FORMATION AND DEVELOPMENT OF ADMINISTRATIVE JUSTICE OF THE REPUBLIC OF KAZAKHSTAN

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ABSTRACT

The article discusses the development and organization of administrative justice in the Republic of Kazakhstan in detail. Authors have studied current models of administrative justice organization and the features of their implementation in Kazakhstan. The methodological basis of the article is based on system analysis, comparison, theoretical and legal forecasting. The article studies the works of Kazakhstan, Russian and foreign scientists in the field of administrative justice, the views of German lawyers. In addition, the article considers some organizational aspects of the development of a draft Administrative Procedure Code of the Republic of Kazakhstan.

Keywords: Administrative Justice, Administrative Law, legislation of the Republic of Kazakhstan, Administrative Court.

INTRODUCTION

Despite the fact that administrative justice development started only in the XVIII-XIX centuries, today it is a complex institution of administrative and state law that regulates public law disputes in the field of public administration. The interdisciplinary nature of this institution lies in the fact that the disputes under consideration affect a number of branches of law, for example, administrative, constitutional, financial law. Moreover, the level of development of administrative justice reflects the maturity of the legal system, the degree of protection of citizens' rights and freedoms. Thus, the institution of administrative justice can be considered as one of the key features of a legal state.

There is another feature of administrative justice which confirms the necessity of its development. The developed institute of administrative justice promotes improvement of the business climate, development of the business community. This also concerns improvement of the investment attractiveness of the state.

In many ways these reasons have served as basis for the interest of the state bodies of Kazakhstan in the development of the administrative justice institution. Thus, in 2010 a draft Administrative Procedure Code-APC was developed and actively discussed. In spite of the wide

involvement of both the academic community and state bodies, the draft required improvement and was withdrawn from discussion. Currently, the Ministry of Justice is developing the second version of the Administrative Procedure Code that includes not only procedural issues, but also issues of administrative procedures. The draft Code will be reviewed in detail in the fourth section of this article.

Although there is a deep interest of Kazakhstani society in formation of the administrative justice institution, no profound scientific research in this direction was conducted in the Republic of Kazakhstan.

RESEARCH METHODS

This article aims to analyze the history of the formation and development of administrative justice in Kazakhstan, to study the models of organization of administrative justice, the prospects and problems of reforming the legislation of the Republic of Kazakhstan on administrative justice.

One of the authors of this article was the head of the working group in the Parliament of the Republic of Kazakhstan on the draft administrative procedure Code of 2010, the head of the working group on the development of current Code of Administrative Offenses in 2014, and nowadays takes part in the ongoing reform of administrative procedure.

The article also pays attention to the Russian experience of administrative justice, due to the common historical experience of the two states, as well as close integration within the framework of the Eurasian Economic Union which requires close harmonization of the laws of its member states (Khabrieva, 2015).

Finally, the article discusses the existing models of the organization of administrative justice. In particular, the French, German and Anglo-Saxon ones. In conclusions authors define the model of administrative justice system to which the system of administrative justice that is being introduced in Kazakhstan is mostly inclines to. Despite the fact that the article is mainly addressed to the issues of historical development and formation of administrative justice, the authors also touch upon the problems of the current legislation of the Republic of Kazakhstan. Within a general conclusion the prospects and possible directions for the further development of the institution of administrative justice in Kazakhstan are analyzed.

LITERATURE REVIEW

In order to comprehensively analyze the issues of the development of the institute of administrative justice, the authors have attempted to analyze the research works of Kazakh, German, Russian and other academics, specialists in the field of administrative law. The methodological basis of the study includes system analysis, comparison, theoretical and legal forecasting.

Considerable attention was paid to the works of Kazakh legal scholars who studied the problems of organization of the institute of administrative justice: R.A. Podprigora, A.B. Gabbasov etc. Special attention was paid to the works of Russian authors T.Y. Khabrieva, L.A. Nikolaeva, A.K. Solovieva, as well as of German authors R. Bousta and A. Sagar.

RESULTS

In 2009-2010 in Kazakhstan scientists and practitioners were actively developing the draft of Administrative Procedure Code. At the discussion stage in the Parliament of the Republic of Kazakhstan there were questions regarding the content of the draft Code, as well as completeness of its subject of regulation.

The key problem of the 2010 draft Code on administrative justice was the problem of its extension on different groups of cases according to their legal content. The draft Code consisted of two separate sections, one of which was devoted to the proceedings on administrative offenses (section 2), and the second-to the proceedings on administrative disputes (section 3). Such approach contradicted to the worldwide experience in the organization of administrative court proceedings, in which proceedings on misdemeanors and public law disputes are clearly separated.

The approach laid down in the 2010 draft Code contradicted the Concept of the legal policy of the Republic of Kazakhstan for the period from 2010 to 2020. The Concept envisaged the establishment of administrative justice system on the basis of existing administrative courts that considered public law disputes with the transfer of cases on administrative offenses to the jurisdiction of courts of general jurisdiction.

These contradictions were revealed at the stage of discussion of the draft Code in the Majilis of the Parliament of the Republic of Kazakhstan, in a working group chaired by the author of this article. A revision of the entire 2010 draft Code was required, because the unification of issues on administrative dispute resolution and administrative misconduct within one Act contradicted to the idea of administrative justice and impeded establishment of effective system for protection of rights of citizens. All of this made it impossible to adopt the 2010 draft Code on administrative justice. In this regard, in 2010, further work on the draft of Administrative Procedure Code was suspended.

Nevertheless, the problem of development of qualitative codified act, which could regulate the issues of organization of administrative justice, remained relevant. In addition, it was necessary to establish precise legal framework for control over the actions of state bodies, which should positively affect the additional legal protection of citizens, as well as the investment attractiveness of Kazakhstan.

In this regard, since 2014, the development of new draft of Administrative Procedure Code has begun. Work on new law on administrative procedures was continued in parallel. Finally, it was decided to merge the two projects and develop a single codified act-Administrative Procedure Code.

Let's consider the most significant innovations of this codification act. Firstly, the draft Code envisages new role for administrative justice as an independent judicial power. These rules were significantly influenced by the German legal system. Thus, the draft Code presented for discussion indicates the need to adapt the experience of Germany, where administrative courts represent independent branch of the judiciary power and consider all public law disputes that are not related to the field of constitutional law.

The draft Code establishes the procedure for carrying out activities, functions of state bodies, regulates public relations arising between administrative bodies, officials and participants of the administrative procedure on the adoption and execution of administrative act, the commission of administrative action, an appeal of an administrative act, a refusal to adopt

administrative act, administrative action and also establishes the procedure for administrative proceedings on consideration and resolution of administrative cases on disputes arising from public law relations.

In addition to general principles of court proceedings the draft of Administrative Procedure Code envisages special principles of administrative court proceedings: competitiveness and equality of the parties with the active role of the court; compliance with reasonable time; the inadmissibility of court interference in the activity of the competent authority; burden of proof.

The draft also provides measures of procedural coercion, one of which is fine. Thus, in case if public authority doesn't submit documents or evidences requested by the court, the judge is entitled to impose fine on the official.

Also the provisions regarding representation in court are considered as one of the features of the Administrative Procedure Code. According to the draft, the claimant is entitled to carry out legal proceedings in court personally with the mandatory participation of representative with a higher legal education.

DISCUSSION

History of Development of Administrative Justice

Historically, administrative justice developed in the countries of Western Europe in the context of development of the ideas of a rule-of-law state, which obliges state bodies to operate within the law and by means that do not contradict the law. The executive branch is limited by the will of the people and generally accepted human rights, the principles of democracy and the priority of human rights. An action which contradicts these principles, that is, a contra legem committed, is subject to immediate cessation. Within this goal the parties of administrative-law relations are granted the right to appear in court with the request to cancel the action of the administration (Nickolaeva & Solovieva, 2004).

Although the XVIII-XIX centuries are traditionally considered as the beginning of the formation of administrative justice institutions, administrative and judicial control over the activities of public authorities dates back to the XVI-XVII centuries. During this period, the principle of settling disputes affecting the interests of the royal power was authorized in France by authorized representatives of the king: the King’s Council at the central level and the commissaries in the field (Nickolaeva & Solovieva, 2004).

Significant changes occurred after the Great French Revolution, which had led to the separation of powers due to which judicial and administrative jurisdictions were logically divided. In 1791, the State Council was established in France, and took over the functions of the State Council of the King dissolved by the revolutionary authorities. This body administered justice in administrative disputes in accordance with special procedural rules. At the end of the XIX century, the State Council was already transformed into the Supreme Administrative Court. Based on the experience gained by the Council of State, the foundations of French administrative law were elaborated (Stirn, 1994).

The French experience affected Germany, where in the XIX century there was a separation of justice and administration. By the end of the 19th century, prototypes of modern administrative justice were created in European states.

Nowadays the majority of researchers clearly identify two models of the organization of

administrative justice-the French and the Anglo-Saxon (Lindseth, 2005). Two, completely opposite ideas comprise their foundations. The basis of the French one-the idea that the administrative courts are part of the government and cannot be considered in isolation from it. By contrast, in Britain historically dominated the idea that administrative disputes should be subject to the courts of general jurisdiction.

Along with this, it would be correct to mention also the German model of administrative justice, which is similar to the French one, but at the same time has significant differences that do not allow identifying them.

French Model of Administrative Justice

The basic idea of the French model of the administrative justice organization laid down in the foundation is the principle of court proceedings in relation to the administration, part of administrative management. Based on this principle, administrative justice acts as part of the state power system. As P.Lindseth notes the legal control over administrative decisions is an aspect of administration and cannot be settled by ordinary courts (Lindseth, 2005).

The French system of administrative justice is traditionally associated with the Supreme Administrative Court. As noted above the administrative court historically originates from the Council of State. This had influence on the fact that today administrative justice is an independent branch of justice, separated from the system of courts of general jurisdiction and the executive branch. It is based on the unchanged principle of separation of powers, that prohibits the judiciary branch to interfere with the affairs of the executive branch and vice versa.

Actions and acts of state administration are controlled by special bodies that are a part of the state administration system. Such bodies can be formed both as at the lower levels of government and as at the regional and higher levels.

Many independent bodies, combining regulatory powers with judicial ones, are considered at least in part as an alternative to the courts, since they provide an opportunity to resolve the dispute before the case is brought to the court (Bousta & Sagar, 2014).

German Model of Administrative Justice

Administrative justice in Germany was also formed on the basis of the principle of separation of powers. As noted above, the process of its organization was actively influenced by the model of administrative justice in France, but the overall system is markedly different. Administrative courts in Germany are separated from the executive branch, but they also occupy a separate place in the judicial system.

It must be noted that this division of the courts has attracted attention of Kazakh lawyers. The analogue of this system has been included in the draft Administrative Procedure Code of the Republic of Kazakhstan. Administrative courts are a part of the judicial branch, which seems logical in terms of the separation of powers. At the same time, they occupy a separate place within judicial branch.

The German model of administrative justice is of interest to the legislation of Kazakhstan as national law of Kazakhstan belongs to the Roman-German legal system. Since Kazakhstan has gained independence, the process of modernization of the legislation of the Republic of Kazakhstan continue to develop. In this regard, the German law serves as a reference model and

object of studying.

Anglo-Saxon Model of Administrative Justice

To begin with, it should be clarified why many have doubt on the very existence of a separate Anglo-Saxon model of administrative justice. The thing is that in common law all disputes with the state administration are subject to the general courts. That is, no special judicial bodies are created.

At the same time, in countries with the Anglo-Saxon legal system there are administrative institutions that operate within the executive branch. These include the courts, tribunals, commissions, etc. A common law judge is empowered to repeal or declare acts of governing bodies illegal.

According to the authoritative Kazakhstani legal scholar R. Podoprigora, many post-Soviet countries, including Kazakhstan, are inclined to the Anglo-Saxon model, with the exception that no tribunals outside the judicial system are created for considering disputes (Podoprigora, 2014). In our opinion, it is necessary to clarify that this is not about borrowing the Anglo-Saxon experience, but about similar elements that can be traced both in the experience of post-Soviet countries and in the model used in the Anglo-Saxon legal system. In particular, the issue of referring disputes with the state administration to the competence of general courts.

At present, we can state the process of deviating from such model of administrative justice in favor of the German one. It was implemented in the draft Administrative Procedure Code of the Republic of Kazakhstan, which is currently at the final stage of development by the Ministry of Justice of the Republic of Kazakhstan.

Historical Conditions for the Development of the Institute of Administrative Justice in Kazakhstan

The Republic of Kazakhstan, being a post-Soviet state, inherited from the Soviet Union a legal system that urgently needed to be modernized and adapted to market relations. In the Soviet Union, administrative justice was not widely developed, since Soviet law assumed that there could be no disagreement between the state and the people. Although in practice there were various forms of supervision and consideration of complaints within state bodies.

Bogdanova notes that two different meanings of the term “administrative” were borrowed from Soviet law in relation to administrative procedures, which still cause confusion. The first is an administrative way of resolving issues related to complaints, which are considered by the administrative authorities themselves according to the rules for handling complaints. The second is related to the prosecution of officials for administrative offenses, and is carried out by the courts. These two meanings coexisted throughout the Soviet period, compensating for the lack of institutions of administrative justice (Bogdanova, 2018).

For example, in the Civil Procedure Code of the Kazakh SSR the proceedings were fixed for individual cases arising from administrative legal relations. Article 1 indicated that cases arising from administrative legal relations and cases of special proceedings are treated according to the general rules of legal procedure with certain exceptions established by the legislation of the Union of SSR and the Kazakh SSR.

This approach has long been retained in the legislation of independent Kazakhstan, where

questions challenging the actions of administrative justice were referred to the competence of the Civil Procedure Code of 1999 that contained a section on "*Special lawsuit proceedings*". Similar section exists in the current edition of 2015.

Since 2000 the Law of the Republic of Kazakhstan "*On Administrative Procedures*" has been in force in the Republic of Kazakhstan. It is aimed to establish administrative procedures, respect the rights and freedoms of citizens, protect public interests, and prevent public officials from using official authority for off-duty purposes. However, this law has been criticized by some legal scholars. Thus, according to the German lawyer J. Pudelka, the Law of the Republic of Kazakhstan "*On Administrative Procedures*" does not deserve its name, since it is very brief and mainly regulates not administrative procedures, but rather administrative and organizational issues (Pudelka, 2013).

Though we agree with the opinion of the scholar, it should be noted that at the time of adoption of the Law "*On Administrative Procedures*" the legislation of Kazakhstan had a different goal. It was necessary to lay the foundation of a common policy formation in the field of administrative procedures. And for these purposes, the general law that formed only the general principles for the implementation of administrative procedures was adopted. Now the legislation of Kazakhstan is faced with the task of preparing a new law on administrative procedures, which would reflect the stages, participants involved in such procedures; publication, entry into force, execution of acts of state administration; entering into administrative contracts, etc. These tasks are considered within the framework of the Administrative Procedure Code.

In 2002 administrative courts were established in Kazakhstan, which, despite their name, deal with cases of administrative offenses and do not resolve public law disputes. As noted by R.A. Podprigora if we speak directly on public law disputes, these disputes can be considered by various courts, which mostly depends on the subject composition of dispute participants. If a dispute arose between a citizen and a state body, the case will be considered by a court of general jurisdiction, if legal persons participate in the case-by a specialized inter-district economic court (Podoprigora, 2014).

The Soviet doctrine of administrative law was based on the recognition of the dominance of tough permissive and controlling regulators. According to Y.A. Tikhomirov bright example of this approach is the presence of the Code of Administrative Offences (Tikhomirov, 2011). Such codes are typical for the post-Soviet countries. Codification of offenses that do not fall under the signs and characteristics of crimes was the achievement of Soviet legal science, although the approaches were markedly different from the classical European approaches in the field of offenses and sanctions in the public law sphere.

Currently, the Code of Administrative Offenses of July 5, 2014, is already (in the history of Soviet and post-Soviet Kazakhstan) the third Code in the Republic of Kazakhstan.

Meanwhile, the objective of adoption of the unified act regulating the organization of administrative justice still remains unresolved. The legislation of the Republic of Kazakhstan is largely based on Soviet law. For this reason modern institutions of Kazakhstan's law have already incorporated some characteristic of socialist law. This applies not only to public administration; lawyers faced the same issues during the reform of private law in Kazakhstan (Sabirov et al., 2019; Mukasheva et al., 2018).

The problem of adoption of unified act regulating the organization of administrative justice is of fundamental importance to the Republic of Kazakhstan. In confirmation of this, we note that the Concept of legal policy of the Republic of Kazakhstan for the period from 2010 to

2020, approved by the Presidential decree, states that administrative proceedings should be a full form of justice enforcement, along with criminal and civil proceedings.

As Gabbasov noted, the experience of reform of the administrative legislation of the post-soviet countries shows that the process of the formation of administrative justice is carried out through the initial codification of general administrative law, administrative procedures, and only then judicial procedures for the consideration of public law disputes (Gabbasov, 2010).

As mentioned above, the draft of Administrative Procedure Code is currently being developed in the Republic of Kazakhstan. The draft Code was developed over a long period of time. It is a universal codified act that regulates the organization of both administrative procedures and administrative justice.

CONCLUSION

The main task of administrative justice is to ensure the rights and freedoms of citizens, defending their interests from the actions of the state administration. In this regard, developed institution of administrative justice is an indicator of freedom of legal system and development of civil institutions.

Within historical perspective, administrative justice in Kazakhstan developed on the basis of the legal system that Kazakhstan inherited from the Kazakh SSR, i.e. socialist law. This left a certain imprint on some legal institutions, for instance, the existence of administrative courts, which consider not the public disputes, but offenses that do not fall under the category of criminal offenses. As well as in all other post-soviet countries, a separate Code on administrative offenses exists in Kazakhstan. All of this has significantly complicated the process of establishment of developed institution of administrative justice.

Nevertheless, the work on the draft of Administrative Procedure Code is being consistently conducted. The second draft Code, which includes issues of administrative procedures, is at the final stage of development.

Currently in the Republic of Kazakhstan, the wide range of subjects of legal relations, including the state, are interested in the development of administrative justice. The draft of Administrative Procedure Code, which is in the process of adoption, will allow to implement the institution of administrative justice in Kazakhstan. This Code will establish the institutional framework of administrative justice, which will give an opportunity to develop an effective mechanism of legal protection.

In the academic community of Kazakhstani lawyers there is no unified view on the ideal applicable model of administrative justice in Kazakhstan. However, it can be stated that today the novelties in this area are guided by the experience of Germany. Nevertheless, we note that the consistent development of administrative legislation in the Republic of Kazakhstan relies primarily on the historical realities of Kazakhstan, its own experience and the legal culture of the people of Kazakhstan. All of this will contribute to the formation of an efficient and modern system of administrative justice.

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