Protection of Rights without Borders

NGO

REPORT ON ADMINISTRATIVE JUSTICE (RESULTS OF THE MONITORING OF ADMINISTRATIVE LEGISLATION AND COURT PRACTICES)

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EXECUTIVE SUMMARY OF THE REPORT ON ADMINISTRATIVE JUSTICE (RESULTS OF THE MONITORING OF ADMINISTRATIVE LEGISLATION AND COURT PRACTICES)

Executive summary

From July 2009 to December 2010 with the assistance of the Open Society Institute Armenia Foundation "Protection of Rights without Borders" NGO implemented a monitoring project with the goal to study newly adopted administrative legislation and to conduct comprehensive analysis of the court implementation practices.

The court monitoring project was implemented in three stages: a preparatory stage, for drafting of monitoring instrument, questionnaires of interviews, program materials and guidelines, selection of monitors, and training; an implementation phase, including securing access to court and the period of monitoring; a final stage for finalization and publication of the monitoring report. A distinct component of the project was the analysis of the administrative legislation in force with the view of identifying the inconstancies and contradictions with international standards and best practices, as well as improving the legal framework for administrative justice.

Between 1 September 2009 and 30 September 2010, 353 administrative cases, held in 807 hearings, were monitored in the Administrative Court of Yerevan. 351 of these cases were considered in ordinary court proceedings, while 2 of them - in expeditions proceedings. 213 of the monitored cases were finalised cases and served as a primary basis for the analysis and the conclusions. Alongside, documents of case files were collected from the parties and the court; and interviews were conducted with the participants of the proceedings.

Results of the monitoring project reveal shortcomings in law and the adjudication of administrative cases. The report includes a number of recommendations to assist the Armenian authorities advancing the administrative legislation and administration of justice in line with international and national standards. However, institutional aspect of the effectiveness of justice, namely the independence of the judges, has not been covered by the project.

The report analyzes the issues of concerns in the chapters related to the i) accessibility of administrative justice (chapter 1), ii) the types of claims under the Administrative Code, shortcomings in law and implementation practices (chapter 2), iii) evidence in administrative proceedings (chapter 3), iv) free legal aid in administrative cases (chapter 4), v) the right to an oral and public hearing (chapter 5), vi) compulsory enforcement of the administrative court decisions (chapter 6), vii) the practice of institution of administrative proceedings by the court (chapter 7), viii) the practice of appealing the court decisions on recusal (chapter 8), ix) the practice of provision of security for damages when injunction is applied (chapter 9), x) the practice of application of Article 83 of the Administrative Procedure Code (observations in reply to the claim) (chapter 10), xi) the practice of application of Article 85 of the Administrative Procedure Code (modifying the subject matter and the ground of a claim) (chapter 11), xii) the efficiency of the mechanisms for collective protection of rights (chapter 12), xiii) the effectiveness of administration of justice by the Administrative Court (chapter 13), xiv) the proceedings on challenging normative acts (chapter 14), xv) liability for the damages inflicted following administrative

procedures (chapter 15) and xvi) the proceedings in the Court of Cassation in administrative matters (chapter 16).

The study gives rise to concerns about the existing legislation that affects the accessibility of administrative justice. This issue is assessed in light of two problems: first, the relevance of the legal definition of the term "administrative body" on effective access and the influence of the norms concerning the jurisdiction of the court on accessibility of administrative justice, having due regard to the exiting instruments and mechanisms for differentiation between cases originating from public relations and cases originating from private relations. In Armenian administrative law the principles and proceedings pertaining to public law abide state bodies, as pursuant to the national legislation administrative bodies are the republican and territorial administration bodies of the executive, as well as local self-government bodies. Therefore, the administrative court lack jurisdiction over the cases against private bodies, which effectively exercising public functions, delegated them by the state. Such regulation highly impedes the accessibility of administrative justice and the effectiveness of existing legal remedies. At this stage of development, when the public functions of the state are being delegated to private persons, such regulation contains serious risks, as the private entities; exercising delegated public functions and influencing public subjective rights of private persons, are not bound by the principles and procedures of administrative law. The NGO has recommended the State to amend the law and include in the definition of an administrative body "any natural or legal entity, which exercises public function delegated by the State".

With the establishment of the Administrative court, the jurisdiction of courts was reconsidered. The Administrative court was recognized as a judicial instance vested with the power to deal with public legal disputes. The monitoring results suggest that in practice the term "disputes originating from public relations" does not have uniform interpretation and application. Many instances were witnessed when the differentiation between civil and administrative rights gave rise to serious difficulties. The administrative court consistently rejected admissibility of the claim with the reason that the dispute was not subject to the jurisdiction of the administrative court, while the court of general jurisdiction refused the consideration of the same claim with the reason that the administrative court should consider the dispute. In practice, no means were offered by the judiciary to resolve the disputes on admissibility and persons seeking administrative justice were constantly denied of the right to a court. It was recommended to place in practice comprehensible criteria based on which the courts should determine the private or public nature of the dispute. A mechanism must be established to settle on the jurisdiction in case of disagreement between the administrative court and the courts of general jurisdiction. It would be advisable to consider introduction of an institute of administrative or public agreement.

RA legislation determines 4 types of administrative petitions. The monitoring results indicate that the definitions of the petitions and their distinction create problems in practice. In the absence of effective instruments of delimitation and in-depth knowledge, the courts do not afford effective judicial protection of infringed rights. The judicial review over the actions and decisions of the public authorities is unjustifiably restricted in detriment to individual rights. Judicial review of administrative acts is not extended to all types of acts, whereas the distinction between different types of claims is unsuccessful in practice. Although, the law does

not define the consequences of submitting "wrong claim", in practice the judges rule on inadmissibly on a ground not defined by law. The report states that Armenian law would also benefit from a clearer distinction between administrative acts. Therefore, the law should define legal consequences of presenting an incorrect claim, while the judges should refrain form ruling on inadmissibility on grounds not defined by law.

Administrative Procedure Code implicitly confers on a party the possibility to testify. Nonetheless, party's testimony is not mentioned in the permissible list of evidence, while the Administrative Procedure Code differentiates between the witness's testimony and the party's testimony. Such incomplete legal regulation creates legal uncertainty with regard to the issue whether the court decision can be based on the party's testimony or not, leaving a room to discretionary and inconsistent interpretation and application practices. The Monitoring results indicate that in practice the Administrative Court is inclined to base its decisions on the testimony of the state party of the case, but not the private persons or legal entities, raising serious issues on equality of arms in administrative proceedings.

During the monitoring process the observers encountered practices that the courts failed to clarify the scope of facts to be proved and to dispense the onus of proof. In vast number of cases, the judges formally discharged their duty by declaring that the party bears the burden to prove the underlying factual circumstances. Instances of failure of the court to elucidate the nature of arguable relation and applicable law were also observed.

The right to free legal aid in administrative cases is not guaranteed in Armenia. Article 6 of the Law on Advocacy provides a limited number of cases, when a person can get free legal aid. These cases involve certain types of criminal cases and civil cases in only two instances. In remaining cases, including in all administrative cases, provision of free legal aid is not possible irrespective of the financial situation of a person or the interests of justice.

The results of the monitoring suggest that the authorities made an effort to ensure the right to a public hearing. A number of shortcomings were identified with regard to expeditious and written proceedings. According to Article 108 of the Administrative Procedure Code, expeditious proceedings can be held, among others, if the claim is obviously well-founded or ill-founded. International standards allow restriction of the right to public and oral hearing in exceptional cases, when the matter is of purely legal or technical nature. In case of the mentioned grounds, conducting a written hearing is not necessarily justified under international standards. Therefore, it is suggested to reconsider and amend the grounds of expeditious proceedings, reflecting the standard of "purely legal or technical nature". On the other hand, the law should prohibit written examination in cases of imposition of administrative sanction, even if the claim is manifestly well-founded, unless the defendant voluntarily waives his right to a public hearing. The decision on written proceedings must be reasoned and open to appeal.

Inaccuracies of court schedules and their frequent non-observance, later and earlier commencement of scheduled hearings de facto hindered public access to the court hearings and often impeded the monitoring activities. The court staff was not friendly in supplying basic information about scheduled hearings and ensuring that the public

may observe and follow everything that happens in the courtroom, while the existing databases had not been regularly updated. Usually, the information was placed post factum. The report also shows that the final court decisions were not pronounced in public hearings or due to the timetable. After the pronouncement the decisions are not immediately available for the public. Only the decisions entered into legal force can be provided to the representatives of the public. The state duty for this information is quite expensive which constitutes additional obstacle for the public to get familiarized with the documents.

In many monitored cases the monitories were banned to make audio recordings in open hearings. The practice adhered was inconsistent. A few judges submitted that the monitors are free to make the recording, while majority of the judges refused to allow, claiming that the law does not regulate this issue or the law prohibits recordings during the hearings. The equipment installed in the courtrooms did not assure uninterrupted recordings of the events taking place at the courtrooms and again the state duties for the recordings were expensive. In some instances the judges beforehand heard the parties, distributed the roles, gave the instructions to the parties and then switched on the equipment. Other actions highly undermining the right to a public hearing were also observed. More specifically, in 95% of cases the content of the procedural documents or evidence have not been announced. In 40 % of cases the participants even did not deliver oral speeches, claiming that the texts of the speeches were in the case file. Report findings suggest a need for serious and effective measures to endure genuine publicity of the hearings. They must be directed to root out the defective practices and to reassert the general principle of holding the hearings and announcing the verdicts behind open doors.

Enforcement of the Administrative court's decisions remains one of the key areas of concern. The existing enforcement system is totally ineffective. In 2004, the Law on the Service for compulsory enforcement of judicial acts was adopted, on the basis of which a Service was established within the Ministry of Justice. The analysis of the legislation and practice demonstrates that the major problem of malfunctioning of the Service is its weak organizational structure. As it is established within the Ministry of Justice, it acts within the overall control of the executive. Upon the suggestion of the Minister of Justice the President appoints the Chief Bailiff, who heads the Service. Therefore, the Service lacks institutional independency, acts under the control and influence of the Executive, thereby serving to the best interests of the Executive and refusing to enforce court decisions against state and executive. Besides, appropriate procedures are not provided in cases of non-implementation of a judicial decision by an administrative authority. Public officials in charge of the implementation of judicial decisions are not held individually liable in disciplinary, civil or criminal proceedings if they fail to implement them. It was recommended to reform the service to advance the efficiency of the enforcement of court decisions, as well as strengthen measures of sanctions. It is suggested to specify exact time limits for non-enforcement and the scope of liability.

The monitoring results disclose ineffective case management and the tendency of unjustified postponements of case examinations. The analysis also highlights a concern with respect to the violation of the right to a reasonable trial, although instances of delays attributable to the participants were also observed. The intervals between the scheduled hearings were rather protracted. However, the tendencies of

scheduling show that the courts were tend to appoint earlier dates for hearings in cases, where they had noticeable personal interests.

The monitoring results show that the claims submitted by the NGOs were not admitted by the Administrative Court with the reasoning that the challenged act, action did not affect the organisation's rights and interests. The interpretation of national legislation is again inconsistent. Despite the ruling of Court of Cassation that in environmental matters NGOs enjoy the right to reassert collective interests, the NGOs did not have guaranteed right to claim a specific collective interest that is liable to be affected by the administrative act.

The court decision of recusal is subject to appeal under Judicial Code of Armenia. However, the Administrative Procedure Code does not define mechanisms for the realisation of this right or the procedure. The Code even does not contain any provision stipulating that this decision is subject to appeal. In contrast, Article 125 of the Administrative Procedure Code prescribes that the interim decisions not explicitly defined cannot be appealed. Monitoring results indicate that in practice no appeal is possible against the decisions on recusal in detriment to the interests of the persons concerned.

The monitoring results disclose ineffective case management and the tendency of unjustified postponements of case examinations. The analysis also highlights a concern with respect to the violation of the right to a reasonable trial, although instances of delays attributable to the participants were also observed. The intervals between the scheduled hearings were rather protracted. However, the logical connection between scheduling and the workload of the court has been adhered to this end, which leaves doubts that the personal interest of the judge in the case has significance.

The monitoring results show that the claims submitted by the NGOs were not admitted by the Administrative Court with the reasoning that the challenged act, action did not affect the organisation's rights and interests; respectively the latter cannot be regarded as an appropriate claimant. According to national legislation, the NGOs did not have the right to claim a specific collective interest that is liable to be affected by the administrative act.

Armenian legislation stipulates liability for the damages inflicted upon administrative procedures: the damage caused by both legitimate and non-legitimate administration must be compensated. The court practice demonstrates that the judges give narrow interpretation to this provision and steadily reject the claims on damages, confining the right to compensation for damages caused by illegitimate administration. Furthermore, if the court satisfies the claim and eliminates the violation, the judges manifest reluctance to compensate the damages.

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The rulings of the Court of Cassation on returning the appeals on point of law seem very problematic and reveal shortcomings with regard to an effective and practical right to a court. Despite the decision of the Constitutional Court on inapplicability of Civil Procedure Code to administrative cases, the Court of Cassation deny to rule on admissibility referring to the provisions of the Civil Procedure Code. On the other hand, the Court of Cassation in its decisions returning the appeal of point of law makes reference to the judgement of the lower court, substantiating that the judgment is lawful. Finally, at the stage of admissibility, the court considers the merits of the case.