

The Third Person Institute and Brief Review of the Gaps in the Administrative and Civil Procedural Law of Georgia Regarding This Institute

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Doi: 10.19044/esj.2017.v13n28p54 [URL:http://dx.doi.org/10.19044/esj.2017.v13n28p54](http://dx.doi.org/10.19044/esj.2017.v13n28p54)

Abstract

The present article deals with the important institute of the administrative and civil proceedings, such as the third person institute. This article provides a brief overview of the importance of the third person institute and the legislative gaps in the civil / administrative procedural law regarding this institute. In conclusion, the article presents possible solutions of relevant gaps and problems.

Keywords: Law, Georgia

Materials and Methods

This study was based on a systematic analysis, logical analysis and comparative legal research methods. The main source of the research is current procedural law of Georgia, works of Georgian and foreign scientists, the Supreme Court decisions and the European Legislation.

Introduction

The third person institute is one of the most important institutions of the administrative and civil procedural law (17;18;19). It is a specific procedural means, which acts against the persons who, although are not immediate parties of the administrative / civil proceedings (plaintiff / defendant), but may be assigned with certain rights and responsibilities according to the court's decision (17;18;19).

Defending the third person's rights fully and involving them in the proceedings with the rule defined by the law is the authority, and in most cases the obligation of the court discussing the case. The issue, fully regulated at the legislative level at first glance, in practice frequently faces many legal and procedural problems.

For the first time, the content of the third person institution was formulated in Article 48 of the Law on Enforcement Proceedings of Baden

in 1864. Then, it was formed with development of the judicial law, judicial practice and a number of gaps were filled. The first court decision, which takes into account the precedent of involving the third persons in the case dates back to 1876 and it is adopted by the Supreme Court of Prussia (5, 233). The aim of establishing the third person institute was mainly the protection of legal interests of the third person, thorough review of the case, maintenance of the process efficiency and legal provision (5, 234-235).

As for the historical reasons of establishing the third person institution in civil / administrative procedural law of Georgia, considering the late adoption of civil and administrative procedural law (the Civil Procedural Code of Georgia was adopted on November 14, 1997, and the Administrative Procedural Code of Georgia on July 23, 1999 (1.2)) the discussion on the mentioned issue is groundless, but of course, after enactment of the procedural law it is important to correctly define the third person institute and to present its contents in a right way.

Georgian court practice shows that the separation of the third parties of “mandatory” and “ordinary” inviting (in the Administrative Procedural legislation), as well as implementation of proper procedural acts with the purpose of defending the rights of the third person (in the civil procedural legislation) without independent pleading, is a problematic issue, which in turn leads to unreasonable restrictions of that person's rights.

There are a few issues in the Administrative and Civil Procedural Legislation of Georgia regarding the third person institute which are still not fully regulated at the legislative level.

Thus, this article aims to highlight the importance of the third person institution, to expose the flaws, which in turn cause restriction of the third party rights and to present the possible solutions of the mentioned problem.

The Third Persons in the Administrative Proceedings and the Features of Involving Them in the Judicial Process

Third Persons and Their Types

The party institution is very important institute of administrative proceedings. Beginning of the process, its progress and completion directly depends on the party's will. The administrative process is built entirely on the activities of the parties, their participation and their will on conducting the process.

Administrative proceedings involve two parties - plaintiff and defendant. The participants of the administrative process, apart from the parties, may be the third persons, witnesses, experts, etc. Thus, several subjects may participate in the administrative process, but the parties are always two - plaintiff and defendant.

As for the third person institution, it is a specific procedural measure of the administrative process, which acts against the persons who are not parties of the proceedings, but according to the court's decision may be assigned with certain rights and responsibilities. (8, 63)

The administrative procedural law of Georgia distinguishes two types of third persons – third person with “normal” and “necessary (mandatory)” invitation.

Precondition for “normal” invitation of third persons to the court is that the expected decision of the court may be related to legal interests of the invited third person. It is not mandatory that the rights of the third person are affected by the decision. It is sufficient that, upon the invitation of the third person, there is an assumption that the decision might affect his/her legal interests. It should be noted that even when there are preconditions of “ordinary” invitation of the third person, the court makes the decision on involving them in the case at its discretion. The court is entitled but not obliged to involve the third persons of "ordinary" invitation in the case (10, 52-53).

For example, inhabitants of village X were denied to arrange the special water tank based on the negative conclusion issued by the expert. Inhabitants of village X appealed to the court and demanded the repeal of the mentioned act. In this case, the body giving the expert conclusion may be involved in the case as the third person in a simple manner.

As for the mandatory involvement of the third person in the administrative process, we are faced with not only the influence on the legal interests of the third persons according to the decision of the court, but also imposing them with certain legal rights and obligations. In particular, the decision of the court determines the rights and obligations of the third persons, and not just their legal interest.

For example, X bought an apartment (owned by Y) on Saburtalo St., Tbilisi on compulsory auction. Y appealed to the court and claimed to annul the results of the above-mentioned compulsory auction. Naturally X shall be involved in administrative case discussion as the third person of “mandatory” invitation, since the court's decision applies not only Y, but X's legal interests and rights, because in case Y's appeal is satisfied he loses the property right on the apartment.

The role of the court discussing the administrative case regarding involvement of the third persons in the case and the results of non-involvement of the third person

Like other fields of law, the administrative law has also shared such fundamental principles as legality, publicity, the state language, disposition, adversary, judicial independence, accelerated legal proceedings and among

them, one of the important principles of inquisitorial system. Considering inquisitorial principle features, judge is authorized to investigate the factual circumstances and evidence on his/her own initiative.

French administrative law specialist Guis Breban noted that while resolving the administrative dispute, the judge shall not go beyond the argumentation of the plaintiff (15, 144). Of course, the judge must be limited within the existed statement, appeal, petition and should not go beyond it. (9, 107-109)

Establishment of inquisitorial principle in the administrative proceedings is due to the fact that there is a public interest in an administrative dispute, which affects decision-making and in this case only the parties can not be entrusted with the investigation of the important factual evidence and the circumstances of the case. (10, 20-21)

Unlike the civil trial court, the active role of the court in administrative proceedings is pointed out by the fact that the court decides the issue of inviting the third persons itself and it is not limited to the parties' opinions on the matter. The third person both with “ordinary” and “mandatory” invitation may be involved in the administrative process: 1. with the initiative of the court; 2. With the initiative of that person himself; 3. With the plaintiff's or defendant's initiative. The court is entitled but not obliged, to involve the third person of “ordinary” invitation in the administrative process, and is obliged to engage the third person of “mandatory” invitation in the process.

It is interesting what happens if there are preconditions of the third person's “mandatory” invitation and the third person of the “mandatory” invitation is not involved in the trial? Can the mentioned circumstance become the ground to absolute cancellation of the superior court's decision and returning the case to the retrial?

The Supreme Court in a number of decisions, including the Grand Chamber in its decision made on 28 July 2009 on the case №BS-1537-1494 (K -08) noted that the Appeal Court had not involved the third person of mandatory invitation that was participant of the legal dispute, regarding which it was possible to make only a general decision by the court (12). The Grand Chamber explained that it was a gross procedural violation that was the absolute ground to cancel the appealed decisions.

The above case study shows that not inviting the mandatory third party to the case is an absolute ground for canceling the court's decision, though the fact which is interesting is that there is no relevant record in the relevant norm of the procedural law (Civil Code, Article 394). It is true that one of the absolute grounds to cancel the decision is non-invitation of the parties of the case (his/her legal representative), however, as I have mentioned the parties of the case are only the plaintiff and the defendant,

therefore, in case “the third person of the mandatory invitation“ is not involved in the case, the issue actually remains without any legal regulation and becomes dependent only on the practice of the court and a broad definition of the relevant norm by the court, which shall naturally be considered as a legislative flaw.

In my opinion, the above mentioned problem can be solved by means of making relevant amendments to the Civil Procedural Law. In particular, in the relevant norm (Article 394 of the Civil Procedural Code of Georgia) the absolute grounds for cancellation shall be indicated non-invitation of not only the parties, but also the third person's that will automatically correct the gap.

The Third Persons in the Civil Proceedings and Features of Involving them in the Trial

The notion of a third person is of specific contents in the civil proceedings. It includes the person with certain procedural rights and obligations who will be allowed in the process if there are special conditions. As a rule, the proceedings of a claim includes plaintiff and defendant parties (co-plaintiff and co-defendant) but during some of the disputable legal relations the solution of this dispute may influence other individual's rights too. The law gives these individuals the opportunity to be involved in the case, and defend their interests or the interest of any party. The interest of these individuals do not coincide with the interests of either the plaintiff or the defendant, they have their own interests in this process, so the third person is considered to be a participant subject in the case (4, 149-151; 17; 18; 19).

The Civil Procedural Code distinguishes two types of third persons: 1) third persons with independent claim, and 2) third persons without any independent claim.

For example: 1) an individual left the house to his illegal heir with the testament. After the death of the owner a dispute was raised between his legal heirs, in this dispute the testamentary heir has the right to present an independent claim, he can engage in the case as the third person and claim protection of his rights. 2) a driver damaged a citizen with the car owned by LTD. The mentioned citizen files a lawsuit against the company, though the driver may be involved in the dispute as the LTD will require to pay this sum from him with the rule of recourse. While the driver does not have an independent claim he has an interest in the mentioned dispute.

Procedural peculiarity of the third person with independent claim is that it is authorized to be involved in the dispute both against the plaintiff and against the plaintiff and the defendant, if such a claim is addressed to the defendant only, it will have nothing in common with the plaintiff's interests,

its procedural status equals to co-plaintiff's conditions and there is no need to call it the third person. The mentioned factor is the basis of the German Code of Civil Procedure, which defines that a third person's claim is directed to both sides (4, 156).

As for a third person without independent claim, his involvement in the process takes place based on submitting an application by this person to the Court. A person who believes that the decision could affect his rights and obligations in relations with the plaintiff or the defendant, applies to the court and claims to be involved as a third person on the plaintiff's or the defendant's side (20).

The third person without independent claim can be allowed in the process on the basis of the parties' initiative. According to Article 90 of the Code of Civil Procedure, the third person without independent claim may be involved in the process with one of the parties' initiative that applies to the Court with a reasoned statement. The mentioned statement is done both in written and oral form. Considering the opinions of the parties the court will make a decision on involvement or refusal of involvement of a third person. (4, 156-157).

The basis of allowing the person without independent claim is: 1) the possibility of lodgement of recourse claim against him in the future; 2) having other legal interest in case results; 3) is in material - legal relationship with the law subject only with the person in whose side he is involved and is not in such a relationship with the opponent (7, 94).

It is interesting if the civil trial court may involve the third party without independent claim in the case with its own initiative.

Regarding the mentioned issue, I would like to draw your attention to one of the problematic issues of judicial practice: This refers to article 1274 of the Civil Code, namely, which civil procedural subject shall be considered, according to article 1274 of the Civil Code, as guardianship and curatorship body in discussion of cancellation of adoption or revocation proceedings? According to the mentioned norm, in discussion of cancellation or revocation of adoption in the court guardianship and curatorship body shall participate by all means, that is, this body shall present before the court as a subject of any kind. Material law defined that guardianship and curatorship body shall necessarily participate in this kind of case (3).

Given the fact that the claimant himself determines who to involve as the party in the process, and the third persons without independent claim are involved in the case with his initiative, the problem is clear - in this case the material norm determines mandatory participation of guardianship and curatorship body in such a process, and, it is not defined anywhere as to

which subject it shall be involved in this case. It is not regulated by the Procedural Code either (1).

At regular meetings of the judges, judges' opinion was expressed – shall these bodies participate in the mentioned process as specialists? Finally, the judges agreed that in these cases the bodies of guardianship and curatorship shall be the third persons without independent claim (11, 9-11).

However, I believe that there really is a contradiction between the Civil Code and the Civil Procedural Code, since, according to the Code of Civil Procedure, involving any subject as the third person in the process does not occur based on the court's decision, it is the prerogative of the party itself. But, since such imperative regulation is established by the Civil Material Code, the court shall consider the material law and based on this involve guardianship and curatorship body in the case as the third person without independent claim. Thus, the Court shall assume the role and actually go beyond the scope of his authority, as non-invitation of the appropriate body to the case may become the grounds for annulment of the decision defined by article 422 of the Civil Procedural Code of Georgia.

Thus, in this particular case we are dealing with the problem outside the legislative regulation, which is still regulated by the court practice.

First of all if we review Section 64-77 of Code of Civil Procedure of Germany, it will be clear that we won't be able to solve above mentioned problem through sharing German example, since there is almost similar regulations, but I think it is possible to solve the above mentioned problem through sharing the example of the United States and making appropriate amendments to the civil procedural legislation.

In particular, the normative acts of the US do not provide the definition of the parties. However, it is clear that the parties are the persons who have a particular legitimate interest to the case. There are two types of third persons: 1) voluntarily involved third persons, and 2) the third persons who have independent requirement. The first type of third persons is involved in the case based on the law (intervention of right), as well as by the decision of the court (permissive intervention) (16).

Involvement of third persons based on the law is possible in two cases, when it is determined directly by the federal statute, or it has a direct and immediate interest to the given dispute, as regards the involvement by the court's decision, in this case their participation is essentially important with the purpose of right solution of the case.

It is interesting that according to the Civil Procedural Code and Arbitration Procedural Code of Russia, the third persons without independent claim may be involved in the case with the initiative of both, the parties' and the court's (16).

Thus, it is necessary to make amendments to the Civil Procedural legislation based on which it will be possible to involve the third person without independent claim legally (in the case when the material legislation directly determines the necessity of participation of a relevant person/body in the process), which, for example, occurs in article 1274 of the Civil Code.

The third person and Authority to Appeal the Court Decision/Ruling

Section 5 of article 16 of the Administrative Procedural Code of Georgia indicates that the third person defined by section 2 of this article enjoys all the rights of a plaintiff (defendant) and shall bear all the obligations of the plaintiff (defendant). Thus, the third person with the “mandatory” invitation enjoys all the rights of a party, including, the right to appeal the court decision (ruling) to higher courts, to take part in the trial.

As for the third persons with “ordinary” invitation, they do not enjoy the same rights as the third persons with “mandatory” invitation. They only have the right to take part in the hearing, to express their views and perform the necessary legal actions for participation in the process (10).

It is noteworthy that the third person with “ordinary” invitation has no right to appeal the court decision (ruling), which in my view is not correct, since this decision may have a prejudicial effect against him, which in turn in the future will increase the risk of limiting the defendant’s rights and lead to violation of the principle of competition in the future.

In addition, there are cases when involvement of the third person with “mandatory” invitation by the court becomes the third person with “ordinary” invitation which automatically excludes the right to appeal the decision against them.

For example, in one case, the Cassation Court, based on the case materials, established that the dispute was about the rights of the third person with ordinary invitation, which confirmed the need of his involvement based on part 2 of article 16 of the Administrative Procedural Code. Taking into account that according to part 4 of article 16 of the Administrative Procedural Code, the third person was unable to appeal the court ruling to the Court of First Instance (on involving him in the case as the third person with ordinary invitation), the Cassation Court held that in receiving the appeal in the proceedings, the Appeal Chamber should not have been limited by learning the authority of the third person involved based on part one of article 16. Right to appeal to a court belongs to Fundamental Rights on which execution of other rights of a person depends, which is why, according to the Cassation Court, making a decision on receiving the appeal in the proceedings by the Court of the First Instance, required assessment of lawfulness of involving the third person with ordinary invitation in the case from the side of the Court of Appeal (13).

There are identical regulations in civil proceedings regarding the third person without independent claim, as according to article 364 of Civil Procedural Code, the decision made by the First Instance of the court may be appealed in the court of appeal by the parties and the third persons with independent claim within the term defined by the law (the same applies to cassation claim as well).

Thus, without independent claim a third person has no right to appeal the decision/ruling. However, the definition regarding the authority to appeal the decision made by the civil chamber of the supreme court by the third person without independent claim has been made a number of times.

For example, according to the ruling of the civil chamber of the Supreme Court of Georgia made on 28 May 2007 on case №as-323-676-07, the issue of allowing the appeal of a third person without independent claim was discussed. According to the materials of the case, the parties of the dispute (plaintiff, defendant) represented the heirs of the first order, and the subject of the dispute was to restore the term for receiving the inheritance. The third person without independent claim was involved in the mentioned dispute who was granted the disputed immovable property based on the deed of gift. According to the decision of the court of the first instance the appeal was satisfied and at the same time, the deed of gift made notarially in the name of the third person without independent claim was annulled. The decision of the Court of the First Instance was appealed by the third person. His appeal was recognized as inadmissible, which, based on a private complaint, became the subject of the discussion of the Court of Cassation.

The cassation court explained that according to article 364 of the civil procedural code, the decision made by the first instance of the court, may be appealed by the parties and the third persons with independent claim according to the rule defined by the law. Analysis of the indicated norm shows that as the legislator determines the circle of persons authorized to appeal, gives the mentioned possibility to the persons whose interests are directly related to the appealed decision.

The cassation court noted regarding the given dispute that according to the decision of the first instance court, as the deed of gift on the real estate made based on notary act in the name of the third person without independent claim, was annulled, he was authorized to appeal the decision made against him.

Thus, in this case the Court held that the third person without independent claim had the right to appeal the decision, but he has no such right in all cases (14).

Similar definitions were made by the civil chamber of the Supreme Court of Georgia in cases №as-705-1078-06 - November 22, 2006; №as-

253-578-09 - March 28, 2009; №as-364-715-07 - July 16, 2007, 2 September 2016 №as-623-595-2016.

Conclusion

Based on the above mentioned, we can conclude that the third person institution is the most important institution of both administrative and civil procedural law.

It is noteworthy, however, that the third person issue is not fully regulated by the procedural law of Georgia. There are a number of issues, the definition and regulation of which is done by the court in many cases due to the absence of relevant legislative norms.

Thus, it is interesting to briefly make conclusion of possible solutions of existed gaps in Georgian Procedural Legislation:

- It is necessary to make relevant amendments to the civil procedural law, in particular, absolute grounds for annulling the decision in the relevant norm shall be indicated not only the parties' but also the third persons' non-invitation, which will automatically correct the existed gap.
- If the necessity of involving the particular person/body is considered by the Civil Material Law, interested person defined in the material law, should be automotically involved in case to avoid the burden that it has to undertake because of existence of flawed norm.
- There are frequent occasions when the court's decision is directly related to the person's legal interest, though according to the procedural law it is not authorized to appeal the court's decision. I believe that after making relevant amendments to the procedural law, the possibility of appealing the court's decision (ruling) by the third person without independent claim and the third person with "ordinary" invitation shall not be limited unequivocally and the higher instance court shall define itself in every particular case the issue of appealing authority that takes place quite frequently in practice. The mentioned amendment in its turn will promote the enforcement of protection right of violated right with the rule of court.

Based on the above mentioned, I think that it would be reasonable if we share the practice of foreign countries and try to adapt it to the Georgian reality. In addition, it is necessary to carry out relevant legislative amendments that will help to eliminate the gaps regarding the third persons in the legislation of Georgia and to develop the third person institution.

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