DEUTSCHE STIFTUNG FÜR
INTERNATIONALE RECHTLICHE
ZUSAMMENARBEIT E.V.

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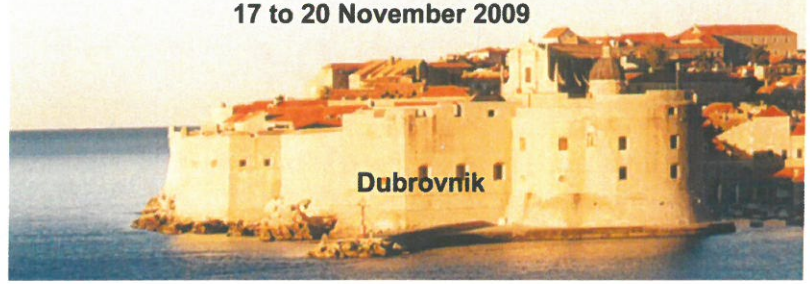
Conference

"The State before the Court - The Role of the Administrative Law and Administrative Jurisdiction for the Development of the Rule of Law"

17 to 20 November 2009



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Conference

"The State before the Court - The Role of the Administrative Law and Administrative Jurisdiction for the Development of the Rule of Law"

17 to 20 November 2009

Dubrovnik / Croatia

Welcome Address by the Director of the IRZ Foundation

On behalf of the German Foundation for International Legal Cooperation, I'd like to extend a warm welcome to the participants of the multilateral regional conference "The State before the Court - the Role of the Administrative Law and Administrative Jurisdiction for the Development of the Rule of Law" in Dubrovnik. This is the eighth time that we are organising such a regional exchange of knowledge and experience here which is intended to contribute to the enhancement of cooperation and stabilisation in the region of Southeast Europe and its neighbouring countries. Scientists and practitioners will discuss the conference issue on three days in a plenary session and after that in two working groups and will exchange their experience regarding current problems and trends in this area.

It gives me great pleasure to welcome experts from 16 nations: from Albania, Belarus, Bosnia and Herzegovina, Bulgaria, Germany, Georgia, Kosovo, Croatia, Macedonia, Moldova, Montenegro, Romania, Serbia, Ukraine, Hungary and Turkey here in Dubrovnik, this formerly sovereign seafaring republic, where the Roland statue has represented the rule of law until today.

The first conference of this series in 2002 dealt with the issue "The Rule of Law and Civic Society - Requirements for a Modern Judiciary". This was followed by the topics "Trends towards a European Private Law", "Reaction of Criminal Law to Youth Crime", "Current Developments in the Insolvency Law", "The Independence of the Judiciary in Europe", "The Law of Criminal Procedure in a Europe that is Growing Together" as well as last year "The Legal Profession as a Motor for the Development of the Rule of Law – Wishful Thinking or a Reality?".

This year's conference will focus on administrative jurisdiction and administrative law, not least against the background of a twinning project carried out by the IRZ Foundation in cooperation with the Croatian Administrative Court which was successfully completed in the spring of this year. The representatives of national legal systems with an extended administrative jurisdiction and countries where such an administrative jurisdiction is still underway or where such an option has only been taken into consideration so far, will have the opportunity to exchange their opinions, knowledge and experience.

I hope that we will address essential aspects with these topics which are of current and practical relevance. Nevertheless, we should also delve into individual aspects in further projects and events - in a bilateral but also in a multilateral format for which I would explicitly like to offer the assistance by the German Foundation for International Legal Cooperation.

I wish all participants an interesting and fruitful conference as well as personally and professionally enriching presentations, discussions and informal talks.

Matthias Weckerling

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Presented by:

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General rapporteur:

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Phone: ++49-(0)163-488 54 07

Conference languages:

German, English, Croatian, Russian

Tuesday, 17 November 2009

Arrival of participants / registration

06.30 p.m. Welcome reception at Hotel Excelsior

07.00 p.m. Dinner

Wednesday, 18 November 2009

09.00 a.m. Opening address:
Matthias Weckerling
Director of the German Foundation for International Legal Cooperation

Welcome address:

Minister Dr. Ivan Šimonović
Ministry of Justice of the Republic of Croatia

Dr. Bernd Fischer
Ambassador of the Federal Republic of Germany in Croatia

Andro Vlahušić
Lord Mayor of the Municipality of Dubrovnik

10.00 – 10.45 a.m. **"The Relevance of the Administrative Jurisdiction in a Democratic State based on the Rule of Law"**

Plenary presentations and discussion:

Rolf Hüffer
President of the Higher Administrative Court of Bavaria, Vice President of the Constitutional Court of Bavaria, Munich

Oleksandr Pasenjuk
President of the Supreme Administrative Court of Ukraine, Kiev

10.45 – 11.15 a.m. Coffee break

11.15 – 12.45 a.m. **"The Structure of an Administrative Jurisdiction in the Transformation States"**

Field reports and discussion:

– **illustrated at the example of Croatia**

Klaus Hage
Judge at the Administrative Court of Minden

– **illustrated at the example of Macedonia**

Dr. Gerd Heinrich Kemper
President of the Higher Administrative Court of Magdeburg and President of the Constitutional Court of Saxony-Anhalt, ret.

12.45 – 02.00 p.m. Lunch

02.00 – 02.30 p.m. **"Topical Issues Dealing with the German Administrative Jurisdiction"**

Plenary presentation and discussion:

Alfred Hartenbach
Parliamentary State Secretary at the Federal Ministry of Justice, ret., Immenhausen

02.30 – 03.30 p.m. **"The Effects of the Case Law of the European Court of Human Rights on the National Administrative Law and Administrative Procedural Law"**

Plenary presentation and discussion:

Dr. Jens Meyer-Ladewig
Ministerialdirigent, ret., Former Commissioner for Human Rights Issues in the Federal Ministry of Justice, Bonn

03.30 – 04.00 p.m. Coffee break

04.00 –05.30 p.m.

"Urgent Relief by the Administrative Courts"

Plenary presentations and discussion:

- system and practical problems in Germany:

Prof. Dr. Jan Bergmann
Judge at the Higher Administrative Court of Baden Wuerttemberg, Mannheim

- current problems in Croatia:

Zoran Pičuljan
State Secretary at the Ministry of Justice of the Republic of Croatia, Zagreb

Klaus Hage
Judge at the Administrative Court of Minden

07.30 p.m. Dinner

Thursday, 19 November 2009

09.00 – 10.15 a.m.

"Administration and Administrative Courts"

"Acceptance and Enforcement of the Rulings of the Administrative Courts"

Field reports and discussion:

- illustrated at the example of Germany

Peter Schroiff
Presiding Judge at the Higher Administrative Court of North Rhine Westphalia, Muenster

- illustrated at the example of Croatia

Gordana Marušić-Babić
Judge at the Administrative Court of the Republic of Croatia Zagreb

- illustrated at the example of Montenegro

Svetlana Budisavljević
Judge at the Administrative Court of Montenegro, Podgorica

10.15 – 10.45 a.m. Coffee break

10.45 – 12.45 a.m.

"Control of the Administrative Action in Germany"

Plenary presentations and discussion:

10.45 – 11.25 a.m.

- in the building law and environmental law

Dr. Birgit Spiesshofer
Lawyer, law firm Hengeler Mueller, Berlin

11.25 – 12.05 a.m.

- in the migration-related legislation

Peter Schroiff
Presiding Judge at the Higher Administrative Court of North Rhine Westphalia, Muenster

12.05 – 12.45 a.m.

- in the tax law by the fiscal jurisdiction

Hermann-Ulrich Viskorf
Vice President of the Federal Fiscal Court, Munich

12.45 – 02.00 p.m. Lunch

02.00 – 04.00 p.m.

Working groups

(A) Setting up an administrative jurisdiction – specialisation or independent structures?

Presented by:

Michael Hund
Vice President of the Federal Administrative Court, Leipzig

Valeriu Zubco
Chief Public Prosecutor of the Republic of Moldova, Chisinau

(B) Indispensable key points for a functioning control of governmental action based on the rule of law

Presented by:

Rolf Hüffer
President of the Higher Administrative Court of Bavaria, Vice President of the Constitutional Court of Bavaria, Munich

Prof. Stevan Lilić
Faculty of Law of the University of Belgrade

04.00 – 04.30 p.m. Coffee break

04.30 – 06.00 p.m. Continuation of the working groups

07.30 p.m. Dinner

Friday, 20 November 2009

09.00 – 10.00 a.m. **Presentation and discussions of the working group results from the previous day**

10.00 – 10.20 a.m. **Summary of the main conference results by the general rapporteur**

Dr. Christine Steinbeiß-Winkelmann
Ministerialraetin, Federal Ministry of Justice, Lecturer at Humboldt University of Berlin

10.20 – 10.45 a.m. Coffee break

10.45 – 11.30 a.m. **"The Effects of the Case Law of the Court of Justice of the European Communities on the National Administrative Law and Administrative Procedural Law"**

Plenary presentation and discussion:

Prof. Dr. Jan Bergmann
Judge at the Higher Administrative Court of Baden Wuerttemberg, Mannheim

11.30 – 12.15 a.m. **"Mediation in the Administrative Law"**

Plenary presentation and discussion:

Harald Walther
Judge at the Administrative Court of Darmstadt
Lecturer at the German University of Administrative Sciences of Speyer and at Johannes Gutenberg University of Mainz

12.15 a.m. Closing address by the organiser

12.30 a.m. Lunch

Departure

Opening address at the conference "The State before the Court – The Role of the Administrative Law and Administrative Jurisdiction for the Development of the Rule of Law" from 17 to 20 November 2009 in Dubrovnik / Croatia

Matthias Weckerling
Director of the German Foundation
for International Legal Cooperation

Ladies and Gentlemen,

On behalf of the German Foundation for International Legal Cooperation I would like to welcome you to this conference. I am pleased that so many interested, competent and wellknown participants, in particular judges, but also representatives from politics and administration, from science and other legal professions, have come here. Please understand that I cannot introduce and welcome everyone personally.

This regional conference for South Eastern Europe is taking place here in Dubrovnik for the eighth time - and I would like to take the opportunity to welcome the initiator of the series of conferences, Alfred Hartenbach. Until recently he was a Parliamentary Undersecretary at the German Federal Ministry of Justice and six years ago he not only initiated, but also secured the funding of the first conference of this kind with the title: "The Rule of Law and Civic Society - Requirements for a Modern Judiciary". On the subject of funding - the costs for this conference are mainly financed through budgetary means of the Federal Foreign Office. So I would like to take the opportunity to welcome the German ambassador to Croatia, Dr. Bernd Fischer, who will speak to us later.

The large number of interested and competent representatives from the judiciary, administration and legal science proves the interest in the topic of our conference: The participants in this conference are not only from the region of South Eastern Europe in the narrower sense, but also from the new member states of the European Union: from Bulgaria and Romania, but also beyond that from Georgia, Ukraine, Belarus and Turkey - and of course from Germany.

Almost all of these countries have an administrative jurisdiction – Turkey probably the oldest – and I would like to welcome Mr. Berberoğlu, member of the Danıştay, the Turkish Council of State. In our bilateral work, the setting-up of an independent administrative jurisdiction in Ukraine was a special concern. Therefore I would like to extend a warm welcome to the President of the Supreme Administrative Court of Ukraine, Mr. Pasenjuk. President Pasenjuk will speak this morning about the general significance of the administrative jurisdiction in a democratic state governed by the rule of law - after the President of the Bavarian Higher Administrative

Court, who at the same time is the Vice-President of the Higher Constitutional Court of Bavaria, Rolf Hüffer, whom I would also like to welcome here.

Lord Mayor Vlahušić, as I mentioned at the beginning, we are gathering here in the city of Dubrovnik for the eighth time. Dubrovnik is not just set amid beautiful landscape, as one can tell even at this time of the year, but it also has a great past and certainly a great future. In the past Dubrovnik was known under the name of Ragusa as a sovereign seafaring republic and an important centre of trade. It is also in many aspects an ideal place for events dealing with the topic of law and the state governed by the rule of law. This is not least documented by the Roland statue on the main square of Dubrovnik which has been representing the rule of law for almost 600 years there. Of course, it stood for criminal law, to be precise, for the so-called high justice, rather than for administrative jurisdiction, which did not exist as an independent category then. And it is documented by the inscription on the entrance portal of the Rector's Palace which calls upon the city fathers to concentrate on their public mission and put their private interests aside. But of course I do not want to pre-empt your welcome address, honourable Lord Mayor, I would just like to express how close we feel to your city!

There is a specific reason why we have chosen administrative jurisdiction as the topic for this year's conference here in Croatia: In spring we implemented a CARDS Twinning Project of the European Commission with the English project title "Support to more efficient, effective and modern Operation and Functioning of the Administrative Court of the Republic of Croatia". This project implementation was overseen by the former President of the Federal Administrative Court, Eckart Hien, who unfortunately cannot attend this conference. However, I am pleased to have Klaus Hage, the so-called Resident Twinning Advisor who was locally responsible for the contents of the project, amongst us.

As in other cases, we will not just leave it at the implementation of an EU project, but will try to ensure the sustainability of the efforts made within the projects through bilateral and multilateral activities. This does not only apply to Croatia: For example, in Macedonia and Bulgaria – here we also gave advice on the creation of a new legal basis - we are assisting in the further development of an administrative jurisdiction; in Serbia we have also provided comprehensive advice; in Moldova we are supporting the considerations on establishing an administrative jurisdiction, and all in all – as the diverse participation shows – the control of the administration by the courts, certainly also the transparency of administrative procedures and the shaping of a substantive administrative law are the joint concerns of all states represented here.

However, it is rather difficult to talk about "European standards" in this context. On the one hand, administrative jurisdiction as such is hardly a "European standard" – many legal systems manage without them, although, of course, there are judges and courts everywhere dealing with contentious administrative matters. Some time ago I read in a publication by the OSCE the statement of a Ukrainian project coordinator that the filing of an individual complaint before an administrative court is granted in "most parts of the world", however, such a statement can hardly be put to the test in reality.

The reason for that is probably well expressed in the title of our conference: "The State before the Court - the Role of the Administrative Law and Administrative Jurisdiction for the Development of the Rule of Law". I do not need to explain further that the control of administrative action by the courts is regarded sceptically by the administration itself – in particular in post-socialist bureaucracies – und apart from that there is the problem of competition from already existing jurisdictions which do not believe that a further specialised branch of jurisdiction is necessary or at least not a further Supreme Court. This is, for example, the situation in Ukraine, about which we will hear more today, and also the initial situation in the Russian Federation. A German administrative judge once said that the setting-up of a constitutional jurisdiction in Germany with its far-reaching competences is the biggest concession of politics to law, and correspondingly one could perhaps say that the setting-up of an independent and efficient administrative jurisdiction is also a considerable concession of politics and administration to law. Vice versa one could say: An empowered citizen in a democratic state governed by the rule of law must have the right to have administrative action by the state checked by independent judges!

When you travel south on the train from Bonn, where our institution has its seat, you pass a nuclear power plant which was built many years ago but which has not been connected to the grid for a single day, and therefore could never fulfil its original task. Residents had brought actions against the construction of the nuclear power plant and the Federal Administrative Court finally deemed these actions as well-founded – an example for effective, functioning individual legal protection by the administrative jurisdiction, which must and should be more than just the review of sanctions imposed by the administration. We will certainly discuss this issue intensively in the next few days. We want to do this by using specific examples from the states of this region and first and foremost from Croatia itself.

After the introductory presentations by Mr. Hüffer and Mr. Pasenjuk which I mentioned we would like to turn to the practical experience with the setting-up and the expansion of an administrative jurisdiction in the transformation states, taking the examples of Croatia and Macedonia. Mr. Hage will present the situation in Croatia and Dr. Kemper will speak about Macedonia. We do

not want to give the misleading impression that we do not want to let speakers from the respective jurisdictions have their say and just want to describe the German project experience. Let me therefore explain that the invited speakers from the administrative courts of Croatia and Macedonia unfortunately had to cancel. So I am all the more pleased that Gordana Marušić-Babić will speak tomorrow about the acceptance and enforcement of decisions of the administrative courts in Croatia and Svetlana Budisavljević will report about the situation in Montenegro. Peter Schroiff will complement these presentations from the German point of view.

After lunch Mr. Hartenbach will speak about current issues in the field of German administrative jurisdiction and after him Dr. Meyer-Ladewig will talk about an issue of interest to all participating states, the European dimension of our conference topic, that is the impact of the court rulings of the European Court of Human Rights on the national administrative and administrative procedural law. Dr. Meyer-Ladewig knows the topic not only from a German point of view, but also from the multilateral perspective of the Council of Europe as the former Chairman of the Steering Committee for Human Rights of the Council of Europe. This European dimension will be complemented by Professor Bergmann who will speak about the European Court of Justice on Friday. There is such a large time interval between those two presentations due to organisational reasons and we certainly do not regard the European jurisdiction in Luxemburg as less important - however, it does not concern – or better does not **yet** concern - most of the jurisdictions represented here.

Administrative legal protection can only be effective when it can be implemented before the final facts are established. Therefore we would like to address a rather specific topic this afternoon – urgent relief granted by the administrative courts based on regulations and practical problems in Germany and Croatia.

From our point of view in the planning of this conference the factual implementation, the enforcement of decisions of the administrative courts, is also of high practical relevance. We all know this issue from the field of civil jurisdiction, but the question of acceptance and enforcement of decisions is of course also a problem for other judiciary branches, even if the issue might not be that controversial with regard to the German administrative jurisdiction – but I do not want to presume to anticipate the results of Mr. Schroiff's presentation. And of course the enforcement of administrative acts themselves is also an issue.

As I mentioned before: The control by the administrative courts must amount to more than just the review of state sanctions. Therefore we have selected a few areas of substantive administrative law in which particularly interesting rulings were pronounced by the administrative courts: building law and environmental law – lawyer Dr. Spießhofer will give a presentation on that topic – migration law – this topic will again be introduced by Mr. Schroiff – and tax law, which in Germany at least is dealt with by another special administrative jurisdiction, the tax jurisdiction, and will be presented by Mr. Viskorf, Vice-President of the Federal Fiscal Court.

Despite the many interesting topics a multi-day conference can and should amount to more than the successive treatment in individual presentations in the plenary sessions. Therefore, we have again set up some working groups. Working group A will deal with the basic questions of setting-up an administrative jurisdiction, e. g. the question whether specialised judges and the respective panels of judges in a court are sufficient or if independent structures should be established for an administrative jurisdiction – as it has happened in Croatia and in three stages of appeal in Ukraine. The second working group B is to define and formulate indispensable key points for a functioning control of state activity based on the rule of law, certainly also against the background of the plenary presentations.

On Friday morning we will present the results from the working groups and then Dr. Steinbeiß-Winkelmann, who is head of the unit "Administrative, Tax and Social Jurisdiction" in the Federal Ministry of Justice, will summarize the conference results.

After the above-mentioned presentation by Mr. Bergmann on the impact of the ruling of the European Court of Justice on national administrative and administrative procedural law we will finally address the topic of mediation, a highly topical issue also in administrative law, at least in Germany. It would certainly be worth another, separate conference. Harald Walther, judge at the Administrative Court of Darmstadt, will present and explain the German experience with mediation in administrative law.

Ladies and gentlemen, such a comprehensively designed conference requires an experienced and competent moderator. I would like to thank Michael Hund, Vice-President of the Federal Administrative Court, the highest German administrative court, for taking on this role. He also participated in the planning of the conference programme. Vice-President Hund is also the former President of the Federation of German Administrative Judges. I'm mentioning this here to point out once more the following: We are not a foundation in the legal sense, but an association, in which the umbrella organisations of the German judiciary and the German lawyers are members, and the Federation of German Administrative Judges is one of them. Its president, by the way, was elected to our Board of Trustees last week.

Of course I am aware that we cannot comprehensively deal with the topic of this conference within two and a half days and therefore I believe it will be useful if we continue many of the issues which will be discussed here today and in the next few days in further multi- and bilateral activities. If you have any questions or suggestions - the responsible project managers are available: Ms. Fortuna for Croatia and Bulgaria, Dr. Pürner for Albania, Bosnia and Herzegovina, Macedonia, Kosovo and Montenegro, Dr. Hülshörster for Ukraine, Belarus and Moldova and Dr. Trappe for Romania and Turkey.

Finally, I wish us all an interesting and inspiring conference, which will contribute to the increasing significance of the administrative jurisdiction for the further development of the state governed by the rule of law in this region and in other countries.

REPUBLIC OF CROATIA
MINISTRY OF JUSTICE

PAPER
presented by Dr. Ivan Šimonović
Minister of Justice

Dubrovnik, 18 November 2009

Dear Colleagues,

Ladies and Gentlemen,

I feel very honoured to welcome you to the opening of this multilateral conference dealing with: The Role of the Administrative Jurisdiction for the Development of the Rule of Law. I would like to thank our hosts from the German Foundation for International Legal Cooperation for their hospitality and for the effort they have taken to organise this important conference.

The Republic of Croatia has paid particular attention to the role and development of the administrative jurisdiction within the reform of its judiciary. We are all aware that the judiciary is one of the fundamental functions of every state, besides the executive and legislative powers. One of the constitutive features of the relation under the administrative law is the privilege of the authoritative decision on the rights and duties of legal or physical persons owned by the higher-ranking party (national or local authorities).

Considering that the national or local authorities represent the public interest in the proceedings for establishing the rights and defining the obligations arising from the relation under the administrative law, the principle was introduced that this legal relation needs to be protected by an independent court. For this reason, the courts' control of the lawfulness of administrative acts is one of the essential issues in the administrative law of every state.

The fundamental criterion for the assessment of every modern legal system is the issue as to what extent judicial protection is ensured and how efficient it is. On the one hand, this principle ensures the protection of individual rights by the courts, and on the other hand, it prevents the executive and administrative powers from exceeding their authorities to the detriment of the citizens.

Prof. dr Stevan Lilić*

CONTRIBUTION TO THE DEBATE ON THE DRAFT LAW ON ADMINISTRATIVE DISPUTES IN SERBIA**

Web-Site of the Ministry

On the web-site of Serbian Ministry of State Administration and Local Government (www.drzavnauprava.gov.rs), one could read the following notice: „In the October 23 to November 11 period, a public debate is to be conducted on the Draft Law on Administrative Disputes", as well as that „participants in the public debate and other interested parties may submit comments and suggestions to the Ministry, by e-mail or post".

According to the information on the web-site of the Ministry, the new version of the *Draft Law on Administrative Disputes* ("LAD") was elaborated by a "Special Working Group", headed by the assistant Minister for State Administration and Local Government. The members include: a professor of the Faculty of Law of the University of Belgrade, a state secretary from the Ministry of Justice, judges of the Supreme Court of Serbia, as well as, a senior advisor in the Republic Secretariat for Legislation, an assistant Minister in the Ministry of Telecommunications and Information Society, an assistant Minister for State Administration and Local Government and an advisor in the Ministry for State Administration and Local Government.

In addition, in cooperation with the Council of Europe in Belgrade, in November 2009, the Ministry organized a Round Table with the title „Presenting and Discussing the Draft Law on Administrative Disputes", which was attended by the members of the Working Group, judges of the Supreme Court of Serbia, deans and professors of particular faculties and others.

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* Dr. Stevan Lilić (www.slilic.com), Professor of Administrative Law, Faculty of Law, University of Belgrade.

** This contribution is a resvised version of the presentation given at the Multilateral Conference "The State Before the Court - The Role of the Administrative Law and Administrative Jurisdiction for the Development of the Rule of Law", organized by the German Foundation for International Legal Cooperation (IRZ-Stiftung), November 17-20 2009, Dubrovnik (Croatia). The contribution is the result of research within the framework of the „Development of the Legal System of Serbia and its Harmoization with EU Law" Project of the Faculty of Law in Belgrade.

Public Debate / Debate in Public

According to the *Law on State Administration* (Official Herald of the Republic of Serbia, no. 79/2005), "A ministry or special organization is obliged to organize a public debate when preparing laws which significantly change the legal regime in a certain field or by which issues particularly of interest to the public are regulated" (Art. 77) .

Judging by the formulations in the text of the Draft Law on Administrative Disputes (Draft LAD), by the fact that the Draft LAD did not have an Explanation, as well as by the circumstance which administrative law experts were not invited to take part in the Round Table, one can conclude that no "public debate" had actually taken place. Instead, one could rather say that some kind of "debate in public" was organized.

The difference between a "public debate" and a "debate in public" is in the fact that, in a true public debate the agency proposing the daft law (i.e. the Ministry and its expert team), is obliged to present to the general and expert pubic arguments and convincing explications as to the reasons, motives and solutions for undertaking a new legislative project, as well as to respond with arguments and in a convincing manner to all substantial issues related to the new legislative project during the public debate. As opposed to this, in a "debate in public" this obligation does not exist, and the "expert debate" usually turns into a "talking spree". Cynics would say that that a "debate in public" is a sophisticated maneuver to cover something up from the public by using the "fig leaf" method.

Seven Thesis on the Draft LAD

As a contribution to the public debate on the Draft LAD elaborated by the Working Group of the Ministry of State Administration and Local Government (on this occasion not going into all details), we will present "Seven thesis on the Draft LAD" which should have been considered if Serbia really wishes a legislative text of good linguistic and legal quality, as well as a efficient tool for protecting the rights of citizens and legality which is in harmony with European standards.

Thesis no. 1: Administration as public service. One of the goals of adopting the new Law on Administrative Disputes was the transformation of the traditional state administration into a public service for the citizens.

This was particularly emphasized in a document adopted by the Government of Serbia titled "Strategy of State Administration Reform" (www.prsp.sr.gov.yu /dokumenta.jsp), which, *inter alia*, states: "... there are obvious trends which cannot be avoided, and which relate to the following (...) the understanding of the state as a service to the citizens, and not as a authoritative instrument of repression", but also at the Round Table "Presenting and Discussing the Draft Law on Administrative Disputes", at which the Head of the Delegation of the European Commission in Belgrade, said: "This law advances the life of the citizens and transforms the traditional state administration into a service for the citizens".

However, a formulation in the Draft LAD speaks to the contrary. In, Article 4 we read: "An administrative matter, as defined by this Law, is an individual non-judicial situation of public interest, in which directly from legal regulations, there results the need of *authoritative legal regulating*." Stating "authoritative" as a feature of an administrative matter, the authors of the Draft LAD do not support the transformation of the state administration into a "service for the citizens", but rather the view that the administration is a authoritative (repressive) power above the citizens.

Thesis no. 2: The object of administrative dispute. Every judicial procedure must have a clearly defined "object of dispute", i.e. what can be contested by a complaint. However, in the Draft LAD, the object of the dispute is in contradiction with other provisions of the same draft (*contradiction in adiecto*).

In Article 2, Paragraph 2, we read: "In an administrative dispute, the court also decides on the legality of final individual acts which decide on the rights, obligations and legal interests, for which in certain cases the law does not prescribe a different judicial protection". Although not particularly clear, this formulation itself is not unacceptable. However, if seen in conjunction with Article 15, which reads: "An administrative dispute may not be conducted against individual acts in matters decided by, on basis of direct constitutional authority, the National Parliament or the President of the Republic", the result is that according to one provision of the Draft LAD, an administrative dispute "may not be conducted" (Art. 15), while according to another provision (of the same Draft), an administrative dispute (Art. 2, Para. 2), "may be conducted". In legislation, these contradictions are impermissible.

On the other hand, although it is said that the Draft LAD contains significant innovations in relation to the current LAD, these differences do not exists in regard to the object of the dispute. For example, an essential difference between the Draft LAD and the current LAD would exist if the object of the dispute had been expanded by the Draft LAD, and consequently, apart from administrative acts, the Administrative Court would also decide on "other individual acts" (e.g. as in the LAD of Montenegro) or "administrative contracts" and "constitutionality and legality of general acts of regional and local bodies" (e.g. in the Draft LAD of Croatia).

Thesis no. 3: Oral hearings. On the occasion of the ratification of the *European Convention of Human Rights and Fundamental Freedoms*, our country (then the State Union of Serbian and Montenegro) had expressed four reservations regarding Article 6 of the Convention.

In the meantime, some of the reservations have been revoked, but the one referring to the non-holding of oral hearings in administrative dispute in Serbia is still in force. To harmonize the Draft LAD with Article 6 of the Convention, it is necessary for oral hearings to be mandatory (as in the LAD in Montenegro and the Draft LAD in Croatia). However, the authors of the Serbian Draft LAD have not designated oral hearings as mandatory. Instead, the following formulation is used: "In administrative disputes, the court, *as a rule*, decides after concluding oral hearings" (Art. 31).

This means that the oral hearing in administrative disputes is not considered mandatory, but rather a possibility ("as a rule"). The consequence of this formulation is that there is no ground for canceling the reservation to Article 6 of the Convention, and one must conclude that the issue of oral hearings in the Draft LAD is not in full harmonization with the European Convention on Human Rights.

Thesis no. 4: Draft LAD does not prescribe appeal. The right to appeal is considered a monumental "democratic heritage" which is at the disposal to the citizens against the decisions of the state (in this case the court).

The European Convention of Human Rights considers the right of appeal an essential component of the "fair trail" principle. However, according to Article 6, Paragraph 2 of the Draft LAD: "Against a judgment in an administrative dispute, *an appeal cannot be lodged.*" This is a drastic deviation, even in regard to the current LAD, which (although restrictively) does prescribe appeal.

Due to the non-existence of an Explication to the Draft LAD, both the domestic and European expert public was deprived of arguments and motives that guided the Working Group in its decision to exclude the appeal in the Draft LAD. It is particularly hard to imagine the harmonization of our administrative legislation with the requirements of the European *acquis communitaire* by eliminating the right to appeal.

Thesis no. 5: The Draft LAD does not provide full jurisdiction. In the context of the European Convention on Human Rights, in order for the administrative dispute to achieve its effect, the courts should be rendering their decisions which can substitute administrative decisions (full jurisdiction).

Although the current LAD prescribes the possibility of administrative disputes in full jurisdiction, judicial practice in Serbia does not accept and does not utilize this efficient institute of administrative justice.

Instead, present administrative disputes in Serbia have the form of a "paper dispute", in which the court does not go into the merits of the administrative matter, but only investigates the "legality" of the administrative act. In this respect, there is no significant difference between the Draft LAD and the current LAD (as opposed to the LAD in Montenegro or the Draft LAD in Croatia).

The Draft LAD prescribes full jurisdiction as a potential possibility. As the Draft LAD does not provide full jurisdiction as a principle, we can conclude that the Draft LAD does not full comply with the European *acquis communitaire* and the spirit of Article 6 of the European Convention of Human Rights.

Thesis no. 6: Urgency without grounds. On several occasions, the public was informed that the Draft LAD must be urgently adopted, with the explanation that the newly established Administrative Court cannot start working while the current LAD is in legal force.

This argument, however, is not convincing, as the Draft LAD itself prescribes a "transitory" application of the current LAD. Article 66 of the Draft LAD reads: "Undecided procedures on complaints and legal remedies, submitted up to the day that this Law entered into force, will be conducted by the competent court according to rules of procedure *which were in force before entry into force of this Law.*" This means that in a large number of cases, the new Administrative Court will still be applying the "old" LAD.

Thesis no. 7: The Draft LAD has significant deficiencies. In the *Serbia Administrative Legal Framework Report* (SIGMA, May 2009), *inter alia,* it is stated that: "The procedure of judicial control of administrative acts in Serbia is only partially harmonized with the procedural standards deriving from the recommendations of the Council of Europe." (p. 17).

Leaving on this occasion the numerous linguistic and legal inconsistencies in the text of the Draft LAD aside (e.g. instead of "complaint" for re-trail, the wording "request" for re-trail should be used etc.), the fundamental deficiency of the Draft LAD must be pointed out.

Namely, it is well known that the Law on Administrative Disputes (LAD) is functionally linked to the Law on General Administrative Procedure (LGAP). This means that when a new LAD is adopted, a new LGAP should also be adopted (and *vice versa*). Here this is not the case. In the procedure before the National Parliament, amendments (not a new Draft LGAP) to the existing LGAP are pending.

Bearing this situation in mind, it only seems logical that, instead of making a new LAD, amendments to the existing LAD should be made. It is not logical to make a Draft LAD without making a Draft LGAP. In finding a solution for this illogical situation, one should be both pragmatic and rational.

Conclusion

As we have shown, the text of the Draft LAD produced by the Working Group is essentially not harmonized with European standards in this field (no mandatory oral hearing; non-existence of appeal; full jurisdiction is not a principle, the current LAD will be applied to numerous pending cases). On the other hand, it seems rational that a new LAD should be produced at the same time as the new LGAP is to be produced: thus, full mutual harmonization of these two significant administrative pieces of legislation would be achieved.

Nota bene: The Draft LAD was adopted by the Serbian Parliament as the new Serbian Law on Administrative disputes in December 2009 (Official Herald of the Republic of Serbia, no. 111/2009). In last minute interventions, most of the discrepancies that were to be found in the Draft LAD have been corrected. However, one still remained – there is no appeal against decisions of the Administrative Court.

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Effects of the ECJ Case Law on the National Administrative Law and Administrative Procedural Law

A.

The former President of the European Commission, Jacques Delors, advanced the thesis as early as 1988 that 80 per cent of all rules of the commercial law, and 50 per cent of all other national acts were induced by EU legislation. Since then, these figures have been under discussion in terms of legal policy. They are ultimately not verifiable due to the interpenetration of legal subjects.

It is obvious that the EU legislation unfolds a unique (and for some people uncanny) dynamism as the broad development of primary legislation shows, starting with the Foundation Treaties of the ECSC, EEC and EAEC (1952/1958), through to the Single European Act (1987), the Maastricht Treaty (1993), the Amsterdam Treaty (1999) and the Treaty of Nice (2003), to the new Lisbon Treaty which was finally enacted on 1 December 2009. The competences of the EU have been significantly extended with every Reform Treaty. The EU bodies have made extensive use of these competences to enact secondary legislation: Hundreds of directives and thousands of regulations are passed year after year: The "acquis communautaire" which was drafted on the occasion of the EU enlargement to the East comprises more than 80,000 printed pages of applicable EU legislation today, divided into 31 chapters (insofar the principle "my way or the highway" furthermore applies for the candidate countries).

The EU legislation, however, has an enormous influence also on the national administrative law not only due to its sheer mass of acts: It is boosted by the ECJ case law which interprets the EU legislation especially according to the principle of the "effet utile", i.e. the "practical effectiveness". This principle means that every rule under the European legislation is to be interpreted to such an effect as to yield utmost benefit for the European integration process. On the one hand, the ECJ emphasises the principle of the Member States' autonomy in terms of their organisation and procedural law, but on the other hand, it is especially the effet utile case law which gives rise to a sometimes spectacular development of the law by the judges, for instance when the ECJ invents a liability claim incurred by public authorities or officials for those cases where national bodies - be it the executive or legislative powers (in the judgements Francovich I and Köbler) but also us, the judges - apply the EU legislation incorrectly and thus cause damage to a national.