

COMPARATIVE ANALYSIS OF LITHUANIAN ADMINISTRATIVE PROCEDURE

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The aim of this article is to describe and analyze Lithuanian administrative procedure by contrasting it with French administrative procedure. By the term, "administrative" procedure we do not mean the manner in which an agency performs its work, but the procedure used by the specialized administrative courts to judicially review administrative (governmental) action. Due to space limitations, we will examine only the more distinct features of administrative procedure, and we will examine administrative procedure only up to and including the passing of the decision in a particular case, without analyzing the execution of administrative judgments nor questions of appeal, cassation (repeal), or reconsideration.

We have chosen to compare Lithuanian administrative procedure to that of the French for several reasons. First, Lithuania has chosen to have a separate system of administrative courts. This was done in emulation of French practice, which also has a separate system of administrative courts. In addition, France was the cradle of the independent body of administrative law in Europe, and a comparison of Lithuanian administrative law to French administrative law makes a good deal of sense.

A second reason encouraging our interest in French administrative procedure is that the procedure in the European Court of Justice (ECJ) is modeled upon that of France.¹ Therefore, knowledge of this model would be useful for a Lithuanian lawyer seeking to understand the administrative procedure practice of the ECJ.

The contemporary doctrine of the separation of powers arose during the Enlightenment. Paradoxically, in France this doctrine has served as a basis for the creation of a separate administrative law and administrative courts. Napoleon's government distrusted the parliament and courts to such an extent that it interpreted the doctrine of the separation of powers as prohibiting the courts from interfering with the government (administration) in any way. Thus only the administration (that is, the government) itself could weigh conflicts and determine the legality of its own acts. Prominent legal theorists from the common law countries, having a long tradition of independent courts, looked skeptically at the French situation in which the administration was its own judge.² Even today, the officials of the French administrative courts who hear the cases do not belong to the corps of judges per se and do not necessarily have a degree in law. Most of them are graduates not of law schools, but of the High Administration school.

The "supreme court" in terms of administrative law in France is called the *Conseil d'Etat*, which is an institution nearly two hundred years old. In contrast, Lithuanian administrative courts were created in January 1999. To improve the newly created Lithuanian administrative courts, it is important to understand some of the established features of French administrative courts to determine whether or not to adopt more of these features.

1. Overview of the French Administrative Courts

The French administrative court system consists of three tiers. The *Conseil d'Etat* (State Council), the highest administrative court and the pride of the French, dates from 1799. *Tribunaux Administratifs* (Administrative Tribunals)

operate as the courts of first instance since the reform of 1953. The three-tier court system was completed in 1987, when, coping with overcrowding, the *Cours Administrative d'Appel* (Appellate Administrative Courts) started their activity.

The competence of Lithuanian administrative courts and their division between district administrative courts and the supreme administrative court is in principle similar to those of France. But the competence of the *Conseil d'Etat* is broader than that of the Lithuanian supreme administrative court, because it has jurisdiction over the legality of acts, whereas in Lithuania this function would be handled by the constitutional court.

It is worthwhile to note several elements completely alien to the Lithuanian administrative courts. First, both the *Conseil d'Etat* and the Administrative Tribunal advise the administration. Secondly, since 1963, the *Conseil d'Etat* has to provide to the president of the republic an annual account of its activity. In the account the council can present proposals regarding necessary reforms in public administration. These accounts are published as public documents.

It is questionable whether administrative activity on the part of the administrative courts, even in the form of consultations to the government, is an element that should be emulated. It is a heritage of history that the *Conseil d'Etat* acts as consultant in legislative procedure and to the administration. The council is composed of 300 members,³ thus it is possible to avoid the breach of the *nemo iudex in causa sua* rule. Nevertheless such consultative functions performed by the state councils (or highest administrative courts) which are composed of fewer members, give rise to doubts stated by the European Court of Human Rights as to whether this is compatible with concepts of fundamental fairness, as provided for in Article 6, Part 1 of the European Convention on Human Rights.⁴

Additionally, French administrative courts decide questions relating to public contracts. If a contract is classified as a public contract, an entirely different set of rules applies, and such a contract is not governed by the civil code.⁵ There is nothing similar to this in Lithuania.

2. Basic Procedural Principles in French Administrative Courts

The British scholars L. Neville Brown and John S. Bell⁶ identify the following defining characteristics of French administrative procedure:

First, the procedure is characterized by its inquisitorial character. Lithuanian administrative court procedure is also characterized by active court participation in the hearing. Legal scholars point out that administrative court proceedings are specific for the subordination element; that is, one of the parties is the state or its institution, thus the defense is against the absolute (the state).⁷ The court, seeking to realize justice in administrative cases, has to be active, thus an inquisitorial element is more desirable in administrative than in civil cases.

Secondly, French administrative court proceedings are, to some extent, adversary—the parties have to prove the circumstances and motivate their requirements. The Law on Lithuanian administrative case proceedings (Article 57, Part 4) also confirms the principle of adversariness, the parties have a duty to prove their case. Eventually, this principle is inherited in the parties' desire to protect their interests.

The third feature of French administrative procedure is that the proceedings take place in purely written form. This is not the case in Lithuanian administrative procedure. The French court examines the case following a brief made by the speaker (*reviser*) and written conclusions provided by the *Commissaire du Gouvernement*. The proceedings in the ECJ are also characterized by the very important role played by written procedures.⁸ Taking into account that both the administrative acts, which are subject to the court review, and most of the evidence are in written form (requests, conclusions, acts), written procedure allows for a speedier resolution of the case (the delays of oral hearing are eliminated) and concentration on the case material, which is hard enough in a condensed oral hearing.

The fourth and the most specific feature is the important role of the *Commissaire du Gouvernement* (commissar of government) in the administrative case proceedings. An analogue in the activity of the ECJ is the General Advocate, whose legal opinion in the case is a very important source of material law. Lithuania does not have anything like this in its administrative procedure.

3. Initiation of the Administrative Case

In France an administrative case begins when a person, aggrieved by an administrative act, presents to the court a *recours* (request, complaint). In the *recours* the plaintiff has to set the grounds for the complaint and major arguments and present a copy of the *recours* (for the working copy of the case) and the administrative act under complaint. The *recours* can be sent by fax. A court fee needs to be paid, and it amounts to approximately fifteen euros. As the procedure is mainly written, the law requires that, in certain cases, the plaintiff be represented by an advocate (a licensed attorney-at-law).

The order of initiation of the case for the review of an individual administrative act in Lithuania is similar to that of France, except that legal representation is not obligatory. The law requires that the complaints be made in written form. There is no

jurisprudence on the question of whether a court can accept a complaint received by fax.

4. Instruction

Instruction is the second stage of the French administrative case. Its scope and purpose is to establish the factual circumstances and clarify questions of law. A received *recours* is transmitted to the *rapporteur* (speaker), a younger colleague, who prepares the case for judgment. The judgment of the case is directly dependent on how the *rapporteur* prepares it, thus the powers of the *rapporteur* are broad: he is the sole person who communicates in the name of the court with the parties, gathers evidence, prepares the proposed opinion, etc. By comparison, in Lithuanian administrative courts, the *rapporteur* is one of the judges and his function is to conduct the examination of the case.

Instruction is a distinctive stage for preparation of the court hearing because, unlike Lithuanian practice, and unlike French civil procedure, the factual circumstances are examined at this stage and not at the court hearing; witnesses are examined through written questions (although the court has the right to orally examine witnesses and experts). According to the British scholars, Brown and Bell, the written reasoning of the parties is very different from English procedure, since "even disputes over facts are typically resolved without any oral hearing of the witnesses."⁹

The guiding purpose of the instruction is to establish facts, the parties also submit their arguments regarding interpretation and application of the law. The *rapporteur* supports his findings with the copies of the relative case law, law commentaries or doctrine. Later the *Commissaire du Gouvernement* supplements the case with his conclusions and his legal assessment of the circumstances of the case.

The informational exchanges end when the *rapporteur* decides that the factual circumstances have been sufficiently established. Then s/he analyses the case and makes certain that the material is sufficient for the court to make a decision. At the end, he prepares the proposed case opinion (*projet d'arrêt*), consisting of a description (*la note*), which contains a short statement of the factual circumstances, sets forth the arguments of the parties, describes the applicable law, and summarizes the doctrine and the case law.

This document is scrutinized by the *reviseur* (reviewer), who is the chairman of the court section which will decide the case. The purpose of the *reviseur* is to review the case and give remarks to the speaker. After the *reviseur* the case is transmitted to the *Commissaire du Gouvernement*. After his conclusions, the case is prepared for a decision.

The *Conseil d'Etat* has a special stage in the instruction which is called *seance d'instruction*.¹⁰ This closed hearing is usually scheduled on one day of the week, and the entire subsection of the court, which has been assigned to examine a certain case, gathers together and hears the speaker's report on the case. Afterwards the *reviseur* gives his comments and the judges discuss the case. The purpose of the discussions is not go deeper into the facts, but to make sure the *reviseur* has duly found the problem and his proposed decision does not conflict with the law. Its second purpose is to give younger colleagues opportunity to increase their experience. After the discussion, the participants vote to approve the *reviseur's* findings. Afterwards, the chairman of the session assigns the case to the *Commissaire du Gouvernement*. Thus the *instruction* comes to end.

Lithuania has nothing comparable to this. The court prepares for the oral examination in the same manner as in a civil procedure; it sends a copy of the complaint to the defendant and to third parties, and if there is a need, makes appropriate rulings to collect evidence or to avail itself of expert opinion (Article 68 of the Law of Lithuanian Administrative Case Proceedings),¹¹ but the examination of the evidence may only take place in the oral hearing.

5. Commissaire du Gouvernement

The function of the *Commissaire du Gouvernement* is to present a comprehensive opinion on the matters of the case. The commissioner is appointed from among the most experienced judges on the court. He checks the case and may make additional inquires to the parties if he thinks it necessary. After analysis, he prepares an opinion about the applicable law

As Brown and Bell point out,¹² the opinion of the *Commissaire du Gouvernement* in an administrative case has two aims: the first is to propose an opinion of the case for the benefit of the deciding judges. The second, broader aim, is to tie the proposed decision to administrative case law, thus assuring uniformity in the application of the law and offering a prognosis on the evolution of the particular legal issue at hand. Thus of the *Commissaire du Gouvernement* brings case law to bear on certain questions of the law.

There is nothing corresponding to this in Lithuania's administrative procedure

6. Decision

The last stage of the case is the making of a decision. After the commissioner presents his conclusions, the case goes to the list of the *séance de judgment* (session of decision). The session of decision is composed of two parts: *audience public*

(public hearing, which resembles to some extent the Lithuanian oral examination of the case) and *délibéré* (the passing of a judgment).

Usually, a large number of cases are appointed for one *audience publique*. The *audience publique* is to some extent an oral hearing: the major points in the case are announced, but, it is not the same as an oral examination of a case in Lithuania's administrative procedure. The parties or their representatives usually participate in the court of first instance because they have an opportunity to speak there for five or ten minutes. In the *Conseil d'Etat* the parties participate only rarely, primarily because the court sits only in Paris, and second - there is little to be gained, because oral argument may not be presented. The *audience public* is truly held in public; anyone can participate or watch the proceedings.

The session starts when the court clerk announces the case. The *rapporteur* quickly reads the opinion of the case; after that, the chairman asks the parties if they have any objections to the opinion. Brown and Bell note that the advocates rarely object to the proposed opinion.¹³ The role of the advocate is to check, while listening to the speaker, whether all important circumstances in the case have been elucidated. Then the *Commissaire du Gouvernement* presents his opinion and the chairman without any further objections, sends the case to the next stage, which is the *délibéré* (the passing of a judgment), and calls the next case. After all the cases on the list are examined, the court confers in private.

The *délibéré* immediately follows the first session. Here the judges discuss the case and give their decision (*arrêt*). Usually, the proposed preliminary decision is adopted. Although the meeting of the judges is confidential, both the *Commissaire du Gouvernement* and other judges of the court may participate as observers. Even though the law requires that the court decision be delivered publicly, in practice the parties get the decision in the registration office.

The decisions (court opinions) of the French administrative courts are very short and laconic; the court follows the law, in giving motivation and discussing every argument, but offers no detailed doctrinal explanations. For this reason, scholars and practitioners of law examine not only the decision itself, but the opinion of the *Commissaire du Gouvernement*.

7. Conclusions

We have compared, in brief outline, the French and Lithuanian administrative procedures. The following conclusions may be drawn:

1. French administrative procedure diverges greatly from the Lithuanian. This difference has been caused by both the distinct historical evolution of the administrative court systems in France and Lithuania, and by their different legal cultures. Although based on the same continental law system, Lithuania's system, of course, has been greatly influenced by Soviet law;

2. The French *Conseil d'Etat* started its activity long before the statutory body of administrative law was created, and this institution took on the historical task to create principles and rules of independent administrative law (the so-called principles of administrative "morality"). The council did this through case law. There is no doubt that the special court procedure has been an advantage: supervision of the case is provided at several levels (the speaker, the reviewer, the *Commissaire du Gouvernement*, a special court session and, finally, the judges, who pass the decision);

3. The peculiarities of the procedure in French administrative courts allow us to assume that such procedure is designed for control of administration and for protection of any individual aggrieved by the executive. The inquisitorial profile and legal opinion of the special official (*Commissaire du Gouvernement*) create the possibility to relieve the situation of the plaintiff and, at the same time, to ensure the development of administrative law. However, any model is characterized by the feature that the form does not warrant the content: if the court's independence is infringed upon, the supervision or examination mechanisms do not ensure justice. And the French model puts at risk the right to a speedy trial (Article 6 of ECHR), because the examination of cases in such a model takes a long time;

4. The adoption of the French procedures by the European Court of Justice shows that this model is not accidental, but a functioning system for judicial review of administrative actions. Few or none of these features are present in Lithuania's administrative procedure. This allows us to conclude that Lithuania did little more than shift administrative cases to a separate set of courts, but nothing was done to create an administrative procedure per se: in Lithuania, administrative procedure is the same as the procedure in the civil courts. Time will reveal the utility of such a model for the judicial review of administrative action in Lithuania.

1. Allan F. Tatham, *Europos Sąjungos teisė*, trans. A. Paksas (Vilnius: Eugrimas, 1999), 38.

2. Albert Venn Dicey, *Konstitucinės teisės studijų įvadas*. vert. L. Raudienė, R. Petkus (Vilnius: Eugrimas, 1998), 225-265.

3. For more details see the official web page of Conseil d'Etat http://www.conseiletat.fr/ce/organi/index_or_me01.shtml (visited on 26/11/2003).

4. *Procola v Luxembourg* (1996) 22 EHRR 193.

5. Barry Nicholas, *The French Law of Contract* 2nd ed. (Oxford Clarendon Press, 1992, reprinted 1996), 23-27.

6. L. Neville Brown and John S. Bell, *French Administrative Law* 5th ed., (New York: Oxford University Press, 1998), 89.

7. Egidijus Laučikas, Valentinas Mikelėnas, Vytautas Nekrošius, *Civilinio proceso teisė*, I tomas (Vilnius: Justitia, 2003), 66.

8. Dominik Lasok, *Law & Institutions of the European Union* 6th ed. (London: Butterworth & Co., 1994), 247.

9. See footnote 6, L. Neville Brown, et al., 95.

10. For more details, see the official page of Conseil d'Etat: http://www.conseil-etat.fr/ce/missio/index_mLju05.shtm! (visited 26/11/2003).

11. Lietuvos Respublikos Administracinių bylų, teisenos įstatymo (1999.01.14 Nr. VIII-1029, nauja redakcija 2000.09.19 Nr. VIII-1927, Žin., 2000, Nr. 85-2566).

12. See footnote no. 6, L. Neville Brown et al., 105.

13. See footnote No. 6, *ibid.*, 110.