Universal Decimal
Classification 342.9 : 351.87

Shmalii O. V.

THE CODE OF ADMINISTRATIVE COURT PROCEDURE AS AN ELEMENT OF CONSTITUTIONAL MODEL OF JUSTICE[1]

Shmalii Oksana Vasil'evna,
Doctor of law, Head of the Department of administrative and service law at South-Russian Institute – branch of Russian Academy of National Economy and Public Administration under the President of the Russian Federation, Rostov-on-Don.

The author provides a critical analysis of some of the provisions of the draft Code of administrative court procedure of the Russian Federation that has been introduced to the State Duma by the RF President. There is noted a lack of normative regulation of the procedure for consideration of civil lawsuits, the rules of collection, research and evaluation of evidence in support of civil lawsuits, the allocation of the burden of proof, measures to ensure a civil lawsuit, the possibility of appealing against decisions on a civil lawsuit, the procedures for the issue of a writ of execution in the draft Code. The attention is paid to the institute of representation in administrative court procedure.

Keywords: administrative court procedure, administration of justice, administrative justice, Code of administrative court procedure.

[1]Published on materials of VIII All-Russian scientific-practical conference «Theory and practice of administrative law and process» (Krasnodar — Nebug — 2013)

Administrative court procedure in the Russian Federation is carried out by the courts of general jurisdiction and arbitration courts. Administrative-procedural norms are contained in the Code of Civil Procedure of the RF, Arbitration Procedural Code of the RF and Code on Administrative Offences of the RF (hereinafter – CAO RF). The science of administrative law and judicial practice have repeatedly pointed to the contradictions of administrative-procedural norms in these codes and to complexities emerging during their application, what does not always ensure the rule of law in protecting the rights and freedoms of citizens and organizations. Consistently defending the constitutional postulates of independence administrative court procedure, the Supreme Court of the Russian Federation on September 19, 2000 introduced to the State Duma of the Federal Assembly of the Russian Federation a draft law on administrative courts, which was considered in the first reading on November 22, 2000 [1]. Later, in November 2006, to the State Duma, in accordance with the Decision of the Plenary Session of the Supreme Court of the Russian Federation, was introduced the draft Code of Administrative Court Procedure of the Russian Federation (hereinafter – draft Code) [2]. At the session of the State Duma the draft was not discussed; June 17, 2013 the draft was excluded from consideration of the State Duma in connection with the revocation of this document by the Supreme Court of the Russian Federation.

Apparently, the reason for the revocation of the draft Code is the fact that in March 2013 the President of the Russian Federation introduced to the State Duma a new draft Code of Administrative Court Procedure of the Russian Federation [3].

Heated debates concerning administrative court procedure took place at the VIII all-Russian Congress of Judges on December 18, 2012. As if long-term efforts of researchers in the field of elaboration of procedural norms of administrative legislation have got a new breath. The controversy, which was unfolded at the Congress, was somewhat unexpected for the President of the Russian Federation, but it was absolutely logical from the standpoint of law enforcer, because the issues related to administrative court procedure not only mediate legislative innovations, but, as a rule, precede judicial reform. At the specified Congress the President of the Russian Federation denoted the creation of administrative court procedure and protection of citizens through laying the burden of proof on public authority as one of the main directions for optimization of administrative justice. At that, the issue on establishment of administrative courts still was not resolved. The Head of the State said in his speech: "We must first complete the establishment of administrative court procedure, as soon as possible adopt the appropriate Code and form judicial panels that will settle disputes of citizens with public authorities and bodies

of local self-government" [4]. Thus, creation of specialized administrative courts is not planned at this stage of the optimization the model of administrative court procedure, what somewhat at odds with the general concept of administrative justice, an integral part of which is the system of administrative courts.

The literature has repeatedly expressed the view, according to which "... all cases arising from administrative and other public relations should be considered by the courts of general jurisdiction. Arbitration courts also should be merged with the courts of general jurisdiction in a unified judicial system. All this would take away the very acute problem of determining jurisdiction of cases, which are currently being considered as by courts of general jurisdiction and by arbitration courts" [8, 55]. The result of the years of disputes on this occasion has become the proposal of the President of the Russian Federation to merge the Supreme Court of the Russian Federation and the Higher Arbitration Court of the Russian Federation. This merging is explained by the need for unification of judicial practice, which in itself is quite topical, but in the absence of a clear understanding of the merged system and the uncertainty of consolidation procedure it raises more questions than answers.

Four forms of court procedure established by part 2 article 118 of the Constitution of the Russian Federation have their own specificity of purposes and legal regulation, but they are designed to solve a common problem – ensuring rights and freedoms of man and citizen through administration of justice. Thus, all forms of court procedure must be considered in the tight functional unity. As a consequence, "exhaustively mentioned four forms of court procedure represent optimally necessary totality guaranteeing full judicial protection, the right to which is provided under article 46 of the RF Constitution. Accordingly, the absence of any of court procedures reduces the effectiveness of judicial protection" [6].

Of course, the adoption of the Code of Administrative Court Procedure of the Russian Federation will promote not only to the development of an applied direction of the administrative court procedure, but also will lead to a change in the doctrinal understandings of administrative process, the debates on the subject and content of which have not been subsiding for years.

There are two approaches to the determination of administrative process in modern science – "narrow" and "wide"; some authors also speak on judicial and non-judicial administrative process [5]. On the basis of the maxim known as "Occam's Razor" – entia non sunt "multiplicanda praeter necessitate – do not multiply entities beyond the necessary, I note that the leitmotif of many debates is the allocation of administrative-procedural law in an independent branch of law.

The lack of a commonly recognized in the doctrine concept of "administrative process" is evident in law-making and law-enforcement spheres in the form of normative collisions and defects in legal practice.

Clearly that the adoption of the Code of Administrative Court Procedure of the RF will be a major step towards increasing the efficiency of the administrative-procedural legislation, however, it will not resolve finally the task of forming administrative justice.

The Russian Constitution stipulates that the judicial power is exercised through constitutional, civil, administrative and criminal court procedure. Hence, it is reasonable to assume that the Code should regulate the procedure for consideration of all administrative and court procedure cases, but this is not so.

The cases, the procedure for consideration of which will be defined by the Code, include the cases that currently defined by chapters 24-26.2 of the Code of Civil Procedure of the RF. In particular, the cases on contesting norms, acts, decisions, actions (inaction) of public authorities, local self-government bodies and their officials, as well as cases on protection of electoral rights. Other cases that are currently resolved in the course of administrative court procedure, will still be considered by arbitration courts and courts of general jurisdiction under the rules of the Arbitration Procedural Code of the RF and CAO RF (apparently this approach will be revised in view of the forthcoming merging of the Higher Arbitration Court of the Russian Federation and the Supreme Court of the Russian Federation).

Article 5 of the draft Code, by analogy with criminal process (article 44 of the Criminal Procedure Code of the RF – civil plaintiff), provides for the possibility of simultaneous resolving a civil claim for damages, including moral damages, when considering administrative case by court. However, the draft does not include the mechanism for the implementation of this norm, what seriously complicates the implementation of articles 52 and 53 of the Constitution of the Russian Federation. So the draft doesn't stipulate the procedure for consideration of civil claims, the rules of gathering, examination and assessment of evidence that substantiate civil claims, apportionment of the burden of proof, the measures of ensuring civil claim, the possibility of appealing against a decisions concerning civil claim, the procedure for the issue of a writ of execution.

As a result, the courts will be forced to resort to the analogy of law (obviously – to similar institutes of civil-procedural legislation), what, in our opinion, is not the most effective means for overcoming the gaps of legal regulation of administrative-procedural relations and is fraught with serious problems of implementation the right to judicial protection. Thus, an aggrieved person, who brings a civil claim in

an administrative case in the absence of normatively established procedure for the implementation of article 5 of the draft Code, risks to lose its right to further judicial recourse with a similar civil claim due to the ban enshrined in paragraph 2 part 1 article 134 of the Code of Civil Procedure (identity of claims). Moreover, in case of appeal of judicial decision concerning civil claim, according to part 2 article 188 of the draft Code this will entail not-entering into legal force of the judicial decision in general, and, therefore, in its main part (administrative claim). In turn, this means that the elimination of the violation of the rights, freedoms and legitimate interests of an administrative plaintiff or obstacles to their implementation or obstacles to the implementation of rights, freedoms and legitimate interests of persons, in whose interest the relevant administrative lawsuit is submitted, is postponed [7]. Here it is worth noting that in the 2011-2012 75% of criminal cases were accompanied by civil claims. Taking into account the categories of administrative cases that are alleged to be considered in administrative court procedure, such percent hardly will be below.

Another, in our opinion, positive novelty is enshrining in part 1 article 57 of the draft Code of a qualification requirements for representative – possession of higher legal education. The purpose, for which the developers of the draft have introduced this norm, is clear – ensuring the right to receive qualified legal assistance guaranteed to everyone under part 1 article 48 of the Constitution of the Russian Federation. However, the mechanism for the implementation of this provision cannot but raise objections. From the meaning of part 1 article 60 of the draft Code it follows that court is obliged to check the powers of persons and their representatives participating in an administrative case; in accordance with the second part of the article, the court decides the question of accepting the powers of persons and their representatives involved in the administrative case, and their admission to participate in court hearing on the basis of the study of documents submitted to the court by the said persons. The uncertainty of this power of the court not only unduly expands the boundaries of judicial discretion, but also opens up the possibility of the abuse of right. Quite predictable a situation where the court in checking the powers of representative on the basis of submitted documents, will come to the conclusion about the need to determine the existence of license to carry out educational activities at the time of receiving by the representative the document of higher legal education.

Possible option for optimizations the institute of representation in administrative court procedure is seen in revival the institute of licensing of activity on providing legal assistance and establishment of a qualification requirements in the

form of availability of an appropriate license. At that, it is necessary to avoid the fiscalization of the institute of licensing (an obvious example: under the action of the Regulation on licensing of paid legal services the latter constituted, mainly, the way of replenishing the state budget by licensing fees). In the licensing activity must be fully implemented functional component of licensing – state control over the licensee's qualifications and legality of the licensed type of activity. Licensing mechanism should provide for preliminary control (verification of compliance of license applicant with qualification requirements) and subsequent control (control over the legality of licensed activity, expressed in verifying the compliance of the licensee with license terms and requirements). Licensing of legal activities should be carried out by the bodies of justice of the constituent entities of the Russian Federation. Licensing bodies should be empowered to conduct inspections of licensee activity for compliance of activities carried out by the licensee with the licensing requirements and terms, to take compulsory for the licensee decisions obliging it to eliminate detected violations, to establish deadlines for eliminating these violations, as well as to suspend an issued license. It is advisable, in our view, to differentiate the types of licenses depending on the nature of rights protection activity, for example: legal assistance to legal persons, rights protection activity in respect of citizens. Successful passing of qualifying examination should be a prerequisite for the issuance of a license; the organizational form of the institute of qualification examination can be Qualifications Commission created under the body of justice from the representatives of the Chamber of Lawyers, scientists, and law enforcement officers.

These and other issues must be resolved in the theory and practice of administrative court procedure, which, I hope, will gain in the future a complete legal framework in the form of the Code of Administrative Procedure.

References:

1. The decision of the Plenary Session of the Supreme Court of the Russian Federation No. 29 from September 19, 2000 "On the Introduction to the State Duma of the Federal Assembly of the Russian Federation the Drafts of Federal Constitutional Laws "On the Federal Administrative Courts in the Russian Federation", "On Amending the Federal Constitutional Law "On the Judicial System of the Russian Federation" and "On Amendments and Additions to the Federal Constitutional Law "On Military Courts of the Russian Federation" [Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 19 sentyabrya 2000 g.

№ 29 «O vnesenii v Gosudarstvennuyu Dumu Federal'nogo Sobraniya Rossiiskoi Federatsii proektov federal'nykh konstitutsionnykh zakonov «O federal'nykh administrativnykh sudakh v Rossiiskoi Federatsii», «O vnesenii dopolnenii v Federal›nyi konstitutsionnyi zakon «O sudebnoi sisteme Rossiiskoi Federatsii» i «O vnesenii izmeneniya i dopolneniya v Federal›nyi konstitutsionnyi zakon «O voennykh sudakh Rossiiskoi Federatsii»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2013.

2. The decision of the Plenary Session of the Supreme Court of the Russian Federation No. 55 from November 16, 2006 "On the Introduction to the State Duma of the Federal Assembly of the Russian Federation the draft Code of Administrative Court Procedure of the Russian Federation" [Postanovlenie Plenuma Verkhovnogo Suda Rossiiskoi Federatsii ot 16 noyabrya 2006 g. № 55 «O vnesenii v Gosudarstvennuyu Dumu Federal'nogo Sobraniya Rossiiskoi Federatsii proekta Kodeksa administrativnogo sudoproizvodstva Rossiiskoi Federatsii»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2013.

3. Draft No. 246960-6 of the Code of Administrative Court Procedure (regulation of the order of administrative court procedure implementation by the courts of general jurisdiction) (introduced by the President of the Russian Federation) [Proekt № 246960-6 Kodeksa administrativnogo sudoproizvodstva (regulirovanie poryadka osushchestvleniya sudami obshchei yurisdiktsii administrativnogo sudoproizvodstva)]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2013.

4. Vladimir Putin's speech at the VIII All-Russian Congress of Judges. Available at: *http://pravo.ru/doc/view/291/373/* (accessed: 25.09.2013).

5. Kolomoets T. A. Terminology of Administrative Process: Issues of the Certainty of Related Range of Terms [Terminologiya administrativnogo protsessa: problemy opredelennosti smezhnogo terminologicheskogo ryada]. *Administrativnoe pravo i protsess – Administrative Law and Process*, 2013, no. 4.

6. Serkov P. P. Administrative Justice in Russia: Issues of Theory and Practice [Administrativnaya yustitsiya v Rossii: problemy teorii i praktiki]. *Rossiiskii sud'ya – Russian Judge*, 2012, no. 12.

7. Skoblikov P. *Draft Code of Administrative Court Procedure: Flaws, Gaps and Conflicts* [Proekt Kodeksa administrativnogo sudoproizvodstva: iz"yany, probely, kollizii]. Available at: http://library.zakon.ru/Discussions/proekt_kodeksa_administrativnogo_sudoproizvodstva_izyany_probely_kollizii/7048 (accessed: 22.09.2013).

8. Slepchenko E. V. Administrative Court Procedure: Concept, Unity and Differentiation [Administrativnoe sudoproizvodstvo: ponyatie, edinstvo i differentsiatsiya]. *Rossiiskaya yustitsiya – Russian Justice*, 2009, no. 3.