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FOREIGN EXPERIENCE IN ADMINISTRATIVE COURT PROCEEDINGS

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Abstract

This article examines the experience of foreign countries in organizing administrative justice and conducting administrative court proceedings, with a view to its possible application in the Republic of Uzbekistan. Drawing on the classifications proposed by A. Solovyov, R. Opalev and A. Zelentsov, the study analyses the three main models of administrative justice: the French, the German and the Anglo-Saxon. The French model is characterized by a dual judicial system in which administrative courts, headed by the Council of State, are structurally linked to the executive branch, while the Anglo-Saxon model of the United Kingdom relies on a system of quasi-judicial tribunals and on judicial review by the courts of general jurisdiction. Particular attention is paid to the German model, including the three-tier structure of administrative courts, the general jurisdiction clause of Section 40(1) of the Code of Administrative Court Procedure (VwGO), the criteria for distinguishing public-law disputes from private-law disputes, and statistical data on the activity of German administrative courts. The article also identifies the main goals of administrative justice: increasing economic attractiveness, improving the quality of the work of administrative bodies and strengthening citizens' trust in the state. The author concludes that the German model, in which disputes with public authorities are resolved within the judicial rather than the executive branch, is the most suitable for the conditions of Uzbekistan. The adoption of a separate code of administrative court procedure in Uzbekistan is assessed as a significant step forward in the development of the national system of administrative justice.

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Keywords: Administrative justice; administrative court proceedings; foreign experience; models of administrative justice; French model; German model; Anglo-Saxon model; Council of State; Federal Administrative Court; Code of Administrative Court Procedure (VwGO); public-law disputes; administrative tribunals; judicial review; separation of powers; Uzbekistan.

Introduction

First of all, it should be emphasized that the concept of administrative justice — that is, the consideration of disputes arising from public-law relations — is far from uniform in foreign countries, as it is in Uzbekistan.

At present, various models of administrative justice exist in practice. According to A. Solovyov and R. Opalev, foreign researchers most often distinguish three main models: the English, the French and the German (Solovyov & Opalev, 2017, p. 19).

A. Zelentsov, in turn, classifies the models on the basis of a different approach, namely according to the criteria of the degree of specialization of jurisdictional bodies and the priority task in their activity. On the basis of the first criterion, the scholar distinguishes between the model of specialized administrative courts (including the German and French models) and the model of courts of general jurisdiction (Zelentsov, 2015, p. 39).

A distinctive feature of the French and German models is that separate specialized administrative courts operate within them. As A. Zelentsov notes, the need for such courts stems from the differences between private and public law, as well as between civil-law and administrative disputes (Zelentsov, 2015). Moreover, in most developed countries belonging to this model, administrative court proceedings are regulated by separate procedural laws. In accordance with the principle of separation of powers, the legislative, executive and judicial branches are independent of one another and are not subordinate to each other.

Under the French model, the process of resolving administrative disputes involves assessing the actions or omissions of administrative bodies, which are regarded as special subjects; for this reason, such assessment should be carried out within the executive branch itself. In this system, cases are heard by administrative tribunals with general and special administrative jurisdiction.

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Today, two independent judicial systems operate in France — the courts of general jurisdiction and the administrative courts — with the administrative courts structurally forming part of the executive branch.

The system of administrative courts is headed by the Council of State (Conseil d'État) as its highest link, which acts as a court of first instance, appeal and cassation for various categories of cases and exercises judicial supervision ("Nekotorye aspekty administrativnoy yustitsii," n.d.). In addition to administering justice, this body has other broad powers. For example, the Council of State also participates in legislative activity: it prepares opinions, formulates positions and proposals on amendments, and drafts and issues acts on requests submitted to it, among other things.

The lower level of the system comprises administrative courts of appeal, ordinary administrative courts and specialized administrative courts, examples of the latter being the financial courts, the National Court of Asylum and other similar bodies. With the exception of cases specifically provided for by law — that is, disputes assigned to the jurisdiction of another court — all administrative disputes fall within the competence of the administrative courts. As a rule, decisions are taken by a panel of judges and, in cases of particular importance, by a plenary session of judges. In addition, the administrative courts and administrative courts of appeal also perform advisory functions.

Among the specialized courts, the financial courts occupy a special place; they include the Court of Audit (Cour des comptes), the regional and territorial chambers of accounts, and the Court of Budgetary and Financial Discipline. The task of the Court of Audit is to review on appeal the decisions issued by the lower chambers of accounts and to supervise the financial statements of state bodies. The regional chambers of accounts audit the accounting statements of state bodies within their territory, and the territorial chambers of accounts are vested with similar powers. The Court of Budgetary and Financial Discipline, in turn, hears cases concerning the liability of officials (Code de justice administrative, n.d.).

It should also be specifically noted that French court proceedings are divided into several types depending on the type of act being challenged and the nature

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of the claimant's demands. First, general proceedings in which administrative acts are challenged.

Second, full-jurisdiction proceedings applied in disputes relating to state property, serious administrative offences and disciplinary sanctions.

Third, proceedings for the interpretation or assessment of legality, applied at the request of courts of general jurisdiction.

Fourth, annulment proceedings, in which the court is empowered to annul an administrative act in whole or in part (Beshe-Golovko, 2013, p. 793).

In Germany, administrative jurisdiction is one of five independent branches of jurisdiction. Administrative courts were established in Germany more than 150 years ago. Their establishment was due to historical circumstances: in the nineteenth century, the bourgeoisie sought to limit the power of the monarchy. Although the administrative bodies were in the hands of the monarch, the bourgeoisie had influence in parliament. Interference by administrative bodies with liberty and property was to be permitted only on the basis of a law adopted by parliament, and this approach was an expression of the principle of the rule of law. An independent authority was to monitor compliance by administrative bodies with the rules adopted by parliament.

For this purpose, supervisory committees existed within the structure of administrative bodies at the beginning of the nineteenth century. However, since this proved insufficient, a need arose to resolve disputes arising from public-law relations through the courts. In 1863, the first administrative court was established in one of the states that later formed part of the German Empire. This, in turn, gave impetus to the establishment of other administrative courts in the empire. From 1919 onwards, the existence of administrative courts was provided for in the Constitution.

Article 95 of the German Basic Law provides for the establishment of the Federal Administrative Court (Bundesverwaltungsgericht) as the supreme administrative court of Germany. The higher administrative courts of the federal states (Oberverwaltungsgerichte) serve as the intermediate level of administrative jurisdiction. At first instance, 52 administrative courts (Verwaltungsgerichte) operate in Germany. The largest administrative court in

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Germany is the Administrative Court of Berlin, which usually hears disputes in cases where the defendant's legal address is located in Berlin.

Each of the 52 first-instance administrative courts is divided into chambers. A chamber consists of a presiding judge and two judges, one of whom acts as the judge-rapporteur. Two lay judges, who have voting rights equal to those of the professional judges, are additionally invited to the oral hearing. In less complex cases, the chamber may, in order to expedite the proceedings, transfer the dispute to the relevant judge-rapporteur for decision by a single judge. Administrative courts examine both questions of law and questions of fact. It should be noted that the court examines only the legality of the challenged actions of administrative bodies, not their expediency.

In the higher administrative courts, the decision-making bodies are called senates; they generally consist of a presiding judge, two professional judges and two lay judges. The senates decide on appeals against decisions of the administrative courts and, in certain other cases provided for by law, act as courts of first instance. The higher administrative courts likewise examine both questions of law and questions of fact.

Under Section 40(1) of the German Code of Administrative Court Procedure (Verwaltungsgerichtsordnung — VwGO), "recourse to the administrative courts shall be available in all public-law disputes of a non-constitutional nature, unless the disputes are explicitly allocated to another court by a federal statute" (Verwaltungsgerichtsordnung [VwGO], 1960, § 40(1)). This general rule ensures that citizens can protect their rights against state bodies in the administrative courts. In other words, a citizen may challenge administrative acts (for example, an order to demolish an illegally built summer house), factual actions (for example, a high level of noise resulting from the activities of state institutions) or by-laws (for example, an order of a local self-government body on the collection of charges), and may apply to the administrative courts to resolve any public-law dispute.

Over time, various theories devoted to distinguishing between public-law and private-law disputes have been developed. In particular, one may ask whether the norm that is decisive for resolving the dispute is a public-law norm. This is the case when a holder of state power is granted rights or obligations

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corresponding to its status. For example, it follows from §§ 2 and 4 of the Restaurant Act (Gaststättengesetz — GastG) that, if the relevant conditions for engaging in this activity are met (reliability, compliance with sanitary standards, etc.), a citizen is entitled to demand that the state grant a licence to operate a hotel or restaurant. If the state does not grant permission to operate a restaurant in accordance with the requirements of the law, the citizen may apply to the administrative court with a claim to oblige the state body to issue it. For this reason, such a dispute is regarded as a public-law dispute and falls within the jurisdiction of the administrative courts.

The mere participation of the state does not make a dispute a public-law one. If a state body purchases pencils for office needs, this is, of course, a civil-law relationship. The reason is that in such cases the state does not exercise state power; that is, it acts not as a holder of state power but as an ordinary citizen. Accordingly, the provision of the Civil Code governing such a dispute is not a public-law norm, since it grants the state virtually the same rights as all private persons who conclude contracts of sale.

Typical public-law disputes include the following.

1. Tax law: The collection of taxes, fees and duties is a public-law function of the state. Only the state, which holds supreme power, has the right to collect taxes compulsorily.

2. If a citizen receives a notice from the city administration stating that he or she must pay a share of 2,000 euros for the repair of the city street passing in front of his or her house and disagrees with it, he or she may file a claim with the administrative court against this notice, which constitutes an administrative act.

3. Disputes in the field of police law are also of a public-law nature. Here the state and the citizen are in a relationship of subordination, that is, a relationship of authority and obedience.

Let us imagine that the police, for reasons of security, require a citizen to leave a certain place in the city centre and, if the citizen does not comply, force him or her to do so — for example, by using police batons. The citizen may file a claim with the administrative court both against being removed from the place and against being struck with a baton, and may ask the court to declare such actions unlawful.

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4. In addition, disputes in the field of the law of assembly are also of a public-law nature.

For example, if the police in Berlin prohibit a demonstration for fear of violence, or disperse an ongoing demonstration using force — for example, water cannon or batons — the citizens subjected to these actions may bring a claim before the administrative court. If the claim concerns a prohibition issued in advance, the prohibition itself is the subject of the claim; if the claim concerns a demonstration that has already been dispersed, the subject of the claim is a declaration that the measures taken by the police were unlawful, so as to prevent such measures in the future. In both cases, the police, as a body of state power, stand opposite the citizen in a relationship of authority and subordination, and therefore the disputes are public-law disputes.

5. A large proportion of the disputes heard by administrative courts relate to the law on foreigners and the right to political asylum.

There are various situations here. On the one hand, every foreign national who requires a visa to enter Germany and whose visa application has been refused by a German embassy may bring a claim before the administrative court against that decision of the embassy of the Federal Republic of Germany. Such proceedings are heard by the Administrative Court of Berlin, because the Federal Foreign Office, to which all embassies are subordinate, is located in Berlin, the German capital. If the claim is upheld, the court obliges the relevant embassy to issue the visa.

Foreigners residing in Germany may object to being deprived of a residence permit and may bring a claim before the court against a decision on expulsion or deportation. They may challenge the relevant administrative acts of the authority competent in matters relating to foreigners. If the claim is upheld, the court itself annuls the relevant administrative acts.

Foreigners who have entered Germany on a visitor's visa and have been refused an extension of that visa or a residence permit may file a claim against the refusal issued by the foreigners' authority. If the claim is upheld, the court obliges the foreigners' authority to issue the relevant permit.

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The same applies to foreigners who have entered Germany seeking political asylum but whose applications have been rejected. In all these cases, the disputes are public-law disputes, because the state, as the holder of state power, is in a relationship of subordination with the individuals concerned.

6. Matters of building law are a typical type of public-law dispute.

Anyone who wishes to build, reconstruct or demolish a house must obtain a permit to carry out construction work. If the authority refuses, the citizen may file a claim for the issuance of the permit. If the claim is upheld, the court obliges the public authority to issue the relevant permit.

In such cases, under the rules of building law, the public authority is obliged to grant a citizen permission to carry out construction work when certain conditions are met (for example, compliance with construction safety standards, preservation of the integrity of the city's architectural appearance, etc.). At the same time, this rule also grants the citizen the right to obtain such a permit. Such a legal relationship between the citizen and the state is a public-law relationship, since rights and obligations are imposed on the authority as an entity exercising state power.

7. Road traffic regulations are another area in which the citizen enters into a relationship of subordination with the state.

If the road traffic police authority puts up a sign limiting speed to 120 km/h, this constitutes an administrative act, and a citizen may challenge it on the ground that it restricts his or her freedom. The same applies to no-parking signs, traffic lights and the like.

In practice, there are frequent cases in which the police order the towing of a car considered to be improperly parked and then present the citizen with a bill for the towing costs. The citizen may challenge this in the administrative court as well.

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8. Law on operating restaurants and hotels

If a citizen wishes to open a restaurant in Germany, he or she needs an appropriate licence, which is granted only if certain conditions are met. If the citizen believes that the authority has wrongfully refused to grant the licence, he or she may file a claim for the issuance of the licence.

If a person operates a restaurant and the authority intends to revoke his or her licence (for example, for non-compliance with sanitary and hygiene rules), he or she may file a corresponding claim. If the claim is upheld, the court directly annuls the decision to revoke the licence, so that the licence to operate the restaurant remains valid without change.

9. Decisions of examination boards

In order to work in a particular profession in Germany, one must obtain the relevant diploma or pass state examinations. In particular, a future judge or lawyer must pass two state examinations: one after completing university studies and the other after two years of practical training. The same applies to doctors. The examination process is an administrative procedure, at the end of which an administrative act (a diploma or other certificate) is issued. If a citizen, as an examinee, disagrees with the result of the examination, he or she may challenge it in the administrative court, because the state examination board is in a relationship of authority and subordination with the citizen and exercises state power.

10. Another important category of public-law disputes is disputes in the field of civil service (Beamte) law.

It should be borne in mind here that in Germany, alongside employees in the public service, there are civil servants (Beamte) who are in a special relationship of trust with the state. Unlike employees, civil servants do not conclude employment contracts. Like judges, they are appointed and receive a salary from the state established by law.

If a civil servant wishes to bring a claim because his or her “employer” has refused to increase his or her salary, he or she applies to the administrative court. This also applies to so-called competitor disputes, in which a civil servant loses

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to a colleague in a competition for a higher position and considers the decision of the selection board unlawful. In all these cases, the claimant is not in a relationship of equality with his or her employer but in a special relationship of authority characterized by subordination.

11. The jurisdiction of administrative courts also covers cases in which citizens or associations wish to use public institutions belonging to the state. A clear example is when a party wishes to hold a meeting in a large hall owned by the city, but the city authorities refuse to make the hall available to the party; or when a city hall, school, cemetery or other public institution serves public purposes, the citizen has a right of access to it and may protect this right in the administrative court. When the question of admission to an institution or organization — that is, whether or not access is available — is being decided, a public-law dispute arises, because the citizen demands that the state, as the representative of state power, ensure his or her right. This should not be confused with the question of how the relationship of use is formalized, since that may also be arranged under private law. For this reason, related disputes — for example, over the rent for a city hall — are, where necessary, heard by the courts of general jurisdiction.

12. A similar distinction exists in the granting of subsidies: the decision to grant a subsidy to a particular person is a public-law decision, since in this case the state acts as the representative of public authority. However, the specific procedures (payment, loan conditions, etc.) depend on how the legal relationship is formalized. If this relationship is of a private-law nature, disputes concerning the procedure for paying the subsidy are heard by the courts of general jurisdiction; otherwise, they are heard by the administrative court.

13. Measures to combat environmental pollution resulting from the activities of public-law entities also fall within the jurisdiction of administrative courts. Decisive here is whether the citizen's claim for protection against harmful emissions is of a public-law nature. This is the case where such emissions arise from the performance of some public function. Examples from the practice of the higher administrative courts include the sirens of (state) fire engines, the unpleasant smell from municipal wastewater treatment plants, noise from a

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municipal playground, and excessively bright municipal street lighting shining into a bedroom at night.

This list could be continued at length. However, an attempt has been made to enumerate the most important groups of cases in the practice of administrative courts.

Today, the German federal states have 52 administrative courts and 15 higher administrative courts, and there is one Federal Administrative Court; together they have jurisdiction to decide cases for the 82 million people (citizens and foreigners) living in Germany, and 1,900 administrative judges work in them. On average, 140,000 cases are heard per year, of which 30,000 are considered under an expedited procedure. Ten per cent of cases reach the appellate court, and 1 per cent of these (about 1,100 cases) reach the Federal Administrative Court. The time taken to consider cases is 9–12 months (shorter under the expedited procedure).

The rate at which decisions are reversed by the higher administrative courts is 20 per cent. Administrative bodies lose about 13 per cent of cases. In about 75 per cent of cases, claimants are represented by lawyers. In about 20 per cent of cases, claimants are exempted from paying procedural costs.

The main areas of jurisdiction are:

- legislation on school and higher education, and quotas for study places (about 10.5 per cent of cases);
- public economic law (about 6 per cent of cases);
- legislation on the rights of foreigners and refugees (about 24 per cent of cases);
- police law and the law of assembly (about 13 per cent of cases);
- building and planning law (about 8 per cent of cases);
- tax legislation (13 per cent of cases);
- civil service law (about 10 per cent of cases).

There are special specialized courts for hearing cases in the fields of social and financial law.

The main goals of introducing administrative justice are:

a) Increasing economic attractiveness

Foreign investors pay particular attention to legal stability. This includes an efficient state apparatus and an active judicial system. An investor's confidence

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grows further when he or she knows that independent courts decide whether the refusal to grant a state permit is lawful or unlawful.

b) Improving the quality of the work of administrative bodies

The work of administrative bodies improves when they receive guidance from outside. Such guidance results from the review of their activities by independent courts. In the future, administrative bodies follow the standards set by the courts. The opportunity for administrative bodies to create preferential conditions for certain groups or enterprises decreases, and corruption is also reduced. The influence of the courts on administrative bodies has an educational character.

c) Strengthening citizens' trust in the state

The fact that decisions of state bodies may be reviewed by independent courts increases citizens' trust in the state.

The courts correct wrong decisions of administrative bodies and, where the administrative body has taken the right decision, explain the legal situation to the citizen.

There is also another model of organizing administrative justice — the Anglo-Saxon model applied in the United States, the United Kingdom, Canada, Australia and other countries — which is of some interest to researchers. In the United Kingdom, the main act regulating the social relations under consideration is the Tribunals, Courts and Enforcement Act adopted in 2007. At present, the United Kingdom has a system of tribunals, which are quasi-judicial bodies occupying an intermediate position between the executive and the judiciary. These bodies are mainly intended to resolve a wide range of disputes between the individual and the state.

The main elements of this system are the First-tier Tribunal and the Upper Tribunal, each consisting of several chambers. Tribunals may review their decisions not only on applications by individuals but also on their own initiative. Decisions of tribunals may also be appealed to the courts. The Upper Tribunal has the power to create precedents that are binding on the First-tier Tribunal (Tribunals, Courts and Enforcement Act 2007).

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In addition to these bodies, the UK system of administrative justice also includes the Administrative Court. It is a specialized court within the King's Bench Division of the High Court and has, in particular, the power to review decisions of courts, tribunals and other bodies (HM Courts & Tribunals Service, n.d.). The Court of Appeal, the High Court, the county courts, the Crown Court and the magistrates' courts also have certain powers in the field of administrative court proceedings.

Disputes concerning the legality of decisions taken and actions performed by administrative bodies and officials are heard by the courts of general jurisdiction, with the main focus on reviewing constitutionality. As noted above, the courts of general jurisdiction exercise control over the decisions and actions of administrative bodies. According to L. V. Karasaeva, "a distinction is made between statutory control established by legislation and non-statutory control expressed in the issuance of prerogative writs: habeas corpus (a demand to release a person unlawfully detained), mandamus (a demand to perform duties) and injunction (a prohibition on performing actions). This list is not exhaustive, and the court may issue various other orders" (Karasaeva, n.d.).

In conclusion, it should be noted that in foreign countries the task of resolving administrative disputes is performed by specialized courts operating both within the judicial system and within the executive branch, by courts of general jurisdiction, and by quasi-judicial bodies. Consequently, the bodies belonging to the system of administrative justice are characterized by great diversity both in their nature and in the scope of their powers.

In our opinion, the existence of a separate act devoted to administrative court proceedings is necessary owing to the specific features of the relations it regulates. For this reason, the above-mentioned code was adopted in our country on the basis of the best practices of leading foreign countries. As our analysis has shown, the foreign experience of the countries of the Romano-Germanic legal family demonstrates the existence of a separate act on administrative court proceedings. Therefore, the adoption of the Code of Administrative Court Procedure is a step forward in the development of the system of administrative justice in our country.

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As a result of analysing the models of organizing administrative justice in foreign countries, we have concluded that the German model can be recognized as the one most suitable for the conditions of our country.

In our view, legal disputes should be resolved not within the executive branch, as in France and the United Kingdom, but within the judicial branch. Of course, the possibility of a dispute first being considered by a body belonging to the executive branch — for example, tax disputes being considered initially by a dispute resolution commission — cannot be ruled out; however, the participation of the court in resolving disputes is mandatory. In this regard, sufficient knowledge and skills on the part of administrative court judges will lead to the lawful, fair and high-quality resolution of disputes and, as a result, will turn the court into a true bastion of justice.

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