concerning fairness. Thus, the German Federal Administrative Court evaluated "good morals" as "the decency of all

[247] Forsyth C. The legal effect of unlawful administrative acts: the theory of the second actor explained and developed // Amicus Curiae. 2001. Issue 35. P. 20 – 23.
[248] Pretorius D.M. Oudekraal after fifteen years: the Second Act (or, A Reassessment of the Status and Force of Defective Administrative Decisions Pending Judicial Review) // Stellenbosch Law Review. 2020. Vol 31. No. 1. P. 31-32.
[249] Ibid. P. 3-4.
[250] Adams T. The standard theory of administrative unlawfulness // The Cambridge Law Journal. 2017. Vol. 76 Issue 2. P. 289 – 310.
[251] Verwaltungsverfahrensgesetz (VwVfG): 25.05.1976 (25.06.2021) // https://www.gesetze-im-internet.de/vwvfg/__44.html (15.07.2021)
[252] Karayiannis A.D., Hatzis A.N. Morality, social norms and the rule of law as transaction cost-saving devices: The case of ancient Athens // European Journal of Law and Economics. 2012. Vol. 33. Issue 3. P. 621–643.

people" who act "honestly and justly"[253]. If an administrative act does not fit into this sense of justice framework and is not honest and just, it will be invalidated.

Common Law has also operated with the concept of morality and its approach has been presented more broadly than the German one. Morality is among the principles determining all public action. For instance, in 1956, Lord Upjohn said that public policy should be dependent on concepts of law, justice, and morality, which are interpreted by judges[254]; thereby, administrative acts must be lawful and comply with the principles of justice and morality. Morality will be applied when there are no clear legal rules governing the legal regime, which establishes the administrative act. On this occasion, James A. Grant noted that "formalism is not necessarily a bad thing, for there is value in having authoritative legal rules that can be applied without the need for the moral and political evaluation that the rules were meant to settle"[255].

Moral values, general morality has been approved by the Constitutional Court of Russia; however, these terms have mostly related to the power of parliament to restrict human rights. The standard formula concludes that (1) human right can be restricted by federal laws and, if necessary, to protect the constitutional values, which are contained in Art. 55 (3) of the Constitution, (2) morality is one of these values, (3) this constitutional rule coincides with Art. 29 (3) of the Universal Declaration of Human Rights and Art. 2 (3) of Protocol No. 4 of the Convention for the Protection of Human Rights and Fundamental Freedoms, and these international treaties include the just moral requirements as the basis for limiting human rights[256].

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[253] Beschluss vom 07.07.2004 - BVerwG 6 C 24.03 // https://www.bverwg.de/de/070704B6C24.03.0

[254] Belhaj and another (Respondents) v Straw and others (Appellants) Rahmatullah (No 1) (Respondent) v Ministry of Defense and another (Appellants): judgment on 17 January 2017, [2014] EWCA Civ 1394 and [2014] EWHC 3846 (QB) [2017] UKSC 3.

[255] Grant J.A. Reason and authority in administrative law // The Cambridge Law Journal. 2017. Vol. 76. Issue 3. P. 508.

[256] Постановление Конституционного Суда РФ от 8 декабря 2009 № 19-П «по делу о проверке конституционности подпункта 4 статьи 15 Федерального закона «О порядке выезда из Российской Федерации и въезда в Российскую

Recognition of morality among general legal values makes us think that the Russian administrative bodies, which adopt, execute and cancel administrative acts, are obliged to follow general moral norms as a criterion of proportionality in the restrictions of human rights. There are no significant objections to this in Russian legal doctrine, but this opinion needs to be developed further.

Despite this slight difference, most post-Soviet laws on administrative procedures reproduce almost all of the German reasons for the invalidity of administrative acts. The Russian legislature is following a different path, and there is no law that can determine the general reasons for the invalidity of all administrative acts. As a result, such a list is established for each area of administrative law and enters into a special law. Now the most popular idea is the doctrine of significant and insignificant defects of administrative acts. This doctrine is applied in the sphere of administrative supervision[257]. There is a list in the article of the Law on State and Municipal Supervision. If an administrative decision, which was passed by a supervisory body, contains some significant defects, this act will be invalidated, and all legal consequences are not considered to have arisen. However, there are sometimes different lists in different laws and, as a result, there are different reasons for the invalidity of administrative acts. Thus, the Law on State and Municipal Supervision declares twelve significant defects (Art. 91) applicable to supervisory administrative acts, whereas there is only one such reason for acts of a bailiff, and that is the unlawfulness of these acts[258]. However, the Law on Enforcement Proceedings, Art. 14 (5), contains the discretionary power of a superior officer, who can cancel an unlawful act of a bailiff if it does not comply with legal rules, i.e. the superior officer must evaluate the

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Федерацию» в связи с жалобами граждан В.Ф. Алдошиной и Т.С.-М. Идалова» // http://doc.ksrf.ru/decision/KSRFDecision29326.pdf

[257] Ст. 20 Федерального закона от 26.12.2008 N 294-ФЗ (ред. от 08.12.2020) «О защите прав юридических лиц и индивидуальных предпринимателей при осуществлении государственного контроля (надзора) и муниципального контроля» // Собрание законодательства РФ. 2008. № 52 (ч. 1). Ст. 6249.

[258] Федеральный закон от 31.07.2020 № 248-ФЗ (ред. от 11.06.2021) «О государственном контроле (надзоре) и муниципальном контроле в РФ» // Собрание законодательства РФ. 2020. № 31 (часть I). Ст. 5007.

defects of the act as important and decide whether it is invalid or not[259]. These two examples demonstrate two contradictory official approaches to invalidation of administrative acts in different administrative spheres.

There are some examples of invalid administrative acts in Russian judicial practice. I have chosen to mention only three of these cases. In the first case, the company broke the sanitary regulations by exceeding the permitted sound level[260]. This violation was real and officials organized a supervision, as a result of which this violator was punished. All the lower courts confirmed this decision, but the Supreme Court overturned the judgment, due to the fact that the supervision being carried out on the basis of the administrative act was passed with a significant procedural defect. This act was invalidated; the punishment was a consequence of this act, and was annulled by the Supreme Court. In the second case, the Supreme Court overturned a judgment because it was given under an administrative act, which was passed with a significant procedural defect - the executive body did not agree this act with the prosecutor[261]. In the third case, the company did not follow the environmental rules, but it was not punished due to the fact that supervision was organized under an invalid administrative act; the executive body acted *ultra vires* and also violated procedural rules[262]. In this case, either of these two reasons is sufficient to invalidate the act.

These cases are indicative, because they demonstrate the official reasoning for the invalid administrative acts, and we can see some confusion between the lower courts and the Supreme Court. The lower courts evaluated the factual nature of the relationship, and if

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[259] Федеральный закон от 02.10.2007 № 229-ФЗ (ред. от 30.12.2020) «Об исполнительном производстве» // Собрание законодательства РФ. 2007. № 41. Ст. 4849.

[260] Пункт 8 Обзора судебной практики Верховного Суда РФ № 2 (2015), утв. Президиумом Верховного Суда РФ 26.06.2015 // Официальный сайт Верховного Суда РФ // https://www.vsrf.ru/documents/practice/15147/

[261] Постановление Верховного Суда РФ от 16.04.2021 № 16-АД21-4-К4 // Официальный сайт Верховного Суда РФ // http://vsrf.ru/stor_pdf.php?id=1996736

[262] Постановление Верховного Суда РФ от 08.06.2020 № 19-АД20-7 // Официальный сайт Верховного Суда РФ // http://vsrf.ru/stor_pdf.php?id=1892268

someone has committed a violation, that person or company will be adjudged guilty and duly punished. On the contrary, the Supreme Court investigated the legal nature of this relationship and reached the conclusion that, if the violation was observed by the executive body on the basis of an invalid administrative act, all official actions relating to this act do not arise. As a result, such a violator will not be punished. There is the main idea – nothing gives rise to nothing.

2. Invalid administrative acts and administrative discretion

Administrative discretion is the subject of independent interest, and whether a discretionary administrative act can be invalidated. German public law tradition has been preserved in the Russian legal system, and still represents an important part and plays an important role for the whole of the post-Soviet area. Thus, almost all such countries adopted the laws on administrative procedures and implemented the German discretionary construction "*Ermessen*" (Par. 40 of the German Administrative Procedural Act[263]). There are two markers to evaluate a discretionary administrative act, and they are the legal purpose and the legal limits of discretionary powers. Russia does not have an administrative procedural act, but, traditionally, these markers are noted in our doctrine. Thus, some similar conclusions have been found in the works of Prof. Yuriy Solovey[264], who noted that the exercise of discretion is limited by legal boundaries, and the courts must have jurisdiction to check how these borders are followed. However, it will be difficult to distinguish the line between legal and illegal if this line is determined by the administrative bodies within the framework of their discretion; and there are also legal limits to judicial control over

[263] Section 40 Discretion. Where an authority is empowered to act at its discretion, it shall do so in accordance with the purpose of such empowerment and shall respect the legal limits to such discretionary powers. Administrative Procedure Act

[264] Соловей Ю.П. Усмотрение в деятельности советской милиции. Диссертация на соискание ученой степени кандидата юридических наук, специальность 12.00.02 – государственное право и управление; советское строительство; административное право; финансовое право. М.: Московская высшая школа милиции МВД СССР, 1982. С. 179 – 181.

discretionary acts, and they are very narrow, in addition to which there are many locks in relation to the review of restrictive discretionary acts[265]. Konstantin V. Davydov also agreed that the Russian courts have recognized the wide scope for administrative discretion, which often gives rise to the uncontrollability of discretionary acts[266].

Now, there is the legal position formulated in 2016 by the Russian Supreme Court, that administrative discretion can be checked by judges, who must evaluate the legal purpose and proportionality of the restriction of rights[267]. Rethinking this sentence, it can be understood as a parallel to German doctrine, according to which administrative discretion is allowed for the cancellation of an administrative act[268], and this is in accordance with the centuries-old tradition that the idea of discretion has been considered the "basic sphere" of government[269]. In the second half of the twentieth century, administrative discretion left the bounds of uncontrolled freedom, and the power to adopt or revoke an administrative act based on choice is not controversial because its legality can be checked at any time in the courts. There are well-known legal concepts aimed at defining discretionary administrative powers, and they are "concretization", "weighting", "evaluating" of legal rules, and finally, there is a legal way of assessing discretion,

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[265] Соловей Ю.П. Дискреционный характер административного акта как обстоятельство, исключающее судебную проверку его законности // Право. Журнал Высшей школы экономики. 2019. № 4. С. 73 – 75.

[266] Давыдов К.В. Административное усмотрение: ошибки правового регулирования и правоприменения (сравнительно-правовой аспект) // Государство и право. 2018. № 7. С. 44.

[267] П. 62 Постановления Пленума Верховного Суда РФ от 27.09.2016 N 36 (ред. от 17.12.2020) «О некоторых вопросах применения судами Кодекса административного судопроизводства Российской Федерации»

[268] Пуделька Й. Понятие усмотрения и разграничение с судебным усмотрением // Ежегодник публичного права 2017: Усмотрение и оценочные понятия 2017: Усмотрение и оценочные понятия в административном праве. М.: Инфотропик Медиа, 2017. С. 4.

[269] Квоста П. Виды усмотрения и порядок их осуществления в Австрии // Ежегодник публичного права 2017: Усмотрение и оценочные понятия 2017: Усмотрение и оценочные понятия в административном праве. М.: Инфотропик Медиа, 2017.С. 16.

represented by legal purposes[270]. Thus, the Federal Administrative Court of Germany referred to a special law and § 48 of the Administrative Procedural Law, noting that the discretionary powers can usually be applied (for this dispute) only to annul the administrative act[271]. If an administrative body exercises discretionary power due to legal gaps, the court must use the general principles of law that relate to the rule of law as part of all modern constitutions[272]. There are laws on administrative procedures with more concise wording on the invalidity of an administrative act than the German and related ones. For example, Art. 50 of the Finnish Law includes four defects as a basis for annulling administrative acts, and as required by legal rule, authorities "may" do it; deciding the question of nullity and applying discretion, the administrative body must evaluate the interests of the addressee of such an act; thus, if new important evidence is received, the act can be null and void only in favour of the addressee[273]. The Code of Kazakhstan does not contain any norms on invalid administrative acts, but administrative bodies "can" invalidate both lawful and unlawful administrative acts, and they must be guided be the theory on favourable and unfavourable administrative acts, i.e. the interests of the addressee are the defining point in these procedures[274]. It is pointless to list the same legal structure that different countries have decided to include into their laws, most of which are based on the doctrine on the interests of individuals and private organizations or the theory on favourable and unfavourable administrative acts.

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[270] Schmidt-Aßmann E. Das Allgemeine Verwaltungsrecht Als Ordnungsidee: Grundlagen und Aufgaben der Verwaltungsrechtlichen Systembildung. Heidelberg: Springer, 2006. S. 207.

[271] Beschluss vom 7. Juli 2004: BVerwG 6 C 24.03. VG 11 K 2220/02 // https://www.bverwg.de/070704B6C24.03.0 (26.08.2021)

[272] Pakuscher E.K. The Use of Discretion in German Law // The University of Chicago Law Review. 1976. Vol. 44. No. 1. P. 106.

[273] Sec. 50 of Administrative Procedure Act of Finland (434/2003; amendments up to 893/2015 included) // https://www.finlex.fi/fi/laki/kaannokset/2003/en20030434.pdf (12.08.2021)

[274] Пункт 2 ст. 84, п. 2 ст. 85 Административного процедурно-процессуального кодекса Республики Казахстан от 29 июня 2020 года № 350-VI (с изм. на 01.07.2021 г.) // https://online.zakon.kz/Document/?doc_id=35132264#pos=1027;-50 (25.08.2021)

My opinion about Russian legal practice is that a discretionary administrative act can be evaluated as invalid if it was adopted, and its legal purpose and/or legal limits of discretionary powers, were not followed by the administrative body. Unfortunately, the doctrine on favourable and unfavourable administrative acts is absent in Russian administrative law. And the Supreme Court demanded that all courts that decide discretionary issues respect the rights and legitimate interests of individuals. This opinion is so similar to the model of favourable administrative acts. However, many lower courts have preferred to rule on the principle of legality, but they are not ready to apply the principle of protecting legitimate expectations. Therefore, the administrative act containing the significant defect, but being of benefit to a person, will probably be invalidated by the court, though this case can develop in a different manner.

Conclusions

Therefore, let me make some remarks, and return to the beginning of my article.

How can we understand that an administrative act is dead, and that it has been invalidated? Russian legislation, judicial practice and doctrine have answered this by stating that there are several indisputable reasons, such as an administrative act leading to a violation; the act was passed by an administrative body acting *ultra vires*; there is a significant procedural defect that was contained in one of the many specialized laws.

What kind of acts can lose their validity? I would add that an unlawful administrative act is not synonymous with an invalid administrative act. The Russian Supreme Court requires all courts to evaluate all the important circumstances of the case, including the likely impact on the rights of individuals and organizations. Actually, formal legality remains a favourite principle of the lower courts.

Was this act stillborn or was its validity lost after a court's or an administrative decision? Of course, if the main idea is that the invalid administrative act is stillborn, then all of its consequences are also null and void. However, these conclusions are often formulated by the courts or superior administrative bodies, and it seems to me that

there is uncertainty whether an administrative body passing the administrative act can confirm its invalidity *ex officio*.

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ADMINISTRATIVE LAW AND THE FIGHT AGAINST CORRUPTION: THE EXPERIENCE OF UZBEKISTAN AND A NUMBER OF FOREIGN COUNTRIES

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Abstract. The article analyzes the efforts of Uzbekistan in combating corruption, briefly describes the role of state governmental bodies in this process, briefly analyzes foreign experience.

In recent years, almost no document characterizing the socio-economic and political situation in the country, as well as the state of affairs in the fight against crime, is complete without mentioning corruption. The implementation of anti-corruption measures is one of the priority areas of state policy based on the coordinated activities of anti-corruption actors.

The creation of an effective executive power apparatus is one of the key tasks. The phenomena associated with corruption in the civil service system have been and are being detected in almost any state, but this does not mean that corruption is always and everywhere the same. The reasons for its emergence and spread in the systems of civil service of different states are very diverse, and therefore attempts to develop universal administrative and legal means to prevent and suppress corruption seem unrealistic.

The problem of reforming the ineffective and partly corrupt executive power apparatus was acutely faced by a number of foreign states, in connection with which sufficient positive experience has already been accumulated there in structural transformations of the administrative apparatus and improvement of the civil service system.

Of particular interest is the practice of those states where structural transformations have achieved the greatest results and thereby created the preconditions for successful economic growth.

First of all, we are talking about the USA, Canada, Great Britain, France, Germany and some other countries with relatively efficient civil service[275].

The use of foreign experience in order to prevent and suppress corruption in the system of public service in Uzbekistan is due, in our opinion, to the fact that the basic laws of the functioning of the bureaucratic apparatus are universal and, as practice shows, largely do not depend on national specifics.

In this connection, the necessary conditions for the formation of an honest, competent and disciplined government apparatus in any society include the following elements:

– adherence to the principle of selection and promotion of personnel based on an objective assessment of their professional suitability;

– stability of legal norms governing relations related to the promotion of a civil servant in the service, his material and moral remuneration based on the results of the performance of official duties (these elements of the passage of civil service allow employees to plan a career, actively engage in improving their qualifications, as well as creating a positive image for themselves personally and for the public service in general);

– providing civil servants with wages and a set of social benefits that sufficiently stimulate conscientious work and guarantee a high prestige of social status after resignation;

– a system of state control over the actions of civil servants, capable of preventing and suppressing possible violations and official abuses on their part.

One of the main methods of building a civil service in foreign countries is an official classification with clear standards in relation to the scope of duties of officials of each class and the qualification requirements imposed on them.

In accordance with the "principle of merit"[276], on which the ideology of the Western civil service is based, a prerequisite for occupying administrative positions, in addition to those classified as

[275] https://www.britannica.com/topic/civil-service

[276] https://www.opm.gov/policy-data-oversight/performance-management/reference-materials/more-topics/merit-system-principles-and-performance-management/

"political", is passing the relevant examinations and passing the competition. During the competition, the results of the annual certification of civil servants are of great importance. Thus, periodic appraisals, exams and competitions are an integral part of the career of a Western official.

As already mentioned, one of the effective legal means of preventing and suppressing corruption in the public service system is the institution of attestation. This is due to the fact that the definition of the qualities possessed by a "state" person at all times remained an indispensable attribute of the technology of power and control.

In foreign countries, special attention is paid to the formation of the upper layer of civil servants.

In the United States, Great Britain, France, Germany and some other countries, this stratum is formed mainly not through "natural" selection from the entire mass of officials, but through the purposeful cultivation of young cadres specially designed to enter the elite. The way up begins with difficult exams, which are admitted to persons of a certain age (usually up to 30 years old) with higher education. The bulk of the candidates selected in this way are traditionally graduates of several leading educational institutions of the country.

The system of selection and training of civil servants in foreign countries (USA, Great Britain, France, Germany), their high social status, protection from political arbitrariness, the important role they play in regulating the socio-economic processes taking place in society, contribute to the formation in this layer of elitist morality[277].

Its integral part is a peculiar sense of being chosen and responsible for the state of society, the cult of managerial professionalism, pragmatism and hard work. The layer of officials in the above-mentioned states is relatively free from corruption and party strife and serves as a stabilizer of the public administration system in times of political turmoil.

One of the basic principles of civil service in Western countries is the principle of material incentives for civil servants. It allows officials to ensure a decent standard of living by national standards and thus retain qualified personnel in the state apparatus.

[277] https://cyberleninka.ru/article/n/analysis-of-the-professional-activity-of-the-civil-servants-of-the-foreign-countries-aspects-of-personnel-management

It is quite obvious that the problem of corruption in the public service system cannot be solved only by increasing the salaries of officials. We need a whole range of legal and organizational measures in this area. It is extremely important to persistently and purposefully form an effective state system of social security for civil servants.

This system could include the following guarantees: a low probability of dismissal from public service due to a change in political leadership, a decent pension, extended leave and other social benefits that are often absent in non-governmental organizations.

In some cases, the possibility of getting a high-paying job in commercial organizations after retirement can serve as a serious additional incentive.

State control is a serious organizational means of preventing and suppressing corruption in the system of public service abroad.

But at the same time, it should be noted that state control cannot be viewed as a repressive activity.

It should be warning, although its content may include criminal and administrative legal components in cases where the warning did not work. It involves organizing the life and activities of the state apparatus on the basis of clearly developed rules.

Acceleration of the establishment of social and legal control over decision-making by civil servants is an important direction of preventing corruption in the civil service system.

However, it is necessary to remember about the danger of excessive state control, which can lead to excessive bureaucratization of management processes, to the inhibition of economic initiative and to possible violations of human and civil rights.

So, in foreign countries, the parliament and its commissions are primarily part of the system of state supra-departmental control over the activities of the executive branch.

The presence of a developed political structure with an experienced and well-organized opposition makes it possible to fairly objectively assess the activities of the executive power apparatus and prevent various kinds of official abuses by civil servants.

Analysis of the Constitution of Uzbekistan[278], the Constitutional Laws on the Legislative Chamber[279] and the Senate[280] of the Parliament reveals the following forms of parliamentary control over the activities of the executive branch that exist in our country: organization and conduct of parliamentary investigations; parliamentary hearings; hearing reports, reports and communications from the heads of the executive branch; questions and inquiries of deputies to officials of the executive power.

This list, it would seem, is sufficient for the implementation of effective parliamentary control over the activities of the executive branch. But, as practice shows, the Oliy Majlis does not yet have mechanisms for the effective implementation of a number of the above forms of parliamentary control.

One of the main directions of the anti-corruption policy of Uzbekistan can be noted the creation and effective functioning of the system of administrative court proceedings, including the judicial collegium for administrative cases, headed by the first deputy chairman of the Supreme Court of Uzbekistan[281], regional, interdistrict and equivalent administrative courts in the context of regions of our country.

Such courts function quite successfully in Germany, France and some other states. They allow citizens to promptly appeal against acts, actions or omissions of the public administration.

In the United States, management disputes, in addition to general courts, which are given priority, are also considered by patent, tax courts and administrative judges, acting separately from the management bodies. We are convinced that administrative courts can contribute to the prevention and suppression of corruption in the civil service.

The country is already actively operating and implementing new rules and procedures for combating corruption, which are aimed at protecting individual rights.

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[278] https://lex.uz/docs/35869

[279] https://lex.uz/docs/52069

[280] https://lex.uz/docs/52006

[281] https://sud.uz/ru/%d0%b0%d0%b4%d0%bc%d0%b8%d0%bd%d0%b8%d1%81%d1%82%d1%80%d0%b0%d1%82%d0%b8%d0%b2%d0%bd%d1%8b%d0%b5-%d1%81%d1%83%d0%b4%d1%8b/

In recent years, the President's Decree "On measures to further improve the anti-corruption system in the Republic of Uzbekistan"[282], the President's Decree "On additional measures to improve the anti-corruption system in the Republic of Uzbekistan"[283], the Law "On combating the legalization of proceeds from crime, financing of terrorism and financing the proliferation of weapons of mass destruction"[284], the Law" On Combating Corruption"[285], a Special State Commission for the development of measures aimed at improving the efficiency of activities in the field of combating corruption, and the Anti-Corruption Agency[286] - a specially authorized state body responsible for the formation and implementation of state policy in the field of preventing and combating corruption, subordinate to the president and accountable to the chambers of the Oliy Majlis, who is currently developing the National Anti-Corruption Strategy for 2021-2025.

An open electronic register of persons found guilty of corruption crimes has already been introduced. There are restrictions on them. For example, they will not be able to work in the civil service, they will not be awarded state awards, and they will not be allowed to manage the shares of controlled enterprises.

From 2022, officials, their spouses and minor children will be required to declare their income and property. If a civil servant refuses to submit a declaration and indicates incorrect data, he can be fired and held accountable.

From now on, civil servants are prohibited from opening bank accounts, owning real estate and other property abroad. If measures to disclose and prevent conflicts of interest have not been taken, this will need to be answered.

Since September 1, 2021, the recruitment of employees of state bodies and organizations is carried out on the basis of an open online competition, and since October 1, the activities of internal anti-corruption control structures have been established.

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[282] https://lex.uz/docs/4355399
[283] https://lex.uz/docs/5495538
[284] https://lex.uz/docs/284542
[285] https://lex.uz/docs/3088013
[286] https://anticorruption.uz/ru/item/missiya

However, it should be borne in mind that an effective anti-corruption mechanism is not only special anti-corruption institutions.

First of all, this implies modern institutions of public law inherent in the rule of law, which together create an anti-corruption institutional environment.

These institutions are:

– administrative procedures - reliable coherence of administrative bodies in the process of exercising power;

– administrative justice - reliable judicial control over the legality of decisions and actions of administrative bodies;

– civil service - a personnel policy based on merit and merit, ensuring the advancement of the best and most capable, as well as screening out the unworthy;

– high-quality rule-making based on regulatory impact assessment (RIA) - high-quality preparation of draft laws, other regulatory measures, assessment of results and consequences, and continuous improvement of legal regulation.

If these institutions are built and function correctly, corruption risks are reduced to a minimum. And then it is not difficult to keep them under control at the expense of special anti-corruption institutions. But if there is no certainty about these fundamental institutions, then the success of the anti-corruption policy cannot be expected either.

PROTECTION OF THE CONSTITUTIONAL AND CIVIL RIGHTS OF CITIZENS OF THE REPUBLIC OF KAZAKHSTAN IN ACCORDANCE WITH THE NEW ADMINISTRATIVE PROCEDURE PROCEDURAL CODE

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Abstract. The article discusses the issues of protecting the constitutional and civil rights of citizens in accordance with the new Administrative procedur – procedural code of the Republic of Kazakhstan. The main attention is paid to identifying the reasons for the violation of citizens' rights. Scientific novelty lies in the study of the main problems arising in the process of protecting the constitutional rights of citizens in accordance with the Administrative Procedure Code of the Republic of Kazakhstan. Analyzing these factors, the author pays special attention to the need of further improving the legal mechanisms for protecting human and civil rights in the formation of a full-fledged administrative justice as an integral part of constitutionalism and the rule of law. The authors analyzed Administrative justice, which is necessary to ensure compliance with the rule of law by government bodies, as well as for the constitutional protection of human and civil rights and freedoms from illegal actions (inaction) and decisions of officials of administrative bodies.

Key words: constitutional rights, administrative justice, administrative proceedings, courts and justice, litigation.

In accordance with paragraphs 1 and 2 of Article 12 of the Constitution of the Republic of Kazakhstan, human rights and freedoms are recognized and guaranteed in the Republic of Kazakhstan in accordance with the Constitution. Human rights and freedoms belong to everyone from birth. These rights are recognized as absolute and inalienable, determine the content and application of laws and other normative legal acts [1].

The recognition of human rights as the highest value, as well as the idea of the rule of law, the division of power and ensuring its

independence, have acquired the most important significance for the state.

A system of administrative courts has developed in many countries of the world. The main purpose of which is to protect the rights and freedoms of the individual from the arbitrariness of the authorities. We support the position that it is necessary to further improve the procedural mechanisms that would ensure the protection of the rights and legitimate interests of citizens, legal entities in public law relations.

The introduction of administrative justice in Kazakhstan did not happen as rapidly as it should be done. The process took a long time. From the moment of the announcement of the implementation of administrative justice in the Concept of legal policy for the period from 2010 to 2020 and until the adoption of the Administrative Procedure Code on June 29, 2020, enacted in July 1-st, 2021 y. However, the impulse for its immediate implementation was the assignment of the President of the Rebublic of Kazakhstan K. K. Tokayev in his Address to the people of Kazakhstan dated on September 2, 2019 - about introduction of administrative justice.

As is well known, the Concept of legal policy of the Republic of Kazakhstan for the period from 2010 to 2020 (Decree of the President of the Republic of Kazakhstan dated August 24, 2009 No. 858) was the fundamental program document for the development of the legal sphere of Kazakhstani society. In this Concept, much attention was paid to the reform of administrative law.

The concept noted that «the development of the public administration system in Kazakhstan is inextricably linked with the legal support of administrative reform aimed at creating an effective and compact state apparatus, introducing new management technologies, improving administrative procedures» [2].

In addition, one of the tasks set in the Concept of Legal Policy was the introduction of administrative justice that resolves disputes arising from public law relations between the state and a citizen (organization).

As is well known, from July 1, 2021, the Republic of Kazakhstan has a new Administrative Procedure Code of the Republic of Kazakhstan (*hereinafter - the Code*).

At the same time, the current Laws of the Republic of Kazakhstan «On Administrative Procedures» and «On the Procedure for Considering Applications of Individuals and Legal Entities» are no longer in force. A number of norms of the Civil Procedure Code of the Republic of Kazakhstan, including chapters 27-29 are terminated.

According to the new Code, administrative procedures and administrative proceedings will be carried out on the basis of principles, among which the following should be emphasized:

1) Principle of legality - an administrative body, an official carry out administrative procedures within their competence and in accordance with the Constitution of the Republic of Kazakhstan, this Code and other regulatory legal acts of the Republic of Kazakhstan;

2) The principle of protection of rights, freedoms and legitimate interests - every citizen of the Republic of Kazakhstan has the right, in the manner prescribed by this Code, to apply to an administrative body, an official or a court for the protection of violated or disputed rights;

3) The principle of the priority of rights - all doubts, contradictions and ambiguities of the legislation on administrative procedures are interpreted in favor of the participant in the administrative procedure;

4) Prohibition of abuse of formal requirements - an administrative body, an official is prohibited from refusing to implement, restrict, terminate the right of a participant in an administrative procedure, as well as impose on him a duty in order to comply with requirements not established by law;

5) Protection of the right to trust - the trust of a participant in an administrative procedure in the activities of an administrative body, an official is protected by laws;

6) The principle of the active role of the court - the court is not limited to explanations, statements, petitions of the participants in the administrative process, the arguments presented by them. The court examines all the factual circumstances that are important for the correct resolution of the administrative case [3].

The Code establishes a mechanism for the protection of human rights by applying to the judiciary in a lawsuit. It defines the legal status of the parties to the administrative process, the rights and

interests of the person concerned. The essence of this institution coincides with the institution of third parties in civil proceedings, whose interests are affected by the administrative case in question, changes in claims and refusal from them, recognition of the claims set forth in the statement of claim, etc. [3].

According to R.K. Sarpekov's administrative justice is one of the integral elements of modern constitutionalism, through which judicial protection of human and civil rights and freedoms is carried out and an important role in the process of democratizing public life and building a rule of law state [4, p.17].

R.K Sarpekov believes that administrative justice is an attribute of a legal and democratic state. Its purpose is not only to resolve disputes of a public law nature, but also to restore justice. In this regard, the presence of an effective system of administrative justice is the most important indicator of the development of legal traditions in the EAEU member states, an indicator of the level of their legal culture as the most important component of a democratic state [4, p. 17].

Thus, the rights and freedoms of the individual are a priority for any modern state, thus the question arises about the mechanism of their protection and further improvement.

According to N.V. Vitruk, the mechanism of human rights and freedoms is a complex procedural procedure for the implementation of rights, freedoms and obligations. The law establishes the procedure for mechanism's implementation, the procedure for its implementation. The law establishes a sequence of actions of the holder of rights and freedoms, obligated legal entities, as well as the content of these actions. The implementation of which aimed at the most complete and accurate use of the right or freedom [5, p.160].

R.V. Yagudin proceeds from a broader interpretation of this concept, considering it as a multi-level and heterogeneous system of elements «synthesizing legal relations in the field of protecting constitutional rights and freedoms of citizens, activities on legal regulation, organization and implementation of these rights and freedoms and improving their guarantees» [6, p.11].

For example, V.A. Lebedev believes that the human rights protection system includes an integral set of elements: forms (self-defense, state and public protection); methods (methods used by the relevant subjects to protect the rights and freedoms) and means

(depending on the powers of the subjects of various forms) to protect the rights and freedoms of man and citizen [7].

According to V.M. Kapitsyna, the «humanitarian human rights mechanism», essentially identical to the concept under consideration, consists of legal norms, legal facts, legal relations, forms and acts of the implementation of subjective rights and legal obligations. It consists of acts of application of the law, elements of legal awareness and legal culture integrated into organizations and actions of individuals, corporations, associations, authorities and local governments [8].

As you know, individuals apply to the judicial authorities both in connection with the verification of the legality of acts of state bodies, also for the protection of civil rights and interests in the implementation of public legal relations. This is the content of an administrative claim: in determining the legality of acts of state bodies and protecting the rights of individuals in public legal relations.

In accordance with a paragraph 1 of the Article 131 of the Code, an administrative case is initiated in an administrative court on the basis of a claim. For the purposes of this Code, claims also mean other appeals to the court provided by the laws of the Republic of Kazakhstan.

The claims that are brought to court are:

1) statement of claim;

2) force statement;

3) action statement;

4) statement of claim for recognition [4].

For example, in accordance with Article 132 of the Code, in case of violation of the rights, freedoms and legitimate interests of the claimant by a burdening administrative act, the plaintiff has the right to bring a claim for challenging with the requirement to cancel the administrative act in full or in any part of it.

According to article 133 of the Code, in the force statement, the claimant can demand the adoption of a favorable administrative act. The claimant may demand the adoption of a favorable administrative act, the adoption of which was refused or not adopted due to the inaction of an administrative body or an official.

According to Article 134 of the Code, upon a claim for the commission of an action, the plaintiff may demand to perform certain actions or refrain from such actions that are not aimed at the adoption of an administrative act.

Concerning to Article 135, in an action for recognition, the plaintiff may require the existence or absence of any legal relationship if he is unable to bring an action in accordance with Articles 132, 133 and 134 of the Code [

Considering the content of an administrative claim, it is necessary to note its subject composition. The Code includes an administrative plaintiff, an administrative defendant, an interested person and a prosecutor to the subject composition.

In accordance with Article 137 of the Code, upon bringing a claim, the case is accepted for proceedings. According to Article 138 of the Code, before the start of the trial, the judge makes all the actions and orders that are necessary to resolve the dispute. If it is possible, during one court session.

Further, the court makes a decision to return the claim on the following grounds:

1) the plaintiff did not comply with the procedure for pre-trial settlement of the dispute established by law for this category of cases. The possibility of applying this order is not lost;

2) the claim does not meet the requirements of the second part of Article 131 of this Code. It will be established that the deficiencies cannot be rectified prior to the preliminary hearing;

3) the statement claim was filed by an incapacitated person;

4) the application is signed by a person who does not have the authority to sign or present it;

5) in the proceedings of the same or another court there is a case in a dispute between the same parties, on the same subject and on the same grounds;

6) the plaintiff withdrew the filed claim;

7) despite the demands of the court, the plaintiff, who did not ask to lead the case in his absence, did not appear in the court on a second summons;

8) the person in whose interests the case was initiated did not support the stated claim;

9) the parties have entered into an agreement on conciliation, mediation or settlement of a dispute by procedure, and it is approved by the court;

10) the state duty has not been paid or paid in addition to the procedure established by the Civil Procedure Code of the Republic of Kazakhstan;

11) the case is not subject to administrative proceedings;

12) there is a final, enforceable, dispute between the same parties, on the same subject and on the same grounds, a court decision or a court ruling approving an agreement on conciliation, mediation or on the settlement of a dispute in a participatory procedure;

13) after the death of a citizen who is one of the parties to the case, the disputed legal relationship does not allow for succession;

14) the organization acting as a party to the case was liquidated with the termination of its activities and the absence of legal successors;

15) the court refused to restore the missed deadline for filing a claim;

16) an agreement has been concluded between the parties in accordance with the law to refer this dispute to arbitration, unless otherwise provided by law;

17) the case is beyond the jurisdiction of this court [4].

In accordance with paragraph 4 of Article 137 of the Code, in order to prepare an administrative case for a preliminary hearing, a judge:

1) indicates to the plaintiff the removable deficiencies of the claim and sets a time limit for their correction, as a rule, not exceeding ten working days from the date of delivery of such a claim, with an explanation of the procedural consequences of failure to comply with the court's requirements;

2) performs the procedural actions necessary for the correct and timely consideration and resolution of the administrative case, provided for by the Civil Procedure Code of the Republic of Kazakhstan.

The specificity of administrative legal relations establishes the content of the requirements prescribed in the administrative claim, and the procedural differences in its consideration. An active position

of the judicial body, the implementation of the principle of adversarialness of the parties to legal proceedings, an administrative claim acts as a universal remedy, as well as an increase in legal guarantees in relation to them, can be achieved through the introduction of various claim methods of protecting the rights and interests of participants in legal relations. Therefore, the consolidation in national legislation of provisions on the form of claim for the protection of the rights of participants in administrative legal relations will help to ensure the rights and legitimate interests of subjects of public legal relations. The use of a procedural instrument as a claim will allow citizens and legal entities to use all procedural methods of protection, such as changing the subject or basis of a claim, mediation.

Thus, the mechanism for the realization of human rights consists of two important components: on the one hand, these are his subjective actions for the realization of rights and freedoms, and on the other, measures of a political, regulatory, legal, organizational and procedural nature designed to exercise these rights.

Currently, an administrative claim acts as a universal means of protecting public material rights of subjects of administrative legal relations. The fundamental principles of administrative proceedings, along with the equality of the parties, should be supplemented by dispositiveness and the application of legal guarantees in relation to entities that are not endowed with power features. The above provisions will contribute to the effective resolution of administrative cases, the implementation of public legal relations, the growth of trust of the subjects of public relations in the system of state power and administrative courts.

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THE VIOLATION OF THE RIGHT TO A HEARING AS A GROUND FOR ANNULMENT OF THE INDIVIDUAL ADMINISTRATIVE ACT IN THE GREEK LAW

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Abstract. The paper describes the Greek legislation establishing the right to a pre-judicial hearing during the procedure of the individual administrative act issuance and presents the fact of the violation of this right as a ground for annulment of act upon the relevant judicial process of adjudication of the application for annulment (Greek: "aitisi akyrossis") before competent courts.

In particular, the article refers to the topics such as a subject of the right to a hearing, its scope and restrictions of its application, the violation of the right and its consequences, as well as the recent case law on the matter.

Keywords: Greek administrative law, right to a hearing, individual administrative act, individual administrative act issuance, administrative processual law, Greek administrative case law

Introduction

Nowadays an interaction between public and private sectors is so common that the practice and day-to-day issues call for more legal protection of the latter, especially when it comes to individuals. Taking into consideration that judicial proceedings usually take a long time to render irrevocable justice, it is very crucial to create such legal instruments which shall shield the rights of individuals and private organizations against the administration when performing its duties.

At the same time in an era of globalization, it seems even more important to present and clarify such legal protection provided by different legal systems.

It is worth mentioning that an established (legally guaranteed) right to a pre-judicial hearing during the administrative procedure of taking a decision and issuing an administrative act are granted only

by few European Constitutions. More particularly, only Spanish [1], Portuguese [2], Irish and Greek Constitutions contain such provisions.

Having a solid theoretical background but also practical knowledge of the Greek administrative law, the author of this article is going to present a brief overview of the right to a pre-judicial hearing according to the Greek legislation and one of the consequences of its violation, which is a ground to seek a remedy of annulment of the correspondent administrative act issued in violation of this right.

1. A legally guaranteed right to a prior (pre-judicial) hearing in the greek law

As it has been already mentioned above, the Greek Constitution [3] is one of few in Europe securing the right for the individuals to a pre-judicial administrative hearing. More particularly, since 1975 [4] its Article 20 para. 2 states that *"[T]he right of a person to a prior hearing also applies in any administrative action or measure adopted at the expense of his rights or interests".*

Furthermore, Article 6 para. 1 of the Greek Administrative Procedure Code [5] specifically provides that *"[B]efore any action or measure against the rights or interests of a specific person, the administrative authorities are obliged to invite the interested party to express his/her opinion, in writing or orally, concerning the relevant issues"*.

Finally, the right to a so-called prior hearing before administrative authorities can be concluded from the following principles:

- principle of human value [6],
- principle of administrative efficiency,
- individual rights of the person,
- principle of the rule of law [7].

From time to time there are opinions that the right to a prior hearing can also be founded on the following constitutional principles [8]:

- free development of personality,

- principle of equality and impartiality of the administrative authorities,
- principle of publicity of administrative action,
- principle of reasoning of administrative acts.

2. The scope of the right and its legitimate restrictions

Pursuant the main provision regulating the right to a prior hearing, namely Article 6 of the Greek Administrative Procedure Code ratified by Law 2690/1999, this right concerns the possibility of the individual in case of issuance of individual administrative acts unfavorable to him/her to present his/her opinion to the competent administrative authority upon a relevant call [9].

Given its constitutional protection, this right cannot be excluded by law, which would be deemed unconstitutional, while it is valid even without the legislative provision or in cases when the law excludes it [10].

More important is that the right to a prior hearing constitutes an essential form of administrative procedure, which non-compliance renders the act illegal [11].

In view of the relatively broad wording of the provision of both, Article 20 of the Constitution and Article 6 of the Administrative Procedure Code, a case-law has delimited the scope of the general provision of Article 20 para. 2 of the Greek Constitution as well as has clarified the requirements of Article 6 of the Administrative Procedure Code.

According to the restrictive interpretation [12] applied by the case-law the following criteria [13] have been formulated:

the prior hearing of the individual is necessary in the case of (a) individual administrative acts, (b) which are issued ex officio, (c) which contain a regulation that is related to the subjective behavior of the interested party and (d) has a positive harm to his/her rights or legitimate interests, while the act (e) must be issued at the discretion of the administrative authority and not its binding competence [14].

Not to exhaust the topic but to complete the image, the author shall analyze further the above criteria.

Although, the right to a prior hearing is provided against individual administrative acts and not the normative acts of the

administrative authorities (Decision No. 2040/1977 of Council of State), there is a case law exception for the right of environmental organizations [15] to express their opinion before a hunting regulation is issued. The right to a prior hearing against normative acts also applied when the relevant legislation explicitly provides for it, e.g., city planning legislation.

If the harmful administrative act is issued upon an application of the individual, the prior hearing is not required, unless it is explicitly provided for by the specific legislation or can be inferred from it [16] (Decisions No. 4743/1977 and 4519/1988 of Council of State). More particularly, there is no right to a prior hearing when the application for the recognition of a right is rejected, unless there is an opposite explicit regulation [17] (Decision No. 3184/1988 of Council of State).

Despite the fact that neither the Constitution of Greece nor the Administrative Procedure Code set such a requirement, the case law demands that the imposition of harmful measure in general and the issuance of a harmful administrative act in particular are due to the subjective behavior of the individual (Decision No. 3222/2000 of Council of State). In other words, when the decision of the administrative authorities is taken based on the objective criteria, the right to a prior hearing is not applied (Decision No. 2594/1977 of Council of State). The problem arises when the objective preconditions and the subjective elements converge: does then the right to a prior hearing apply? One of the most representative examples is the imposition of a reforestation measure to the individual. According to the Decision No. 1646/2002 of Council of State such a measure is mandatory when the provisions of the Constitution and the necessary conditions of the law are met. However, a later decision (Decision No. 127/2003 of Council of State) ruled that the reforestation measure was due to illegal subjective behavior of the culprit owner who had cleared the forest area [18]. It has been also ruled out by Council of State (Decision No. 122/2009 of Council of State) that in the case of imposition of a fine on the basis of objective data, the prior hearing of the interested party is mandatory if a margin is left for the measurement/definition of the fine.

As for the requirement of positive harm to individual's rights and/or legitimate interests it should be clarified that the use of measures of administrative coercion is not an action or measure taken within the meaning of article 20 par. 2 of the Constitution. In such cases we are talking about material executive actions of the administrative authorities with the aim of forcing the individual to comply with the administrative acts or the administrative lifting of an illegal factual situation [19].

The right of a prior hearing is not exercised in cases where the issuance of the adverse act is a mandatory, obviously because its exercise would be irrelevant [20].

The obligation for the prior hearing is not revoked neither if the possibility of administrative substantive appeal is provided against the act [21] (Administrative Procedure Code, article 6, para. 4 [22]), nor if is it cured by bringing a quasi-judicial administrative appeal by the interested party (Decisions No. 2640/2001, 4302/2001, 380/2002, 1027/2002 of Council of State). However, the recent case law has changed completely its position and by Decision No. 1392/2016 of Council of State it has ruled that the violation of the right of the prior hearing is covered if the individual filed a quasi-judicial administrative appeal against it [23].

It should be also noted that in the case of a complex administrative action, which results in the issuance of a harmful administrative act, as long as the interested party is heard before the issuance of the final act, the act is deemed valid (Decision No. 2053/1977 of Council of State).

3. Establishing a ground for an application for annulment of the administrative act

According to article 48 of Presidential Decree No. 18/1989 [24] the grounds for an application for annulment (in Greek "aitisi akyrossis") are four:

1) Incompetence of the administrative authority that issued the act,

2) Violation of an essential form ordered for the legality of the act,

3) Violation of a substantive provision of the law,

4) Abuse of power, when the act of the administrative authority has itself all the elements of legality, but it is issued for a purpose obviously different from the one the legislation has set.

Following the above categorization R. Bonnard and other French scholars distinguish the external and internal legality, where the first concerns the incompetence and the Violation of an essential form of procedure, while the latter refers to the violation of law and abuse of power [25].

According to the caseload presented by the case law of Council of State, the non-compliance with the rules of article 20 para. 2 of the Constitution and article 6 of the Administrative Procedure Code, i.e. the non-compliance with the right to a prior hearing, constitutes a violation of the essential form of procedure. However, the recent Decision No. 4477/2012 of the Plenary Session of the Council of State places serious restrictions on invoking this ground for annulment, as it requires the applicant to put forward in his application the arguments that he would have made if he had been called for a hearing [26]. In the absence of such arguments, the made plea is considered ineffective and the application is rejected by the court [27].

It is also crucial to mention that the omission of prior hearing is not examined ex officio according to the case law of Council of State (Decisions No. 3718/2003, 932/2008 of Council of State). However, the treatment by the regular administrative courts [28] interpreting article 79 of the Administrative Procedural Law Code is different.

4. Evolution of case law on the matter

Through the decades since the constitutional provision for the right to a prior hearing before administrative authorities has been adopted and ratified, its judicial treatment and degree of necessity were changing.

During the 19th and most of the 20th century, in European but also Greek case law and legal theory there was a prevailing perception according to which the legality of the act itself is inextricably linked to the legality of the whole process of its issuance, and any deviation is restored only by the annulment of the act [29].

This permanent position has for years led to the accumulation of a huge number of administrative disputes that have resulted in courts due to irregularities in the procedure followed before or during the issuance of these acts, due to violation of an essential form ordered for the legality of the act, regardless of whether these irregularities had caused harm to the individual [30].

As soon as 1990s the Court of Justice of the European Communities has ruled [31] that the issuance of an act harmful to the person in violation of the right to a prior hearing does not entail the invalidity of the act unless, without that irregularity, the administrative procedure in question could have resulted in a different result.

In response to the needs of the topical judicial system overloaded with an unreasonably high number of applications for annulment of administrative acts due the violation of the right to a prior hearing, for almost a decade now administrative courts began also to create case law that seeks to reduce the possibilities of annulment of administrative acts for this reason.

As already mentioned above, the start was made by the decision of the Plenary Session of the Council of State No. 4447/2012. The main points of this decision concern the matter of effectiveness of pleas for annulment and the relationship between the right to a prior hearing and the quasi-judicial appeal. In particular the majority of the plenary session expressed the opinion that "…*for the effectiveness of the invoking by the individual of a plea alleging non-compliance with the right of a prior hearing before the issuance of the act unfavorable to him, a parallel mentioning of the arguments that he would have made before the Administration if he had been called is required. In addition, where the specific legislation governing the issuance of an adverse administrative act provides, in addition to the initial prior hearing, for one or more stages of an appeal before hierarchically higher bodies, failure to comply with the prescribed type of prior hearing during the administrative procedure is covered, provided that the interested part files the appeal or appeals and puts forward, in his view, the critical arguments which he did not make before the issuance of the initial act. In this case, in fact, the final decision should be considered as an enforceable administrative act, after the filing of the appeal or the appeals, because as a final*

administrative act is the one finally issued after the exhaustion of the appeal procedure".

Decisions No. 98/2015 and 1392/2016 of Council of State followed. The first one rules also on the matter if the pleas may be first raised in the application for annulment or, for the admissibility of the application, they must first be included in the quasi-judicial appeal. Following Prof. Lazaratos' commentaries [32] to his decision, it seems that the court ruled based on the rule of positive law and the teleological interpretation of article 45 para. 2 of Presidential Decree No. 18/1989. As for the decision No. 1392/2016 reiterating the reasoning of decision 4447/2012, it has been criticized [33] for the overly restrictive interpretation of article 6 para. 4 of Administrative Procedure Code instead of adopting the criteria of objective data where a prior hearing is not mandatory.

The most recent case law on the matter in fact validates the previous judgments with a basic reference to the decision No. 4447/2012 of Council of State. There are three decisions worth mentioning: (a) Decision No. 966/2018, (b) Decision 1019/2018, and (c) Decision 2612/2019 of Council of State.

The first one interpreting the provision of para. 2 of article 20 of the Greek Constitution, stated that since the right to a prior hearing is provided to an individual in order to present to the competent administrative authority his/her opinion before the issuance of the harmful for his/her interests act, therefore, for the effectiveness of the plea of annulment based on the violation of this right the applicant has to put forward the arguments that he/she would have invoked if he/she had been called for a hearing. This decision literally repeated the para. 7 of the Decision No. 4447/2012.

The second decision dated 2018 was concentrated on the matter of the quasi-judicial administrative appeal as a way of treating the omission of prior hearing. According to this decision, if a special legislation governing the issuance of harmful act provides in addition to the prior hearing and one or more quasi-judicial appeals, then the non-compliance with the right to a prior hearing is covered if the individual files the appeals expressing the crucial arguments.

The latter one dated at 2019 deals with the issuance of administrative acts by tax authorities. More particularly, the court ruled that provided that the form of a prior hearing has been

complied with in the context of issuance of harmful administrative act by the tax authorities based, among others, on the commission of an administrative offense by the individual, there is no need in further hearing before the issuance against him of another act of the tax authority, the legality of which presupposes an ascertainment of the same offense. Again, the Decision No. 4447/2012 has been mentioned citing that the main scope of the right to a prior hearing is to allow the individual, to whom the harmful administrative act refers, to present specific arguments before the competent administrative body, in order to influence the final decision by that body with regard to the relevant act, after a different appearance or assessment of the facts.

Conclusion

Undoubtedly the right to a prior hearing is one of the safeguards during the procedure of individual administrative acts issuance. Taking into consideration the fact of almost mandatory [34] prerequisite of this right for the validity of individual administrative act, it is also quite important to mention Professor Lazaratos' opinion [35] back in 2015 stating that "*never, as far as I know, regular administrative courts or the Council of State have violated or ignored the exceptional provision of article 6 para. 4 of Administrative Procedure Code*".

Although this right is constitutionally guaranteed and specifically regulated in law, the recent case law began to interpret it more restrictively responding to the practical demands of the field. There is an intense criticism about its almost automatic consequence in case of application for annulment. Especially where the case is adjudicated before regular administrative courts but also before Council of State as a court of substance and they have a power of substantive judgment, it is considered reasonable and desirable to formulate the required reasoning and their own substantive judgment as to the existence of the facts and events invoked by the individual and their seriousness, without having to resort to the annulment of the administrative act [36].

Nevertheless, it seems safer and more appropriate for this possibility to be regulated by law and in more detail to avoid the ease of judicial interference.

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THE PROTECTION OF RIGHTS OF CITIZENS IN ENFORCEMENT PROCEDURE IN RUSSIA

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Abstract. The article concerns itself with the question of protection of citizens' rights in enforcement proceedings in Russia. The system of enforcement of laws and types of methods used to protect citizens in enforcement proceedings are analyzed, with sufficient attention being given to administrative (non judicial) and judicial means to recover the violated rights of the parties to said proceedings and other interested persons. The article also features recognition, observance and protection of citizens' rights safeguarded by the principle of legality as an important part of the functioning of the state mechanism in Russia.

Keywords: protection of citizens' rights, enforcement proceedings, bailiff, legality.

1. The System of Enforcement Procedure in Russia

The system of forced execution and enforcement proceedings being a very important part of the state mechanism, allows to ensure the public interest viewed as the sum total of private interests. [3] The developed system of enforcement proceedings is integral to modern government based on the rule of law and provides for the quality of compliance of administrative practice to established standards [12, p..5], [18], aimed at safeguarding individual rights as a fundamental value.[4] With the advance of information technologies in public administration enforcement procedure is taking on some specific features which, on the one hand, facilitate the protection of rights of individuals in enforcement proceedings but, on the other hand, are held responsible for their violation. [24]

In Russia a court bailiff or bailiff of the Federal Bailiffs' Service (the FBS of the Russian Federation or FSSP) is tasked to implement forced execution and enforcement proceedings. The FBS is a federal

body of executive power which reports to the Ministry of Justice of the Russian Federation. [15]

However the situation was different in the past. Prior to 1998 forced execution and enforcement proceedings were carried out by court bailiffs that were organized as a body of judicial power and constituted its part accordingly. Gradually with the implementation of the principle of division of powers and the minimizing of corruption factors [10] enforcement procedure was transferred to a body of executive power, initially from 1998 to 2005 to the Ministry of Justice of Russia, then since 2005 up to the present to a federal body of executive power, the Federal Bailiffs' Service, specifically formed within the system of justice.

The Federal Bailiffs' Service is represented by a central office in Moscow and territorial bodies in the subjects of Russia in which a bailiff bears the direct responsibility for performing the functions entrusted to them by the state. The Model Provision of a territorial body establishes the organization of activities and the main powers of a territorial body of the FBS of Russia.[13] The territorial body of the FBS is represented by the Head Office of the FSB, acting in the territory of a subject (subjects) of the Russian Federation. By agreement with the Ministry of Justice of the Russian Federation the Director of the FBS - Chief Bailiff of the Russian Federation takes a decision on the matters of establishing, reorganizing and liquidating territorial bodies. The President of the Russian Federation appoints Director of the FBS of Russia. The Director of the FBS - Chief Bailiff adopts the structure and staffing of territorial bodies within the limits defined by the President of the Russian Federation for authorized staffing level of state employees in enforcement bodies.

2. Types of the Methods to Protect the Rights of Citizens in Enforcement Procedure in Russia

It is essential to point out that this article deals with the protection of the rights of the parties to enforcement proceedings and other interested persons, citizens and organizations and the consequences that may arise when bailiffs act in breach of the principle of legality. [19] In this 10 case it seems appropriate to

speak about the principle aimed at protecting legitimate expectations in enforcement proceedings, which is inherent not only to administrative procedure per se, but it can be extended to apply to the conduct of public authorities as a whole, particularly where such expectations are concerned. [16] Enforcement procedure which under the Constitution of the 11 Russian Federation concerns itself with fundamental rights of man and citizen is just the area where the principle of legitimate expectations fits perfectly well. While analyzing whether the activities carried out by an enforcement body comply with the principle of legality it is necessary to dwell on the main ways and guarantees that ensure compliance with this principle, among which one can mention professional competence of a bailiff, effective control over their actions by authorities assigned to this duty and supervision. [5] In this connection such methods as state 12 and public control, the prosecutor's and administrative supervision and the citizens' right to challenge illegal actions and decisions taken by the bailiff may be added to the list given above.

The methods of protection against abuses of the individual rights in enforcement proceedings imply certain forms and methods of activity of legal and organizational character, as well as standard practices applied within the powers granted to specific subjects in enforcement proceedings in relation to the debtor, the recoverer and other interested persons. The content, the legal consequences and types of the methods to address the violations of the individual rights in enforcement proceedings, on the one hand, depend directly on the nature of the violated right, but on the other hand, the will of the subject whose rights have been abused, and, additionally, they are determined and restrained by the competence of a public authority subject of internal control or external control (supervision).

Administrative law traditionally distinguishes between administrative (non judicial) and judicial methods or remedies to protect the violated right. [1], [11] Enforcement proceedings are not the exception in this case. For this particular reason illegal actions (inaction) and decrees issued by a bailiff (all the decisions made by a bailiff in respect of enforcement procedure are stated as his decree) and can be appealed in an administrative or judicial order. The harm inflicted on a citizen or an organization, a legal entity arising from illegal actions (inaction) committed by an enforcement body or by an

official of such body, including the issuing of the act by a bailiff contrary to law or in contradiction to another normative act, is subject to compensation from the treasury of the Russian Federation. [2]

The protection of the rights of the recoverer, the debtor and other persons in enforcement proceedings is effected in the manner stipulated by the provisions of Chapter 17 of the Federal Law (FZ) "On Enforcement Procedure ". The foregoing does not exclude civil liability claims for the harm caused by unlawful decrees and illegal actions (inaction) by a bailiff (Article 1069 of the Civil Code of the Russian Federation). [6]

3. Administrative Protection of the Citizens' Rights in Enforcement Proceedings in Russia

The Constitution of the Russian Federation provides that citizens are entitled to the protection of their rights and freedoms by all means not prohibited by law (Chapter 2, Article 45), they have the right to address personally, as well as to submit individual and collective appeals to state organs and local self-government bodies (Article 33). Public legal relations pertaining to administrative complaints and appeals lodged by citizens in enforcement proceedings are regulated not only by the relevant provisions of the Constitution of the Russian Federation but also by international treaties of the Russian Federation, by federal constitutional laws, by the Federal Laws "On the Procedure for Consideration of Appeals by Citizens of the Russian Federation", "On Enforcement Procedure" respectively and some other federal acts. Administrative procedure for handling individual complaints and appeals is prescribed by rules of law. Administrative and legal regulation which enables appeal by law is a very effective tool for upholding the citizens' right in enforcement proceedings. While the general legal rules set forth in the Federal Law "On the Procedure for Consideration of Appeals by Citizens» form the basic provisions, the special rules of challenging action (inaction) and orders by bailiffs are contained in the Federal Law "On Enforcement Procedure", which prescribes that, first, submissions of appeal are made in written paper form or in electronic

form as the only admissible manner of addressing the case in point as compared with more general rules, stipulated in the General Law; second, the period of lodging an appeal is shortened to 10 days; third, the consideration of an appeal is limited to a ten-day period. Legal regulation of the matters in question by the Specific Law may be considered an improvement of administrative procedure on the relevant rules of the General Law in the part regarding the shortened terms for making appeals and, thus, strengthening the legal standing of the citizen. However, the changes to the rules governing the form and the terms of filing appeals may be viewed as a disadvantage to the legal standing of the citizen in enforcement proceedings when compared to the relevant rules as stipulated in the General Law. [9] Although there are generally specified terms within which enforcement procedure is to be conducted and the question of establishing the personal identity of the party to enforcement proceedings is of key importance, the introduction of the rules which limit the methods and the periods of submitting appeals seems not quite correct and requires further consideration and alignment with the relevant rules of the General Law.

An administrative appeal or a complaint challenging action (inaction) and orders issued by bailiffs according to the subordination are a common method of protecting citizens' rights, as

well as the rights of organizations and other interested persons participating in enforcement proceedings. A complaint is a request by a citizen to restore or to defend their violated rights, freedoms and lawful interests or the rights, freedoms and lawful interests of other persons. Under

Russian law the citizen has the right to approach state authorities or officials about matters they find important. This right of the citizen is counterbalanced by the obligation on the part of state authorities and officials to receive citizens' appeals and applications, to register them, to consider

them and to give timely replies and, if necessary, to take measures in case drawbacks are found. In practice administrative complaints of citizens challenging action (inaction), orders by bailiffs regarding enforcement procedure are in most cases referred to their immediate superior - the chief bailiff. [7], [17] Acting as a private person, on their own initiative, the citizen defends not only

their rights, freedoms and lawful interests but also the rights, freedoms and lawful interests of other individuals. They can evaluate the actions taken by the bailiff, by other officials, by the executive body of the Federal Bailiffs' Service or any other public official involved in the enforcement proceedings during which their individual rights to lawfulness and reasonableness are violated. Due to the existing legal framework appeals and complaints are taken to be treated as a unique tool for exercising control over the activities of a public authority. [20]

At the same time appeals are an important means of strengthening channels of communication between the state apparatus and the citizens, an essential source of wide and varied information, as well as an effective instrument for counteracting corruption, bureaucracy, abuse of power and other forms of dishonest behavior by people in authority.

There is evidence that the requirements of the legislation with regard to enforcement procedure are violated not only by debtors but also by the public employees of the Federal Bailiffs' Service. Every year a large number of complaints against the violations of the citizens' rights in enforcement procedure are referred to the FBS. In 2020 920000 complaints were filed for consideration, which shows an increase by 23% as compared with the number of 748000 complaints filed to the FBS as of 2019. [25] In addition to the constitutional guarantees of the right to challenge any breach of the law committed by the members of the FBS during the course of duty in administrative procedure, the citizens address their complaints to the Ombudsman Office of the Russian Federation, the Administration of the President of the Russian Federation, the Civic Chamber of the Russian Federation which are designed to analyze and summarize all the issues raised by the citizens in their written submissions and during a personal reception, to ensure that the President of the Russian Federation, the Prime Minister of the Russian Federation, the heads of the federal executive organs are promptly and regularly informed of the number and the character of the individual complaints. Based on the information obtained and analyzed these public and state bodies make proposals for eliminating the causes underlying the citizens' complaints and

engage the mass media in coverage of the relevant discussion and analytical work.

One of the shortcomings of handling the citizens' complaints in administrative procedure is that, in fact, they are to be considered by the organ of executive power the action (inaction) of which is disputed and which is interested in high assessment of the performance of their duties. One more drawback of the protection of the rights of citizens in administrative procedure is that the complaints are in some cases left unattended and unsatisfied and the officials allowing such violations go unpunished. [7], [8]

That is the reason why the parties in an administrative case seek judicial protection of the violated rights as in this case the prospects for fair, objective and unbiased adjudication of their complaints are held higher. Nevertheless it is important to point out that judicial adjudication of administrative complaints may be preceded by consideration of such cases in administrative procedure by an executive body or an official based on subordination, which, on the one hand, offers the way for redressing wrongs prior to judicial consideration and, on the other hand, increases the responsibility of the officials and bailiffs for the decisions and actions they make.

4. Judicial protection of citizens' rights in enforcement procedure in Russia

The adoption of the Code of Administrative Judicial Procedure of the Russian Federation in 2015 marked a new step in ensuring the citizens' rights and constitutional guarantees of their protection in enforcement procedure in the state governed by the rule of law. [22], [23]

In the court the citizen whose rights have been violated in enforcement proceedings acts as an equal party in the case rather than a pleader. Under Russian legislation the citizen in an administrative case is referred to as the administrative plaintiff while the opposing party represented by a state body with the duty to carry out enforcement procedure is called the administrative defendant. The official responsible for the decision in the case in administrative proceedings is obliged to provide explanation before the court.

During the trial it is the public official of the Federal Bailiffs' Service who gives explanation of the disputed actions taken by the bailiff, substantiates them with arguments which are subject to thorough evaluation by the administrative plaintiff, by the judge and other participants in administrative judicial procedure. It is not, then, surprising that very often the public officials reconsider their decisions and redress the violations at the pretrial stage.

Prior to 2015 judicial procedure applicable to the complaints against action (inaction) and the decisions issued by executive bodies and officials was specified by the Law of the Russian Federation of 27 April, 1993 "On Appeal to the Court against Acts and Decisions Infringing Citizens' Rights and Freedoms", by the provisions set forth in Subsection III "Proceedings in Cases Arising from Public Relations of Section II of the "Code of Civil Procedure of the Russian Federation", as well as by the legal rules stipulated in Section III "Procedure in Arbitration Courts of First Instance in Cases Arising from Administrative and Other Public Relations" of the Arbitrazh Procedural Code of the Russian Federation. The Law of the Russian Federation "On Appeal to the Court against Acts and Decisions Infringing Citizens' Rights and Freedoms", Subsection III of Section II of the Code of Civil Procedure of the Russian Federation ceased to have legal force after the adoption of the Code of Administrative Judicial Procedure on 15 September, 2015.

This Code regulates the manner of realization of administrative judicial procedure during the consideration and adjudication by the Supreme Court of the Russian Federation and by courts of general jurisdiction of administrative cases, including cases regarding the challenge of decisions, actions (failure to act) of public authorities, other state bodies, bodies of military administration, local self-government bodies, officials, state and municipal servants. The burden of proof in administrative cases on challenge of decisions, actions (failure to act) of bodies, organizations, persons vested with state or other public powers lies on the respective body, organization, or person. The form of applying to court in administrative cases is an administrative statement of claim which is submitted by persons who believe that their rights, freedoms and lawful interests are violated or disputed, or there are obstacles to the realization of such rights, freedoms and lawful interests, or some obligation is unlawfully

imposed on them. Such categories of administrative statements of claim are submitted to court within three months since the day when a citizen, an organization or other person learned about the violations of their rights, freedoms and lawful interests.

The administrative cases assigned to the above mentioned category are considered by the courts of general jurisdiction within one month since the day when the administrative statement of claim is accepted by the court and within two months if the administrative cases are considered by the Supreme Court of the Russian Federation.

After the consideration and adjudication of such cases the court adopts one of the following decisions: first, to satisfy the stated claims in full or in part; second, to refuse to satisfy the stated claims. If a decision, action (inaction) is recognized by the court as unlawful, the body, organization, person that adopted the challenged decision or performed the challenged action (inaction) must remedy the violations and restore those rights, freedoms and lawful interests in the manner stipulated by the court and within the stipulated period and must accordingly inform the court, the citizen, the organization or another person in whose regard those violations occurred within one month since the coming of the decision into effect.

The administrative statement of claim for the award of compensation arising from an unlawful decision, actions (failure to act) taken by a bailiff is applied to the Russian Federation which is represented in court by the Federal Bailiffs' Service acting as the main budget administrator. The questions concerning judicial protection of the rights of the parties and other interested private persons in enforcement proceedings are specified in Chapter 22 of the Code of Administrative Judicial Procedure of the Russian Federation.

Chapter 24 of the Arbitrazh Procedural Code provides for the protection of the rights of legal entities, sole proprietors (individual entrepreneurs) and other agents of economic and business activity. Claims on challenge of decisions, actions (failure to act) of bailiffs and other officials of the Federal Bailiffs' Service are considered by the courts in pursuance of the administrative procedure as stipulated in the above mentioned laws.

The Supreme Court of the Russian Federation ruled that the court could not refuse to accept the administrative statement of claim, or could not return it or leave it without action or dismiss it on the grounds that the administrative plaintiff failed to identify correctly the administrative defendant or the state body acting on behalf of the Russian Federation. During the preparation of an administrative case for the proceedings the court issues a decree in which it indicates the Russian Federation as the administrative defendant and draws to participation the FBS as the proper state body vested with the powers to act on behalf of the Russian Federation in administrative claims for the award of compensation arising from unlawful actions (failure to act) by a bailiff.

Upon the satisfaction of the claim for the award of compensation the court in the operative part of the decision indicates the amount of damages that are to be recovered by the Federal Bailiffs' Service out of the budget of the Russian Federation.

In 2020 the Federal Bailiffs' Service showed growing progress in meeting the performance indicator measured as "the proportion of the decisions made by the official employees of the FBS in enforcement procedure which were recognized by the courts as unlawful against the overall volume of work (the quality of work, including correction, timeliness and completion of

the work performed) set out by the state run program of the Russian Federation "Justice" adopted

by the decree of the Government of the Russian Federation on 15 March, 2014 No 312 The final year indicator for 2020 reached 0.0051% compared to the target value of 0.0065%, while in 2019 the delivered indicator amounted to 0.0057%. [25]

In cases for the award of compensation the court establishes the fact of inflicting the injury, the fault of the person inflicting the injury and the causal relationship between the unlawful actions (inaction) of a bailiff and the injury inflicted.

The fact that actions (inaction) of a bailiff were not deemed unlawful in separate court proceedings is not a ground for the refusal of the claim for the award of compensation arising from the injury inflicted by the same actions (failure to act) and, therefore, the legitimacy of these actions is to be evaluated during the

consideration and adjudication of the claim for the award of compensation of the injury inflicted.

If during the enforcement procedure the bailiff failed to perform all the necessary actions to enforce the executive document on compensation at the expense of the sums of money or other property of the debtor deemed to be lost at a later time, the plaintiff in the case on the award of compensation for the unlawful inaction of the bailiff cannot bear the obligation to prove that the debtor does not have other property subject to recovery.

At the same time, the fact that the real performance per se did not occur may not serve as a ground for holding the state responsible for the compensation of the sums of money not received from the debtor on the enforcement document because the responsibility of the state for enforcement of judicial acts in respect to private persons is limited to proper organization of enforcement procedure of judicial acts and does not entail a positive outcome, should one is determined by the objective circumstances contingent on the debtor. [21]

The provisions of item 5 of article 356 of the Code of Administrative Judicial Procedure, item 4 of article 321 of the Arbitrazh Procedural Code of the Russian Federation and item 3 of article 22 of the Federal Law "On the Enforcement Procedure" in compliance with which the recoverer has the right to repeatedly present a writ of execution for enforcement after it is returned unsatisfied do not preclude the recoverer from seeking the award of compensation in court for default on the outstanding debt due to unlawful actions (failure to act) on the part of the bailiff.

Within the meaning of Article 1081 of the Civil Code of the Russian Federation the Russian Federation has the right of recourse against the person in connection with whose actions (omission to act) the injury was inflicted in the amount of paid compensation, for example, in the event of loss of property the claim for compensation of the injury sustained is to be pursued against the person entrusted with the task to hold the property concerned in custody (the custodian or the debtor) or in the case of incorrect evaluation of the debtor's property compensation is sought against the appraiser responsible for providing such appraisals.

By virtue of the fact the FBS of the Russian Federation acts as a representative of the defendant under principle obligation to recover

compensation from the Russian Federation out of the treasury of the Russian Federation, the FBS has the right to claim compensation by way of recourse against the person responsible for the injury inflicted on behalf of the Russian Federation. [14]

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