

ALTERNATIVE METHODS OF JUDICIAL PROTECTION AND DISPUTE RESOLUTION IN ADMINISTRATIVE LAW

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Abstract:

The administrative court is not the only and main method, instead it is just one of the methods for judicial protection and dispute resolution and the final one which solves the disputes that have not been solved by a private party and an authority within an out-of-court stage.

Key Words: Administrative procedure, alternative dispute resolution, administrative court, effective remedy

Introduction

The state administration issues administrative acts and references, implements actions and concludes the agreements of public law that impact the daily life of individuals, therefore efficient methods are required for the restoration of the rights that have been unfairly and unlawfully violated and the lawful interests as well as for the dispute resolution. As it follows from Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Articles 89 and 92 of the Satversme [Constitution] of the Republic of Latvia, the state has to provide as efficient as possible protection of the fundamental rights of persons.

The efficiency of judicial protection and dispute resolution within the administrative procedure presents one of the cornerstones of a democratic and judicial state. The unjustified long hearing of cases contradicts also the very essence and idea of the administrative procedure which is the timely and efficient hearing of cases. This also violates the principle enforced by the European Convention of Human Rights and Fundamental Freedoms and the Constitution of the Republic of Latvia that a case has to be heard within a reasonable time. At present the administrative court in several European countries does not provide efficient protection of people.¹⁰⁰ At the administrative court of Latvia the terms of hearing cases at a single court instance can take as long as a few years. The opening of new courts and the increase of the number of judges is not the most rational tool for improving the quality of the administrative process and eliminating the overload of court. The state has to improve the efficiency of both the court process and also the administrative process within an authority and the possibilities for judicial protection and dispute resolution presenting alternatives to the court for the purpose of securing a private party's rights and judicial interests in compliance with the basic principles of a judicial and democratic state.

Main Text

The use of alternative methods for judicial protection and dispute resolution presents a logic solution of the development of administrative law. In order to attain the goal defined in the Administrative Procedure Law, i.e. to ensure the judicial, accurate and efficient application of the basic principles and legal norms of a democratic, judicial state, as well as an independent, objective and competent control over the operation of the executive power, actual and efficient implementation tools are necessary.

A high quality administrative procedure is aimed not only at the correct application of legal norms to actual circumstances, but also at the efficient solution of the particular situation. While taking the role of an observer within an administrative procedure in an authority, a private party becomes

¹⁰⁰ Alternatives to litigation between administrative authorities and private parties: conciliation, mediation and arbitration: Proceedings of multilateral conference. Lisbon (Portugal), 31 May–2 June 1999/ Council of Europe. Strasbourg: Council of Europe Publishing, 2000, p.20.

active at the court procedure only. Therefore, the administrative procedure needs to be rational, enabling consensus and focused on the fair result.

Along with the development of the participation democracy the principle of good governance includes also the principles of co-participation and co-responsibility of a private party, and makes it necessary to establish a modern administrative procedure in an authority where hearing is replaced by the concept of negotiation.

The concept of negotiation can be successfully implemented by alternative methods for judicial protection and dispute resolution. Their application can ensure the self-stabilisation function of the administrative procedure by securing the predictable use of rights and fulfilment of obligations that is not distant from the moment of the actual necessity.

Delayed justice is not comprehensive justice,¹⁰¹ however, a longer administrative procedure in an authority compared to the current one possesses a higher value of democracy and a judicial state, and usually it is shorter than a court procedure.

The alternative method for judicial protection and dispute resolution can be defined as a technique for dispute resolution (except litigation) by means of which timely and efficient protection of fair and judicial rights and resolution of disputes can be achieved with or without involving an intermediary based upon the actual and legal circumstances of the case. The appeal within the framework of the state administration, quasi court, arbitration, prosecutor, ombudsman, mediation and reconciliation are all supplements to the conventional administrative procedure both in an authority and at the court aimed at making the procedure more efficient.

It only in case of disagreement when methods for judicial protection and dispute resolution are required for the participants of the administrative procedure to settle their conflict in a rational manner that is acceptable to the society and supervised within the framework of the conflict law. The current authority of the resolution of administrative disputes has caused the overload of the administrative court,¹⁰² however, alternative methods are aimed not only at relieving the load of courts, but also at providing the methods for judicial protection and dispute resolution that are most appropriate for resolving administrative disputes and promoting the public trust to the state administration. Alternative methods are independent legal and social values, a component of the legal awareness and culture that help to create a state that is not the “judge’s state”,¹⁰³ but a judicial and democratic state instead.

The pluralism of methods for judicial protection and dispute resolution follows from Article 13 of the European Convention of Human Rights and Fundamental Freedoms and Article 89 of the Constitution of the Republic of Latvia, i.e. the fundamental right to protect one’s rights and to solve administrative disputes by employing various judicial methods.

An administrative dispute may be based upon factors of both legal and social character, e.g. the lack of trust, knowledge and cooperation, therefore the judicial character of the procedure is not the only exclusive standard that an authority has to follow. The more difficult the relationship between the state administration and the members of the society, the more specific the character of disputes that emerge. Besides, the court is not always able to secure a timely and fair resolution of a dispute, therefore the parties to a dispute should have a possibility to eliminate their disagreement by employing the method that is most appropriate for the actual and legal circumstances of the individual case, attaining a judicial and fair resolution in this way (the principle of accessibility of justice).

The right to access to various judicial methods are still not absolute. The goal of the system of judicial protection and dispute resolution is to ensure efficient and fair resolution of a dispute. The state may, at its own discretion, select the types of methods that comply with the legal and social necessity and which yield considerable public benefit and can be provided by reasonable resources.

The use of alternative methods for judicial protection and dispute resolution may be established as voluntary or mandatory either in a law or on the basis of a law.

¹⁰¹ Carper D.L., McKinsey J.A., West B.W. Understanding the Law. Fifth Edition. Ohio: Thomson West, 2008, p.188.

¹⁰² Luhmann N. Legitimation durch Verfahren. Neuwied und Berlin: Luchterhand, 1969, p.101.

¹⁰³ Hefe O. Taisnīgums. Filosofijas ievads. Mūsdienu domātāji. [Justice. Introduction to philosophy. Modern thinkers.] Riga: Apgāds Zvaigzne ABC, 2009, p.58.

Appeal within the framework of the state administration

The appeal within the framework of the state administration is the alternative method that is used most often. The following objectives of the appeal have been defined in legal texts – judicial protection during the pre-court stage, the provision of an opportunity for the state administration to correct its own mistake and the relief of the load of the administrative court.¹⁰⁴ However, taking into account the principle of resolution of a dispute and the condition that other alternative methods can be integrated in the appeal procedure, the author has defined an additional objective of the appeal, in particular, the provision of the possibility for the participants of the administrative procedure to come to an agreement as regards the resolution of the dispute, thus preventing the submission of an application to the court.

The appeal has to be a procedure of review of a private party's objectives that is compliant with the public interest, within which an authority acts in an objective and responsible manner, promoting trust and establishing the legal certainty as fast as possible. The principles of good governance and efficiency oblige the appeal authority not only to establish the illegal character of the initial administrative act or, to the contrary, its legal character, but also to strive to achieve the consensus between the participants of the case as to the most fair and judicial solution whenever it is a viable option. Not all the cases of appeal include an infringement of rights and the illegal character of an administrative act or action (error), although this does not mean that there is no dispute which a private party could submit to the court. An authority can achieve this in direct negotiation with the relevant private party by explaining the reasoning behind its decision or by employing an alternative method.

In Latvia the written procedure of appeal prevails, therefore the law should provide for cases when this can be an oral procedure, or provide for a possibility for the participants of the administrative procedure to choose. An oral procedure ensures the private party's participation, the transparency of the state administration and it would be useful, for example, if the dispute is not related to the interpretation of the legal norms and the parties to the procedure are willing to reconcile. A written appeal procedure does not ensure the direct communication and fast interaction between the parties to the administrative procedure.

The compliance with the procedure of appeal may be optional or mandatory, still the mandatory character of the appeal is not absolute and allows for the following exceptions in the administrative procedure: (1) when there is no superior authority or this is the Cabinet of Ministers; (2) if the exception is provided *expressis verbis* by the law; (3) if a private party requests to omit the procedure of appeal and to permit to submit application to the court at once;¹⁰⁵ (4) if the requirement to comply with the procedure of appeal is disproportionate or does not depend on the wish of the private party; (5) if the private party can justify the inefficiency of appeal or if the compliance with it can cause considerable infringement of the private party's and public rights or interests.

The mandatory appeal restricts the person's rights to a fair court, and any restriction of the fundamental rights has to be provided for in a law or based upon a law. In Latvia the Administrative Procedure Law and the State Administration Structure Law do not stipulate this restriction clearly enough, therefore, one cannot agree that the conditions of the mandatory procedure of out-of-court review are applicable to the cases of the dispute over public law contracts.¹⁰⁶ Prior to applying to the court a private party is obliged to object against the initial administrative act or actual act of the authority.

If regulatory acts do not define the authority of appeal, Part Two of Article 76 of the Administrative Procedure Law should provide for the optional appeal with the issuing authority of the

¹⁰⁴ Singh M.P. German Administrative Law in Common Law Perspective. 2nd edition. Berlin: Springer, 2001, p.221; Cowan D.S., Halliday S., Hunter C., Maginn P., Naylor L. The appeal of internal review: law, administrative justice and the (non-) emergence of disputes. Oregon: Hart Publishing, 2003, p.4; Buck T. European methods of administrative law redress: Netherlands, Norway and Germany. Prepared for the Department for Constitutional Affairs. DCA Research Series 2/04, November 2004, p.39; Briede J. Administratīvā akta apstrīdēšana: Administratīvā procesa likuma 75.-81. pants. Administratīvais process: likums, prakse, komentāri. [Appealing against an administrative act: Sections 75-81 of the Administrative Procedure Law. Administrative procedure: law, practice, comments] Riga: Latvijas Vēstnesis, 2005, p.183.

¹⁰⁵ Meulen B.M.J., Litjens M.E.G., Freriks A.A. Prorogatie in de Awb. Invoeringsevaluatie rechtstreeks beroep. Haag: WODC DEN, 2005, p.26.

¹⁰⁶ Višķere I. Publisko tiesību līgumi un to kontrole administratīvā procesa kārtībā. [Public law agreements and their control by applying the administrative procedure.] *Jurista Vārds*, 3 February 2009, vol. 5, p.21.

administrative act. For the appeal procedure to be efficient, an authority should establish a special appeal commission that would evaluate appeal applications in an objective manner and independently of the issuing authority of the administrative act. The necessity of this type of authority is particularly essential if the issuing authority of an administrative act defines it as mandatory.

For the improvement of the quality of the appeal Part Two of Article 76 of the Administrative Procedure Law should also provide for a general possibility that it is not the supreme authority according to the hierarchy that reviews an appeal application, but in cases that are of particular importance to the society or complicated it can establish a permanent or *ad hoc* appeal commission. An *ad hoc* authority could be necessary if, for example, the knowledge of interbranch experts is required for reviewing an application and the relevant authority does not possess it at the required quality level. There could be officials of various ministries, independent experts, judges, attorneys at law, law researchers, etc. among the members of the appeal commission. The commission could issue an administrative act itself or provide a legally not binding proposal to the issuing authority of the administrative act.

The appeal authority may not be of political character, or there is a risk that a political official may adopt a decision within the administrative procedure that is not based on legal, but political criteria instead. If the above principle is implemented in the direct state administration in Latvia, it does not work in the indirect administration. The Council of a regional municipality that consists of political officials adopts administrative acts in compliance with Article 37, Paragraph 3 of Article 41 and Article 47 of the Law “On Municipalities”. The deciding power has merged with the executive power at the level of municipalities. In municipalities administrative acts should be adopted by the administration of the municipality and the council of the regional municipality should decide on political issues related to the strategic development of the municipality. Therefore, a new Law on Municipalities should be adopted and it should distinguish between the different branches of the municipal power.

Quasi court

Quasi court can present an alternative to the appeal or the administrative court. Historically and also at present the quasi court in the administrative law is recognised as an efficient method for judicial protection and dispute resolution in the countries of both the law of the continental Europe and the Anglo-Saxon law,¹⁰⁷ although it is traditionally associated with an Anglo-Saxon law institute.

The authority based affiliation with the state administration is the most important feature that distinguishes the quasi court from the administrative court, still the functional importance and impartiality are more important than the authority based affiliation. A deviation from the principle of the distribution of power is admitted and state administration authorities empowered by the law may act in a similar manner to the court for attaining a goal that is compliant with the public interest if the usurpation of the power does not take place and the mutual supervision is ensured.

Article 6 of the European Convention of Human Rights and Article 92 of the Constitution of the Republic of Latvia covers not only the classic court authorities, but also quasi courts.¹⁰⁸ The above legal norms are not categorical and do not provide strictly that the rights to a fair and open hearing of the case can be implemented by applying to the court only.

For the purpose of recognising the quasi court an independent and impartial authority it has to comply with the following criteria: (1) its status has been defined in the law; (2) the procedure of appointing its members, their premature termination and suspension does not cause any doubt as to their impartiality; (3) members are independent of the executive power, the parties to the case and any other influence; (4) the process of the review of the case is fair with appropriate procedure guarantees; (5) legally binding resolutions are usually adopted by the college.¹⁰⁹

¹⁰⁷ Robson W.A. Justice and Administrative Law. London: Macmillan & Co, 1928; Cane P. Administrative Law. Fifth edition. Oxford: Oxford University Press, 2011; Pranavičienė B. Kvaziteismai administracijos kontrolės sistemoje. Vilnius: Lietuvos teisės universitetas, 2003; Bilak D.A. Administracine Justicija Lietuvoje. Vertinimas. (Administrative Justice in Lithuania an Assessment). Parengė Jungtiniai Tautų vystymo programa. Vilnius: UNDP, 2003.

¹⁰⁸ Judgements of the European Court of Human Rights in the cases: 4451/70 *Golder v. The United Kingdom*, para. 32; 2614/65 *Ringisen v. Austria*, para. 95.

¹⁰⁹ Judgements of the European Court of Human Rights in the cases: 9273/81 *Ettl and Others v. Austria*, para. 34., 38; 19178/91 *Bryan v. the United Kingdom*, para. 37; 2614/65 *Ringisen v. Austria*, para. 95; 2614/65 *Salabiaku v France*, para. 28.

In Latvia most cases are heard on three levels of administrative courts, i.e. the first instance in the Administrative District Court, the appeal authority at the Administrative Regional Court and the cassation instance at the Department of Administrative Cases of the Supreme Court Senate. This model was established based upon the experience of other countries and the historical tradition, but not on the basis of the law doctrine compliant with the social reality. The accessible judicial protection level at the development stage of democracy can be valued positively, still it has to be ensured in compliance with the actual situation taking into account the necessity for the comprehensive efficiency of the system.

When the administrative justice is developed the length of the democracy development and consequences have to be taken into account. The experience of the West European countries confirms,¹¹⁰ that the formation of democracy and the rule of law, the responsible state administration and the public legal culture is a long process. The number of administrative disputes will continue to grow during coming years, and this is attested by the statistics of recent years. The increase of the number of judges and the reduction of the accessibility of the court cannot be endless and disproportionate, therefore, over long term the capacity of administrative courts will be insufficient for ensuring timely hearing of all the cases. The overload of the court presents the shadow side of democracy development.

The administrative justice should be diversified in Latvia basing its development on the traditional litigation and the quasi court procedure. The administrative justice should be made more informal and efficient without reducing the access to the judicial protection system. In the medium term specialised quasi courts should be established for the major categories of cases, for example, taxation, municipal cases. In the long term general and specialised quasi courts should be established as the first stage of the administrative justice, at the same time maintaining just two levels of administrative courts, i.e. the Administrative Regional Court and the Supreme Court.

The quasi court possessed several advantages in comparison to the court, e.g. the informality of the process, specialisation, accessibility that ensure efficient private parties' judicial protection and dispute resolution. Quasi courts can hear a high number of cases within a comparatively short time period. Slightly distant legal control from the point of view of time ensures higher quality of the administrative procedure.

Arbitration

Arbitration is a method that is similar to the quasi court from the functional point view, but different from the authority point of view; this is a typical human rights institute and its use in the administrative law is limited.

In the Recommendation Rec(2001)9 of the Committee of Ministers of the Council of Europe to Member States on alternatives to litigation between administrative authorities and private parties and its Explanatory Memorandum the Member States of the Council of Europe are encouraged to use the arbitration law institute not within the administrative procedure, but between an authority and a private party in the private law.

The arbitration as a private law authority lacks the legitimate empowerment to cancel or amend the acts of the public power. An authority and a private party cannot change the procedure of judicial protection and dispute resolution stipulated in the law and delegates the authority to decide on the legality and repeal of public legal acts to a private party. However, its use cannot be fully excluded.

An authority and a private party may submit any dispute for resolution to the arbitration which adopts a resolution of the character of recommendation. Besides, only the law can stipulate that the arbitration can evaluate the disputes concerning reparation related to the administrative law.¹¹¹ If the arbitration can impose legal obligations upon and establish rights for the state, it is admissible within the administrative procedure. In this case the arbitration does not need empowerment for evaluating the legality and repeal of an actual action and an administrative act because this has been done by the authority or court in advance; however, based upon the internal conviction, it has to evaluate the existence of the damage, its scope and the causal relationship between the illegal action and the damage. In the course of evaluating the length of the infringement of rights, the character and reversibility of the caused consequences, the arbitration determines what kind of reparation would be most fair under the particular circumstances. For this purpose Part Four of Article 93 of the

¹¹⁰ Phillips O.H. Constitutional and Administrative Law. Fifth edition. London: Sweet & Maxwell, 1973, p.497.

¹¹¹ Poudret J.F., Besson S. Comparative law of international arbitration. 2nd edn. London: Sweet & Maxwell, 2007, p.312.

Administrative Procedure Law and Article 22 of the Law on Reparation of Damages Caused by State Authorities have to be amended by stipulating: „A private party may appeal a resolution by an authority regarding reparation to the court or, by concluding the arbitration agreement with the authority, to submit the issue on the type and amount of reparation for resolving at the arbitration. The arbitration resolution can be appealed with the Administrative Regional Court.”

The arbitration and quasi court cannot be recognised as an ombudsman because, different from the members of the arbitration, the parties to the administrative procedure cannot select a person who will perform the ombudsman's obligations, and different from the quasi court, it does not adopt a legally binding resolution.

Ombudsman

The ombudsman is a state official who has been appointed not only by the legislator (parliament), but also the executive power (the Cabinet of Ministers or a ministry) or the court (the Council of Justice) and established by the constitution or the law and who, upon its own initiative (which makes it different from the court and the quasi court) or upon a claim by a private person on the legality of the acts by the state administration and court system authorities and their compliance with the human rights and the principle of good governance, carries out independent and impartial investigation, promotes reconciliation and provides suggestions for the elimination of the infringement of the private parties' rights and the improvement of the operation of the state administration and courts.

The legal institute of the ombudsman is characterised by a few essential features describing its essence and distinguishing it from other methods for judicial protection and dispute resolution:

- 1) *independence* – the ombudsman has to be independent of both whom it supervises and who appoints it to the post. The independence is not ensured by the authority alone. The individual's personal traits of character are much more important and they include competence, honesty, attitude to people and communication skills. Grammatical amendments providing for including the ombudsman in the Constitution of the Republic of Latvia, would not change its independence guarantee *de facto*. The Constitutional court of Latvia has clearly recognised the status of the ombudsman as an independent authority and its independence guarantee.¹¹² Amendments can just arrange the internal system of the Constitution;
- 2) *the recommendation character of conclusions* – the opinion expressed by the ombudsman is comparable to the decisions of the constitutional court from the point of view of authority and competence, however, in the countries with young tradition of democracy the ombudsman faces the challenge of ensuring the fulfilment of its conclusions. In Latvia, the attitude by the state administration to the ombudsman not only encumbers the daily work of this authority, but also imposes a long-term threat to its importance and usefulness. The elimination of the above situations is, first and foremost, the responsibility of the ombudsman itself; it has to be an active defender of its conclusions. There are several ways how the ombudsman can promote the fulfilment of its decisions, in addition to its authority and personal authority: (a) by making the results of its work public in a comprehensive and regular manner; (b) by notifying the Parliament and the Cabinet of Ministers on the cases of non-fulfilment; (c) by demanding explanations from authorities when recommendations are not fulfilled; (d) by applying to the administrative court and (e) by initiating disciplinary cases and criminal cases on the illegal acts of officials;
- 3) *facultative method for judicial protection and dispute resolution* – the judicial protection and the initial selection of the most appropriate method may not cause negative legal consequences for a private party, therefore if a private party is not satisfied with the ombudsman's conclusion it can appeal against the resolution or the act of an authority with the court. Contrary to the principle of equality and the foreign practice, in Latvia in compliance with Part Three of Article 24 of the Ombudsman's Law, the initiation of an examination case does not stop the accounting for the procedure terms established by the law. Parallel to the submission of a claim to the ombudsman a private party is forced to submit an application to the court, thus it is not possible to select the

¹¹² On the compliance of Part Five of Article 19 of the Law on the Budget and Financial Management, Part Two of Article 44 of the Law on the State Audit Office and Part Two of Article 19 of the Ombudsman Law with Articles 1, 83 and 87 of the Constitution of the Republic of Latvia: Judgement of the Constitutional Court of the Republic of Latvia (25 November 2010) in the case No. 2010-06-01. *Latvijas Vēstnesis*, 30 November 2010, vol. 189.

method for judicial protection and dispute resolution that would be most appropriate to the particular conditions. Two judicial protection and dispute resolution methods are employed for the resolution of a single dispute at the same time. This situation contradicts the principle of efficiency and does not relieve the load of the administrative court. Amendments have to be made in Part Three of Article 24 of the Ombudsman's Law allowing a private party to turn to the court following the receipt of the ombudsman's resolution on the initiation of the examination case or conclusion. Moreover, the Ombudsman's Law should stipulate that the ombudsman can evaluate claims on the issues regarding which litigation has been initiated before the hearing of the case at the court has been completed;

- 4) *an individual or collective post* – in Latvia the ombudsman's institute is monocratic which means that a single ombudsman is appointed. In the countries where there is just a single ombudsman, the ombudsman's institute has a vast range of responsibility and, thus a higher load. It is unavoidable that in such circumstances it has to define certain issues as priorities. In the countries where there are several ombudsmen, more financial resources are required for ensuring their operation, it is difficult to mark the borders of responsibility and to ensure coordinated protection of human rights. The model of the ombudsman's system where the ombudsman's duties are performed by several persons, who ensure the coordinated protection of human rights, at the same time splitting the responsibility fields in equal shares among several persons, is more efficient. Two persons should be appointed for fulfilling the ombudsman's obligations in Latvia because the scope of responsibility is to broad for one person; therefore, Part One of Article 3 of the Ombudsman's Law should provide for the appointment of two persons for the performance of the ombudsman's obligations: one of them would be responsible for human rights and the other would assume the responsibility for good governance. In this way a considerable contribution to the judicial protection and relieving the load of administrative courts would be secured both in short and long term;
- 5) *authority based accessibility* – in comparison to the state administration and the court the ombudsman is more accessible for private parties. The ombudsman's efficiency may not be below the level that is required by the law from the state administration and the court. For example, a state fee does not have to be paid, there are no formal requirements as to the claim, the ombudsman also provides consultations. An application to the ombudsman can be submitted both in writing and verbally, similarly to any other state authority, unfortunately, the information on the ombudsman's website provides a narrow interpretation of Part One of Article 23 of the Ombudsman's Law (the Ombudsman's office, n.d.) and it is specified that the application can be submitted only in writing. The criterion for the submission of an application is the ability to be a subject of law and not the capacity of a private party. A claim may be submitted also by underage persons and incapacitated persons if they are able to submit and to prepare an application of the required quality level. An application may be submitted by a private party whose rights or judicial interests are violated by a resolution or act of an authority. Applications that are submitted by other persons or are anonymous can serve as the basis for carrying out examinations based upon the ombudsman's own initiative.

Review of applications is the ombudsman's traditional function,¹¹³ which takes a considerable time of its time. The ombudsman has the discretion to decide whether an examination case should be initiated and whether the circumstances that are referred to in the application should be investigated. After having reviewed a person's application the ombudsman decides on the initiation of an examination case and it may refuse to do so if it is not competent in the particular case or if there is no necessity. For example, an application may be based on a private party's insufficient knowledge, lack of understanding on the legal regulation or a resolution or act of an authority, emotions or other circumstances which the ombudsman may eliminate without initiating a case in bilateral or trilateral negotiations or by a written reply.

¹¹³ Stuhmcke A. Ombudsmen and Integrity Review. Grām.: Administrative Law in a Changing state: Essays in honour of Mark Aronson. Edited by Harlow C., Pearson L., Taggart M. Oxford: Hart Publishing, 2008, p.354; Eklundh C. The Swedish Parliamentary Ombudsman System. Grām.: Hossain K., Besselink L.F.M., Selassie H.S.G., Völker E. Human rights commissions and ombudsman offices: national experiences throughout the world. Hague: Kluwer Law International, 2000, p.427.

The principle of good governance applies not only to the state administration, but also to the ombudsman, whose actions cannot be left outside any control. A private party may not appeal against the ombudsman's resolution at the court, however, it can appeal against it with the ombudsman itself. In such cases the ombudsman can establish a collegial application for the review of the appeal application. The final resolution is when a private party addresses its application to the authority that has established the ombudsman and can decide on his/her suitability to the position.

In Latvia the ombudsman can supervise not only the authorities that are included within the state administration according to the authority structure. For the purposes of the Administrative Procedure Law the definition of an authority should be applied considering its functional aspect. The ombudsman may examine also the acts of private parties to whom the functions of the public power have been delegated.

The ombudsman does not supervise the work of the administrative court, however, its authority should be expanded by respecting the principle of the division of power, the judge's independence and considering the benefit to the society. The ombudsman may not interfere with the courts judgement, still it could supervise courts, first when the court operates as a state administration authority from the functional point of view, second in relation to the organisation of the court's work (the work of chancery), and third, similar to the Minister of Justice, it could initiate a disciplinary case against the judge.

The ombudsman's work is not just directed to the authority and the improvement of its work, but also towards the education of private parties and the society, however, the ombudsman criticizes the state administration and not a private party.

The modern concept of the ombudsman's law institute comprises two equally important functions: prevention and resolution of disputes.

Under the conditions of the pluralism of the methods for judicial protection and dispute resolution the ombudsman's mission is not just to fight the consequences or to review applications, which has been its traditional task until now, but also to prevent eventual problems in the operation of the state administration that exist only theoretically. The appeal, quasi court or court prevent individual errors, and the ombudsman has to deal with systemic errors prior to the emerging of a formal dispute between a private party and an authority. The first above category of authorities look back, however the ombudsman has to look forward in the future.

In Latvia, the ombudsman considers the provision of a conclusion on an examination case as the basic tool of its operation without any reason. The result index of quality is the number of reconciliations between a private person and authority; moreover, the ombudsman's office has to become an authority that is similar to the State Probation Service and where specialised mediators in the administrative law develop.

Mediation and reconciliation

The ombudsman is the pioneer of mediation and reconciliation in the administrative law, and the candidate to this post should possess knowledge on the methods and the skills of their application. The law researchers have not agreed on a uniform definition of mediation.¹¹⁴ The concept is used in its narrow sense according to which a mediator is just leading the process and does not express any opinion (process oriented), and in its wider sense where a mediator suggests to the participants to discuss its view of the most fair, long-term and most appropriate solution (content oriented). The supporters of the narrow interpretation of the concept of mediation distinguish between mediation and reconciliation, however the supporters of the broader interpretation do not. The author distinguishes the concepts "mediation" and "reconciliation" because the difference in the manner of achieving the resolution is essential enough for viewing both as different methods between which the parties to a dispute may choose. In the Recommendation Rec(2001)9 of the Committee of Ministers of the

¹¹⁴ Alternatives to litigation between administrative authorities and private parties: conciliation, mediation and arbitration: Proceedings of multilateral conference. Lisbon (Portugal), 31 May–2 June 1999/ Council of Europe. Strasbourg: Council of Europe Publishing, 2000, p.77; Tolsma H.D. How can mediation be implemented in the current administrative decision-making process? Grām.: Quality of Decision-Making in Public Law. Studies in Administrative Decision-Making in the Netherlands. Edited by Graaf K.J., Jans J.H., Marseille A.T., Ridder J. Groningen: Europa Law Publishing, 2007, p.69; ; Spencer D., Brogan M. Mediation law and practice. New York: Cambridge University Press, 2006, p.3; Trosens A. Kas par mudina konfliktējošas puses izmantot mediāciju. [What encourages conflicting parties to use mediation.] Jurista Vārds, 24 May 2007, vol. 17/18, p.7.

Council of Europe to Member States on alternatives to litigation between administrative authorities and private parties and its Explanatory Memorandum the explanation of methods has been misplaced and is not consistent.

Mediation and reconciliation may be used also in the cases where parties are in unequal positions from the point of view of their knowledge and possibilities, because this is the reason why there is a mediator who levels out any differences and monitors the situation to avoid that the superiority of one party does not depress the other and does not impact its decision-making ability. The mediator employs several strategies of leading the process for minimising the difference between the parties' statuses, and if this is not successful and the superiority of any of the parties emerges within the procedure, the mediator should interrupt the mediation procedure. This problem is less pronounced in the reconciliation because the reconciliator has better opportunities for levelling out any inequalities basing upon its knowledge, opinion and proposals, by its activity.

Mediation and reconciliation may be used in all the administrative disputes because the goal of the principle of a judicial state is not the unilateral power, but judicial relationship instead. However, depending on the essence and the circumstances of a dispute a particular method can be more appropriate for resolving disputes than another one. Mediation is more efficient in the disputes over interests and the reconciliation is more efficient in judicial disputes. Mediation is directed towards the mutual conciliation of the interests of the parties to the dispute and the achievement of the conciliation, however, the reconciliation includes the evaluation of the rights of the parties to the dispute and the provision of the opinion on the most appropriate rights of the parties to the particular dispute. The fields of the administrative law where mediation is used more often have emerged in practice: these are the disputes that are related to the environment, the territory planning and building law, the tax law, the social law, the competition law, remuneration, civil service, etc.

In the case of the issue of both a free and mandatory administrative act, mediation or reconciliation may be used; just the goal of the application of methods is different in each case. In the case of a mandatory administrative act the goal is the achievement of the agreement on the accurate actual circumstances and the applicable law, and in the case of a free administrative act not only the actual circumstances have to be identified, but also the rights or interests of the public and an individual have to be balanced in an accurate way. In both cases the decisions and acts of an authority have to be accurate and correct to impose the least restriction of the individual's interests.

In the mediation and reconciliation procedures the interests or rights of a private party (fairness) are not given up. The authority can attain the goal of the administrative procedure also unilaterally, however, a private party does not agree with any evaluation of the rights or judicial interests imposed by the authority, it evaluates it critically and based upon its own considerations of justice. Moreover, it is not possible to use a universal pattern for the accurate definition of the correct resolution or act in changing life situations. Mediation provides the capacity for finding non-standard solutions within the framework of the legal norms, helps the personnel to evaluate the circumstances of the dispute in a better way when the mediator draws attention to the conclusions of the theory and case law, to identify the best resolutions to a dispute, their strengths and weaknesses, to develop the most realistic version of the solution, to achieve an agreement and to define the procedure of its fulfilment. Each party to the dispute has a possibility to analyse the circumstances and causes of the dispute in an active and responsible manner and to better understand the arguments of the other parties to the dispute. By allowing an active participation by a private party it assumes the responsibility for the final solution, thus there is a higher guarantee that the achieved resolution will be complied with and not appealed against by it.

Mediation and reconciliation can be used not only at the state of appeal and litigation, but also in the stage of the fulfilment of an administrative act or a court resolution.

The elements of mediation and reconciliation by means of which it is possible to achieve the agreement of parties to the administrative procedure as to a fair and judicial resolution efficiently should become a component of the administrative procedure because it offers a structure within which all the parties to the administrative procedure can actively participate in finding a resolution. The fundamental principles of the law are achieved in the use of the methods, i.e. the fairness, justice, transparency, participation, efficiency and informality.¹¹⁵ The use of the methods reduces the number

¹¹⁵ Haft F., Schlieffen K. Handbuch Mediation. München: Verlag C.H.Beck, 2009, p.215.

of cases when a private party applies to the court due to obvious lack of understanding and subjective reasons.

The use of mediation and reconciliation may be voluntary or mandatory. The mandatory use of the method can be provided for by a law or a court decision, and this is a deviation from the principle of the voluntary character. The mandatory mediation and reconciliation restricts the rights of a private party to a fair court, however there is a legitimate goal behind it, i.e. the resolution of disputes and the improvement of the efficiency of the court system, and the restriction is proportionate because it does not fully deny the access to the court and the parties do not have to agree on the conciliation on mandatory basis. The mandatory mediation and reconciliation can be imposed in the cases where usually a high number of participants is involved and it would be disproportionate and difficult to secure the agreement by all the parties on the use of methods, and in the cases where the efficiency of these methods is generally recognised.

The agreement on the use of mediation or reconciliation may be concluded in writing or verbally. It is done verbally if the number of parties is high and the conclusion of a written agreement would not be reasonable.

Mediation and reconciliation are accessible if the procedure of the remuneration of the mediator's services and other expenditure is fair and proportionate. In the administrative law deviations from the basic principle of the private law, according to which the costs related to the application of the methods are covered by the parties in equal parts, is admissible. If the law or the judge imposes mediation or reconciliation as mandatory or if an authority proposes to solve a dispute within the mediation or reconciliation procedure, as well as in the cases when it is used at the state of the issue of an administrative act, the expenditure related to mediation and reconciliation should be covered by the state. In the other cases the basic principle of the equal participation in covering the expenditure should be complied with. The total expenditure of mediation or reconciliation may not exceed the expenditure of litigation, therefore the state could define the professional fees of certified mediators and reconciliators and the procedure for assessing them similarly to those of notaries and intermediaries in the criminal law. The participation of the ombudsman is free in any case.

In the public law mediation and reconciliation are aimed not just at the conclusion of reconciliation, the result may be also the repeal, amendment of an administrative act, the issue of an administrative act with a certain content, the recall of the application or admission as justified thereof. Both methods can eliminate the parties' doubts and lack of knowledge, as well as clarify the actual and legal circumstances.

In Latvia, the administrative procedure does not have the legal regulation for the use of mediation, however, this situation will change when the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters is implemented. Different from Lithuania and Estonia, Latvia has not done it yet. The Directive is not applicable and it does not apply in the cases of revenues, customs or administrative cases, or in relation to responsibility of the state for the acts and inactivity in the course of implementing the state power, still the Member States are not prohibited to apply the provisions of the Directive also at the national level and to establish the general regulation of mediation that would include also the terms of the use of mediation also in the public law. In Latvia the Mediation Law should cover all the branches of the law.

In the administrative procedure the duties of a mediator may be performed by a judge, a certified mediator, mediation commissions, the ombudsman, state and municipal officials. The perfect type of the judge comprises not only the judging, but also listening to the parties of a dispute, assistance to the parties of a dispute to achieve mutual communication and to resolve the dispute. The achievement of peace in the relationship between the parties to the dispute should be valued above the formal and narrow interpretation of duties. Besides, the Administrative Procedure Law has defined the impartiality law institute broader than it is in other procedure law. Within a single case, the judge may hear the case even if before that, when the application for temporary regulation was considered, he/she has expressed an opinion on the possible outcome of the case. The legislator has not admitted that this action creates the basis for doubting the judge's impartiality. Article 24¹ "Concluding a conciliation" which defines the judge's entitlement to lead the process of conciliation should be added to Chapter 3 "Basic principles of hearing cases" of the Law "On Judicial Power". In order to ensure that mediation becomes an integral component of the system of resolution of disagreements, the

authority of certified mediators specialised in resolving administrative disputes should be established. In Latvia, the Ombudsman's office should become the centre for the development of specialised mediators in the administrative law. State and municipal officials can both use mediation according to its traditional interpretation, when the dispute is between the addressee of an administrative act and a third party, and also its elements for encouraging the agreement with a private party. The state can also establish specialised mediation and reconciliation authorities that are a combination of the quasi court and the ombudsman from the point of view of their functions and role.

As it was referred to above, a reconciliation concluded by the parties to the administrative procedure may be a result of mediation and reconciliation; different from other alternative methods, this is not a procedure, but the resolution of a dispute in a form of a judicial transaction. From the point of view of the efficiency of judicial protection and dispute resolution, a conciliation has a higher value than a court judgement because it provides the best judicial protection to a private party according to his/ her judgement, and improves the judicial stability.

If an administrative act is a unilateral ordinance of an authority, a conciliation is an expression of the parties' to the procedure will justified by the agreement. The authority may not use the conciliation for refusing the performance of the duties imposed by the law, however, for the purpose of eliminating the dispute, the authority can use the conciliation for establishing the legal consequences that are different from the ones in relation to the initial administrative act, actual acts or the public law agreement if this does not breach the legal norms, is justified on the basis of reasonable considerations of usefulness and generally compliant with the public interests. Thus, by means of a conciliation the parties agree on the termination of legal relationship or its restoration and certain legal consequences are replaced with different consequences that cannot be disputed and doubted. The negative impact of the conciliation is that it prevents the parties from returning to their initial position. The positive impact is that the initial view is replaced with the regulation achieved in the result of the agreement. If a party does not duly perform the conciliation or doubts its validity, the other party cannot ask for the restoration of the legal consequences that have been terminated by the conciliation, however, he/she can request its performance by applying to the court. In the case of the conciliation the aspect of judicial protection is not that important, because a private party and an authority conclude only the agreements to which they fully agree.

The state administration works for the public interests that include also proportionate compliance with a private party's rights and judicial interests, therefore, in any case the authority has to evaluate the possibility and the usefulness of concluding a conciliation. The state administration and a private party do not have a general obligation to conclude a conciliation, however, if the private party has a total discretion to decide on concluding it, the principle of good governance and also the law stipulates the conditions for using the discretion of action of the authority.

In Latvia, the function of the conciliation is fulfilled by an administrative agreement which possesses another function. i.e. the provision of the quality of the administrative procedure. Although the empowerment provided in Articles 79-86 of the State Administration Structure Law allows an authority to conclude administrative agreements for the termination of a dispute without any additional authorisation by special laws, still, in practice it can be seen that these are more often concluded in the fields where special legal forms provide for the conclusion of the administrative agreement and the criteria of the agreement. For the purpose of improving the efficiency of the practical use of the administrative agreement institute, the legislator has to evaluate the possibility of including it also in other special laws, for example, the Building Law, the Law on Planning the Territorial Development, the Law on Municipalities, by defining also the criteria that should be evaluated when the decision on the conclusion of an administrative agreement is adopted.

The decisive precondition for concluding the administrative agreements provided for in Article 41 of the Law "On Taxes and Duties" and Article 27³ of the Competition Law is the agreement of the private party to the tax debt assessed by the State Revenue Service on unilateral basis or the breach established by the Competition Board. The administrative agreements provided for in both norms create beneficial consequences to the private party who voluntarily admits an administrative act issued within the unilateral dominance administration procedure. The narrow interpretation of the possibility of concluding an administrative agreement included in Paragraph 1 of Part One of Article 80 of the State Administration Structure Law as it is in both norms referred to above would be contrary to the goal and the principle of efficiency of the reconciliation institute. Thus, the State

Revenue Service and the Competition Board, as well as other state and municipal authorities can conclude an administrative agreement for the purpose of terminating a dispute also in other cases, for example, for finding a resolution compliant with the public interests and for preventing uncertainty when it cannot be done within a reasonable procedure, within the legal norms.

If the parties to the administrative procedure resolve a dispute and conclude an administrative agreement, the court resolution on the termination of the litigation, based upon the conclusion of the administrative agreement in the case is *res judicata* by character, therefore, the court supervision over the procedure of concluding the administrative agreement is essential in resolving on the termination of the litigation. In compliance with the current valid legal regulation the court just has to establish the fact of concluding the administrative agreement. Paragraph 7 of Article 282 of the Administrative Procedure Law should provide the obligation of the court to verify the judicial character of the administrative agreement, for example, whether the subject of the reconciliation is an issue covered by the competence of the relevant public person, whether the obligations of the public party are legal, whether the agreement does not contradict the principles of the state administration or does not impose disproportionate restrictions on the private party's judicial protection, and whether the agreement does not violate the rights and interests of third parties.

The State Administration Structure Law emphasises the conclusion of an administrative agreement within the court procedure which should be interpreted as inclusive of the stage of the execution of the court judgement as well. However, by respecting the principle of the legal certainty one should strive to conclude an administrative agreement as soon as possible following the emerging of a dispute.

Although an administrative agreement may be concluded at any stage of the administrative procedure, it does not always serve as the basis for terminating the litigation. Reconciliation serves as the basis for the termination of litigation if it has been concluded before completing the hearing of the case. An administrative agreement that is concluded at the stage of cassation would not serve as the basis for terminating the cassation litigation.

Prosecutor

Another method, i.e. the prosecutor, differs from the above referred methods because of its specific role within the administrative procedure. The prosecutor's functions are mainly related to the criminal procedure, however, the prosecutor performs certain tasks also in the administrative procedure. One cannot agree to the conclusion of the Constitutional Court that the prosecutor in the administrative procedure is just an element of the socialist law.¹¹⁶ In 39 out of 47 Member States of the Council of Europe the prosecutor performs tasks not only in the criminal procedure, but also in the administrative procedure. The legislator may oblige the prosecutor to perform tasks also outside the criminal procedure at its own discretion.

The prosecutor's role within the administrative procedure should be defined in compliance with the current judicial protection system. Taking into account that there are several methods for judicial protection and dispute resolution, and respecting that the criminal law is the basic field of operation of the prosecutor, the prosecutor's participation in the administrative procedure is an exception.

Under standard circumstances the prosecutor does not interfere in a dispute between an authority and a private party. The prosecutor interferes only in cases when it is necessary to defend essential public interests or where there are no other possibilities, but the principle of justice requires action. In exceptional cases also the protection of the interests of a particular private party may comply with the public interest, for example, the judicial protection of an incapacitated person, children, elderly persons.

When no public interests can be identified and other methods are available to a private party, the private party should use such methods. For the purpose of establishing a rational system of judicial protection and dispute resolution the prosecutor may not compete with the ombudsman or other

¹¹⁶ On the compliance of Part Two of Article 279 and Paragraph 4 of Part One of Article 280 the Code of Administrative Violations of Latvia in the section that stipulates that a court decision in the case regarding an official's decision on imposing an administrative penalty is final, and Part Four of Article 239 of the Civil Procedure Code of Latvia with Articles 89, 91 and 92 of the Constitution of the Republic of Latvia and Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950): Judgement of the Constitutional Court of the Republic of Latvia (20 June 2002) in the case No. 2001-17-0106. *Latvijas Vēstnesis*, 26 June 2002, vol. 95.

methods for judicial protection and dispute resolution and implement the rights of private parties on their behalf. Within the administrative procedure the prosecutor defends the public rights and judicial interests and the ombudsman defends mainly the rights and judicial interests of private parties. Thus, for the purpose of protecting the public rights and interests the prosecutor should have the rights and obligations of the participant of the administrative procedure for defending the public interests. Paragraph 7 of Article 2 of the Public Prosecutor's Office Law, similarly to Part Three of Article 9 of the Environment Protection Law present exceptions provided for in Part Two of Article 31 of the Administrative Procedure Law according to which the prosecutor may apply to the court by protecting the public interests or the judicial interests.

Conclusion

All the above listed alternative methods are equal, therefore also other methods for judicial protection and dispute resolution have to be included in the clause of disputing of and appealing against an administrative act in Articles 76 and 188 of the Administrative Procedure Law in addition to the disputing and appealing accordingly. The wording of this indication may be general by emphasising just the possibility of judicial protection and dispute resolution by employing other methods. Specialised regulatory acts would detail the type of method and the procedure of their application.

Alternative methods are comprised within a uniform system and aimed at the attainment of a single goal, i.e. the provision of efficient judicial protection and dispute resolution within the administrative legal relationship. The state should have the law policy planning document that defines the goal of the system and the individual tasks of each method. Quantitative and qualitative result indices have to be set for the system of alternative methods and each method individually for making the evaluation of the attainment of the goal possible. Alternative methods have to be analysed collectively and within close context with the judicial system because there is an evident feedback relationship between them.

In comparison to other European countries, Latvian has not adopted essential regulatory acts for a long time, for example, the Mediation Law and the Arbitration Law; moreover, they should be adopted in such a way that ensures the application of mediation and arbitration also in the administrative procedure. However, the positive obligations of the state include not only the development of the legal regulation of alternative methods and the strategic planning of their use, but also the ensuring of the efficient application of the methods in the practice, in particular if the use of an alternative method is a precondition for submitting an application to the administrative court. The state administration has to establish the system of result indicators and summarise and analyse the operation of alternative methods on regular basis. For example, the mandatory appeal cannot be imposed arbitrary and it cannot be just illusionary, it has to be actual and efficient. The legitimate interests of private parties have to be balanced with the interests of efficient state administration, in the opposite case the private party's rights to the accessibility of the court are violated without a valid justification. In Latvia, the mandatory character is perceived as a dogma without any reason, besides the usefulness and efficiency of the mandatory appeal can be doubted because the state administration does not summarise and analyse the efficiency of the appeal on the level of individual authorities and the state as a whole on regular basis. For the purpose of evaluating the efficiency of appeal the state and municipal authorities do not perform and public the appeals statistics, analysis of changes on regular basis and do not provide the eventual causes behind it and the proposals for improving the situation, and the analysis of the appeal statistics and the causes behind the repeal of administrative acts.

The efficiency of judicial protection and dispute resolution presents a quality index that demonstrates whether the procedure defined and implemented by the state in practice secures the timely and compliant utilisation of rights and freedoms in a conflict situation between an authority and private parties and whether the justice and the goals set by the legislator are achieved within the procedure.

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