Universal Decimal
Classification 342

Maile A. D.

EXPERIENCE OF ORGANIZATION JUDICIAL SYSTEM IN GERMANY OR HOW CAN BE USEFUL FOREIGN EXPERIENCE?

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In considering the improvement of Russian judicial system the author sets out objectives, organization principles of the judicial system of Germany. The article notes that, despite the fact that executive power under the Constitution in the exercising of its activity is linked to the law and that is why its actions are subject to judicial control.

Keywords: administrative courts, judicial system of Germany, extrajudicial administrative procedures, improving of a judicial system, judicial oversight in the sphere of public administration.

Controversy and scientific discussions on the establishment of specialized administrative courts in Russia have being conducted for a long time [6, 18-20; 2; 3; 5]. Problem is still not solved. A new round on the need of their creation flared after VIII all-Russian Congress of judges, which took place in Moscow from 17th to 19th of December, 2012.

As the President of the Supreme Court of the Russian Federation Vyacheslav Lebedev noted in his speech, consideration of cases by courts contrary to the rules of jurisdiction does not meet the requirements of fair trial, because a court that is not authorized to hear a case, within the meaning of articles 46 and 47 of the Constitution of the Russian Federation, is not a legitimate court. Judicial acts taken as a result of such consideration cannot be recognized really ensuring rights and freedoms. Pointing to the fact that to date there is no separate administrative proceeding

provided for in part 2 article 118 of the Constitution of the Russian Federation, although the need for a Code of Administrative Court Procedure has been noted in 2000 in the Resolution of V all-Russian Congress of judges, it called for introducing to the Resolution of the Congress an address to the legislative branch of the Russian Federation to adopt the Code of Administrative Court Procedure [10].

Chairman of the Supreme Arbitration Court of the Russian Federation, A. A. Ivanov in his report underlined that it is necessary to persistently and firmly enter the mechanisms of binding pre-trial appeal of decisions taken by administrative authorities. At that, should be developed and legislatively enshrined the common to all departments principles of extrajudicial administrative procedures. In his opinion, this is the most direct and efficient way to achieve simultaneously both reducing the burden on courts and reducing the time and cost of considering such cases [11].

In his speech, the Chairman of the Constitutional Court of the Russian Federation V. D. Zorkin noted that the uniqueness of the Russian judicial system is that, unlike many other countries, where there are specialized courts, there are two branches of the judiciary in Russia – courts of general jurisdiction and arbitration courts, which apply the same rules of substantive law (in our opinion, the lack of specialized courts, it is not the uniqueness, rather, the disadvantage of the Russian legal system). Interpretation of these rules often varies, causing many problems for persons seeking judicial protection. Meanwhile, the rule of law and arising from it principle of constitutional legality presuppose uniform understanding and application of the law by a court not only in every mentioned judicial subsystem, but also in the judicial system of the Russian Federation as a whole. Notably, such uniformity implies not only a purely formal aspect – the same interpretation and application, but also, what is more important, a substantive aspect, that is, the interpretation and application complying with the principles and rules of the Constitution. First of all – compliance with the principle of legal equality in the exercise of rights and freedoms and the consequent inadmissibility of their illegal restriction in law enforcement activity [12].

On the need to establish administrative courts was also said by the President of the Russian Federation, V. V. Putin, who has noted in his speech that "first of all, we should complete the establishment of administrative proceedings, promptly adopt the appropriate code, and form judicial structures that will settle disputes of citizens with public authorities and bodies of local self-government" [13].

At the conclusion of its work VIII all-Russia Congress of judges has decided to request the State Duma of the Federal Assembly of the Russian Federation to

ensure priority consideration of the draft of federal constitutional law "On Federal Administrative Courts in the Russian Federation" and the draft of federal law on "Code of Administrative Court Procedure of the Russian Federation" [1].

The need for reliable protection of the rights, freedoms and legitimate interests of citizens requires the building of a qualitatively new level of Justice in the Russian Federation.

Appreciating the establishment of administrative courts in Russia, it should be noted that even if administrative proceedings are created in the system of courts of general jurisdiction, this will lead to a more effective administration of justice. Administrative and legal disputes should be considered by the specialized administrative courts according to the rules of administrative proceedings.

As correctly argued by Professor Yu. N. Starilov, "improvement of the judicial system should take place, mainly through the establishment of administrative courts in the country. It is about feasibility of establishing administrative courts in Russia, which could more effectively (as compared to the current level and quality of judicial protection, the work of state bodies and officials) ensure the legality of the activities of executive bodies, as well as firmly protect the rights, freedoms and lawful interests of individuals and legal entities. Development of administrative justice as a form of exercising of the judiciary, and the codification of administrative-procedural norms will allow strengthening of administrative and legal protection" [4, 427].

The main content of judicial oversight in the public administration of Germany is to verify the legality of the activities of public authorities through rechecking of issued by them normative legal acts, which is generally carried out on the basis of claims (complaints) of natural and legal persons contesting these legal acts.

The ninth section of the Basic Law of Germany is dedicated to the organization of the judicial system of the German State and contains a number of provisions, which are the constitutional framework for the organization of court proceedings as a whole.

Article 92 of the Constitution stipulates that the judicial power is exercised by the Federal Constitutional Court, the federal courts provided for by the Basic Law, and the courts of the provinces. The independence of judges, as well as related with it legal status is guaranteed in all instances and for all branches of Justice (articles 97, 98 of the Basic Law of Germany). At that, in the field of general, administrative, financial, labor and social jurisdiction the Federation in the role of supreme judicial chambers establishes the Federal Trial Chamber, Federal Administrative Court, Federal Financial House, Federal Labor Court and the Federal Social Court (article 95).

Thus, three of the five supreme courts listed in this article refer to the field of administrative proceedings. In accordance with article 96 of the Basic Law of Germany, if necessary, in Germany also may be established other federal courts. So, there have been established military courts for those who are in public-law, official relations with the Federation (in German *Truppendienstgerichte*).

The judicial authorities directly involved in verification of legality of administrative acts in the field of public-law relations issued by the government of Germany, in a broad sense, include:

1) Federal Constitutional Court;

2) Federal Administrative Court;

3) Federal Social Court;

4) Federal Financial Court;

5) Federal Court of Patent Appeals;

6) constitutional courts of the federal provinces;

7) The European Court of Justice (it also has supervisory powers and on the basis of relevant complaints checks compliance of the German legislation with applicable legal norms of EU. If a legislative act is not in conformity with the norms of European law, Germany must in due time bring their normative legal acts into line with applicable European legislation).

Federal Constitutional Court on the basis of claims (complaints) of the federal and province executive authorities, and other bodies listed in the Constitution of the Federal Republic of Germany, as well as natural and juridical persons hears cases of conformity of federal or province normative legal acts' form and content to the Basic Law, or concerning the correspondence of province law to the rest federal law, whether the norm of international law forms an integral part of federal law and whether it directly generates rights and obligations for an individual, when the Court seeks such a decision. In addition, the Constitutional Court decides on constitutional complaints, which may be filed by any person alleging that a public authority has violated one of the basic rights or one of the rights stipulated in part 4 article 20, article 33, 38, 101, and 104 of the German Constitution (parliamentary minority also has the right of a query about the constitutionality of any law that has entered into force).

Under the so-called incidential control any court of Germany is entitled to submit a request to the Federal Constitutional Court, if it considers that law is contrary to the Constitution, and on the contrary, every decision of any court may be appealed to the Federal Constitutional Court by means of submitting a constitutional complaint if the applicant considers that the decision violates it basic rights.

Federal Administrative Court and subordinate administrative courts (the system of general administrative proceedings includes following courts: 1) administrative courts as first instance; 2) supreme administrative courts of Germany provinces as appellate instance; 3) Federal Administrative Court as cassation instance), on the base of the relevant statements of individuals and legal entities, deal with cases of conformity regarding the form and contents of decisions made by bodies of public administration in the form of individual administrative acts to the current administrative legislation. The competences of the Federal Administrative Court include all cases in the field of public-law relations, except those that are referred to the other federal courts. The competences of the Federal Administrative Court include all cases in the field of public-law relations, except those that are referred to the other federal courts.

According to the provision on administrative courts, the Federal Administrative Court is the only highest judicial instance in the field of general administrative jurisdiction.

All the administrative jurisdiction courts are collegial courts. In accordance with paragraph 5 of the Provisions on Administrative Courts, there are formed Chamber of judges consisting of three professional judges, including the presiding judge and two lay (public) judges. Lay judges do not participate only in making a ruling and a court decision if an oral hearing is not conducted.

Paragraph 9 of the Provisions on Administrative Courts provides for creation of senates in the Supreme Administrative Court of a province. Senates make decisions by a group consisting of three professional judges. Province legislation may provide for that the senates shall take a decision with help of five judges, two of whom may be lay judges.

According to article 10 of the Provisions on Administrative Courts, in the Federal Administrative Court are formed senates comprising of five professional judges, including the presiding judge, that make decisions in oral proceedings, and comprising of three professional judges – without oral proceedings.

Lay judges participate in oral proceedings and in making decision on the case on an equality with a professional judge (paragraph 19 PAC). Thus, their legal status coincides with the rights of lay members of court in other areas of jurisdiction.

Federal Social Court and subordinate social courts consider cases on conformity of the decisions of managerial bodies, the competence of which includes decision-making in the field of public-law relations in the form of individual administrative acts concerning pension scheme, health insurance, nursing care insurance, accident

insurance, calculation of pension, social money, and some other, to the current social legislation in respect to their form and content.

The cases on contestation of the above-mentioned decisions of administrative bodies on social issues affecting the rights and legitimate interests of interested persons are considered by social courts under the rules of court proceedings established by the Federal Law "On Social Courts" [9].

Federal Financial Court and subordinate financial courts based on complaints of interested parties consider cases on conformity to the current legislation of the decisions taken by financial authorities in the field of public-law relations in the form of individual administrative acts related to taxation and recovery of customs duties. Additionally, these courts deal with cases of contestation of decisions made by administrative authorities (individual administrative acts) on the calculation of child allowances. Activity of financial courts is governed by the Provision "On the procedure for determining jurisdiction of financial courts" dated October 06, 1965.

Federal Court of Patent Appeal, on the base of an appropriate claim (complaint) of a natural person or organization, examines cases of conformity to law of decisions taken by the offices of registration of inventions and granting of patents, trademark office and the Federal Office for Quality Testing.

Complaints and claims received by the Federal Court of Patent Appeal shall be allocated among individual Senates on the base of the so-called plan of allocation of cases, which is defined in advance for each year by the Presidency of the Court. Allocation of cases also regulates affiliation of individual judges to different senates. Thus, ensures compliance with an essential constitutional and legal principle that no one may be withdrawn from jurisdiction of its legitimate judge.

The activity of courts of patent appeal is governed by various legislative acts, including by special provisions of laws on patents, utility pattern, protection of integrated microchips, industrial designs, trademarks and protection of new varieties of plants. In addition, here are applied the provisions of the law on the judicial system and the Code of Civil Procedure, but only insofar as this is not excluded by the peculiarities of patent proceedings.

As part of the patent proceedings acts the principle of objective clarification of all the circumstances of a case (the principle of officiality). This means that court is not limited to taking into account the facts presented by parties (the so-called adversarial principle acting in a civil process). On the contrary, the court must, on its own initiative, to investigate the circumstances of the case in the framework of the submitted applications; it is not bound by the evidence presented by parties.

However, the participants of the process are required to assist in clarifying the circumstances of the case by giving reliable statements about the actual circumstances.

Constitutional courts of the federal provinces, based on requests from the subjects listed in the Constitution of a province, deal with cases of conformity of form and contents of province's law to the Constitution of the province. These courts also hear disputes concerning competence of the bodies of representative and executive power of provinces and some others.

Applications of citizens on violation fundamental rights by province's public authorities are not considered by these courts. Such complaints are in the exclusive competence of the Federal Constitutional Court of Germany.

In accordance with paragraph 3 article 95 of the Constitution of Germany, to ensure the unity of Justice in Germany was created a Joint Senate of the federal courts of the State, which was governed by the Federal Law "On Ensuring the Uniformity of Administration of Justice by Supreme Courts" from June 19, 1968 [7].

This Senate is not an independent court, but an administrative body entrusted with administrative oversight over the activities of federal courts. So, if one of federal courts wants to take a decision that is different from the decision of another federal court, then the matter becomes the subject of consideration in the Joint Senate. The decision on this matter taken by the Senate is binding on the exercising them by the courts.

The Basic Law of the Germany guarantees not only formal right of applying to court, but also real claims to effective judicial control. Despite the fact that the executive power, in accordance with the Constitution, while carrying out its activities is bound by the law, that is exactly why its actions are subject to judicial review. In the administrative and legal literature of Germany is noted that establishment of responsibility of managerial bodies and the State for their actions (actions of officials of public institutions) is associated with the exercise of exactly public, authoritative functions (hoheitliche Verwaltung). Distinguishing feature of a managerial body performing "public functions" is the fact that it performs them "as its primary duty" [8].

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