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TOWARDS THE QUESTION ABOUT THE PLACE OF ADMINISTRATIVE CONTRACT IN THE SYSTEM OF ADMINISTRATIVE LAW[1]

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The author argues that contractual regulation penetrates into the branch of administrative law, becoming an independent legal phenomenon, designed to be an auxiliary means of regulating social relations within the framework of executive-managerial activity.

Insufficient elaboration of the theoretical aspects of the theory of administrative contract and the need to determine what approaches to determination of the place, role and essence of administrative contract have been formed in the legal literature are noted in the article.

Determining the external expressions of administrative contract, the author emphasizes that administrative contract, first and foremost, is a comprehensive legal relation that is based, as opposed to an administrative act, on bilateral will expression of the parties.

Keywords: administrative law, administrative contract, public administration, administrative-legal regulation.

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The development of interdisciplinary research leads to the interpenetration of forms and methods of legal regulation. This fact confirms the possibility of using contractual forms, based on the principle of optionality, in such branch as administrative law, which has traditionally been based on mandatory methods of legal impact.

Administrative contracts issue today is not in the second tier of administrative-legal science, and is at the forefront of it. And this is conditioned not only by various socio-economic, political and other socially significant aspects, but also by the need of administrative-legal science to determine the place, function and role of contractual regulation in administrative (managerial) relations. Application and use of administrative contracts in the sphere of public administration has the closest connection with the practice of public administration, which feels the need for appropriate legal regulation. And, as you know, a prerequisite for the formation of a legal framework is certain theoretical exploring.

Modern trends in the science of administrative law allow saying that the theme chosen for the study has not only theoretical, but also practical significance, because it allows you to identify the causes that affect on the place of administrative contract both in the system of administrative law and in the system of public administration.

Pretty much, legal scholars still have not carried out fundamental researches concerning the place and role of administrative contract in the system of administrative law. The solution to this problem will define administrative-legal nature of this phenomenon, which, as we know, has a quite multifaceted nature.

It should be noted that contractual relations in general are alien to managerial relations. Recently, however, there is an objective need for the existence of conciliation procedures, which stipulate the application of contractual form of regulation of managerial activity. There is also no need, which is dictated by socio-economic aspects, to reduce administrative law exclusively to the methods of administrative and authoritative impact on public relations.

Development of understandings of about administrative contract is associated with the expansion of scientific researches within the framework of administrative law. Problematic of administrative contract extends not just through new research, but also through comprehensive study of the subject on several fronts.

In our view, it is necessary to eliminate a gap formed in the administrative-legal science by determination the place and role of administrative contract in the system of administrative law.

Traditionally, the use of the term of "contract" is characteristic of civil law. However, due to the above-mentioned possibility of application of this legal category in administrative law, as well as the importance of this concept for administrative-legal regulation, the use of the sectorial concept of "contract" to the terminology of management is not quite justified. In terms of the understanding of this term in administrative law, it must be adapted to managerial relations.

This fact gives rise to the need to operate a large number of categories, not specific to administrative law, reflecting the essence of civil-law relations going beyond administrative-legal regulation. Features of administrative-legal regulation in different spheres and sectors of the public administration require the use of special terms and concepts, as well as explanation of these terms. All of the above together causes some difficulties for legal-scholars.

However, as the experience of the administrative-legal researches shows, certain administrative-legal categories and concepts have penetrated from other branches of both public and private law. In connection with this, one should agree with the point of view of the Yu. E. Avrutin about that it is difficult to give even an approximate list of the concepts that "have come" in administrative law from other branches of law [1, 5].

Within the framework of administrative law you cannot unequivocally accept civil doctrine as the basis when the study of the category of "administrative contract". Of course, you will need to use the civil-law researches of contract, but it is not advisable to apply concepts that have been developed within the framework of private-law regulation. Here we cannot support the view of I. A. Ostapenko that to enter into and perform administrative contracts it would be appropriate to use, though in specific limits, stipulated by the civil legislation general requirements of contractual law [11, 37].

The author also points out that administrative contract in the system of legal relations takes an intermediate position between administrative act and contract of private-law nature. In this, administrative contracts are subject to the general principles of contractual law, with certain restrictions, due to the peculiarities of administrative-legal regulation [11, 39-40]. However, it is not entirely clear towards what sectorial affiliation does contractual law gravitate? If from the point of view of civil law, then the application of the general provisions is considered to be inappropriate.

We believe that in considering administrative contract, one must be rely on research carried out in the framework of the general theory of law, which determine the place and role of contract in the system of legal regulation as a whole.

It should be noted that there is a "chaos" in administrative law science, which is caused by the existence of different concepts, scientific ideas, opinions, doctrines, views and opinions on the nature of administrative contract. However, there is no a unified theory of administrative contract. The mentioned forms of views about the concept and essence of administrative contract are very close to each other in content, since they are fundamentally based on the ideas of two-three scientists made back in the early 90-ies of the XX century. In subsequent studies the concepts are formulated through complementing existing views by actual materials. Terminological diversity of definitions of administrative contract is due to a lack of legal consolidation of this notion in the current legislation.

In recent years there has been a sufficient number of works devoted to the specific issues of administrative contract. This indicates a positive dynamic and allows you to talk about the transformation of views on administrative contract in the process of their case study.

However, in our subjective opinion, perhaps only dissertation research of L. V. Shcherbakova devoted to administrative and contractual obligation [16] significantly enriched the administrative-legal science, although the study has touched only one aspect of administrative contractual theory.

The attempts that have been taken by the scientific community on the proposal of legislative enshrining of unified provisions concerning administrative contracts [9, 209-214] have not led to the emergence of real normative legal acts. This, in our view, is due to inadequate study of the theoretical aspects of the theory of administrative contract.

Regulatory framework for administrative and contractual practice at present is represented by the norms of administrative law that are contained, usually, in different sources.

We should agree with the point of view of L. V. Shcherbakova that, as a matter of fact, the European model of administrative and contractual obligations with a minimum level of adaptation to the domestic legal realities has been shifted into the Russian legislation, what will not allow to develop and enrich the theoretical base of administrative contract [17, 288].

There is no a unified doctrinal approach to the definition of the place and role of administrative contract. Therefore, it seems to us that it is necessary first of all to focus efforts of legal scholars and move from the discussion to offering real definitions, which subsequently could be legally enshrined. Only in this way it will be possible to eliminate a gap formed between administrative-legal science and practice.

However, hard as legal scholars try, in the field of view mainly remains only the contract itself. It seems to us that the extension of the subject matter of raised problem would make it possible to comprehensively explore the legal nature of administrative contract.

On the other hand, we should mention the fact that most of the main administrative-legal categories are also enough debatable to date.

As rightly pointed out by Yu. E. Avrutin, interest towards the conceptual apparatus of administrative-legal science is quite high and is aimed at understanding the prospects for consolidating the doctrinal judgments into legal interpretation in normative legal acts [1, 6, 7].

For the task you need to determine which approaches have developed in the legal literature to determine the place, role and nature of administrative contract.

To solve this task one need to determine what approaches have developed in the legal literature concerning determination the place, role and essence of administrative contract.

So, Yu. N. Starilov attributes administrative contract to one of the administrative-legal forms of realization of managerial actions [5, 401]. Most authors of modern textbooks on Russian administrative law [4, 159-164; 7, 142-148; 6, 294-296; 2, 263-266; 3, 155-158] also attribute administrative contract to one of the form of public administration.

O. S. Rogacheva and E. A. Koshevarova correlate administrative contract with the form of public administration that allows regulation of public relations on the basis of will and expression of will of administrative law subjects, who have volunteered to take on certain obligations in order to achieve a public good [13, 42].

Certainly, the forms of public administration play an essential role in the mechanism of realization the powers of public authorities. You must also take into account, as rightly pointed out by N. G. Kanunnikova, that forms of public-managerial activity of executive authorities and their officials are defined by law, enshrined in the laws and other normative legal acts governing the activities of these bodies. Therefore, in the public administration public authorities and their officials are obliged to use only those forms of activity that are established by the norms of administrative law [8, 12].

Specified author by giving the notion to the form of public administration argues that it is an outwardly expressed kind of action of a public authority, which fills executive branch by state-legal content, represented by administrative-legal acts that promote the goals, objectives and functions of public administration and generate legal effects [8, 12]. As follows from the definition, administrative contract

does not refer to the external form of expression of a public authority action, that is not uncontroversial.

In turn, I. A. Ostapenko, considering the issue of place of administrative contract in the system of contractual law, notes just the fact that the administrative contract is an institute of administrative law [11, 39-40], without giving proper attention to the problem of correlation of administrative contract with other institutes of administrative law, and not pointing to its place among other institutes.

There is also a point of view on the possibility of attributing administrative contract to the legal form of expression the method of regulation of public relations [14, 53-72]. A. I. Stahov also regards the contract as a special legal tool aimed at ensuring of execution [15, 23].

In our view, such interpretation of administrative contract also has the right to exist, since it seems possible to talk about contractual method as about a separate method of administrative-legal regulation of managerial relations, or contract as about a separate element of administrative-legal regulation.

Thus, contractual regulation also penetrates the branch of administrative law, becoming an autonomous legal phenomenon designed to be an auxiliary tool of regulation of public relations within the framework of executive-managerial activity.

In turn, A. Yu. Melehova rightly notes that so far there is no a unified concept of administrative-contractual regulation in the existing Russian legislation [10, 55]. In support of the specified author's point of view you must also emphasize that the theory of administrative law lacks of not only a unified understanding of administrative regulation, but also of well-established view about the possibility of existence of such regulation.

Also the legal literature indicates that the relations concerning the conclusion, execution and termination of administrative contract are regulated by substantive and procedural norms, the totality of which should be considered as an independent institute of administrative law [10, 55-56]. And once again, we emphasize that there is no mention of the place of this institute in the system of administrative law.

Moreover some authors [5] transfer the problem of the administrative contract into administrative-procedural plane, saying about a special administrative-contractual procedure. In this connection one has to point out that, of course, the procedural aspect of administrative contract has the right to exist, but, in our view, it is not completely justified to move it beyond substantive law without a precise determination of its place and role in the system of administrative law,

while being based on the Western-European model of administrative-procedural legislation.

Also, it is not clear about place of administrative-contractual proceedings (or procedure) within the framework of the administrative process in general. This applies to issues dealing with disputes that may arise on the basis of concluded administrative contracts. So, in the light of the draft Code of Administrative Court Procedure of the Russian Federation [12] it is difficult to determine whether will the disputes arising between the parties of an administrative contract be settled in the course of administrative proceedings.

Criticizing the concept of administrative-contractual proceedings (procedure) it is fair to say that categories such as conclusion, amendment and termination of administrative contract is broader than the concept of "administrative proceedings", because the dynamics of administrative contract must be also included into the content of such proceedings. Within the framework of administrative proceedings or administrative procedure set out exclusively procedural actions that do not reflect the essence of a contractual obligation. It is necessary to make a reservation that our position on this issue is also not indisputable.

Numerous and quite dynamically developing views on of administrative contract tell us about enough high interest in the subject. However, as we have noted above, this fact only notes the relevance, and it is early to say about sufficient elaboration of this issue.

A critical look at the existing ideas about the place and role of administrative contract in the system of administrative law may lead to the conclusion that this issue is not resolved from a theoretical point of view.

Thus, administrative contract has a complex legal nature. It is often considered as a form of public administration and as a method of state-legal impact. However, these are only the external manifestations of administrative contract. But we must not forget that administrative contract, in the first place, is a complex legal relation, which, unlike an administrative act, is based on bilateral expression of will of the parties.

Current trends suggest that the theory of administrative contract develops within the framework of theoretical problems of the forms and methods of public administration. These directions, in our deep conviction, have a right to exist, but are not fully justified because they do not give a full explanation of the essence of administrative contracts.

At first sight it might seem that administrative contract must be seen as a form of expression the activity of participants of managerial relations arising in

connection with the implementation of their subjective rights and responsibilities in the area of public administration. For a number of reasons it is impossible to fully agree with such an approach:

First, in the legal sense the contract should be understood as a form of exposition of these or those relations, that is, as a kind of administrative legal relation based on mutual expression of will of the parties.

Second, administrative contract can be characterized as a legal relation of a regulatory nature.

And, finally, third, administrative contract can be called complex administrative-legal relation having a complex legal nature, characterized by the possibility of legal regulation by the various branches of public law.

It seems to us that the theory of administrative contract must evolve within the framework of the substantive part of the theory of administrative-legal regulation mechanism, and administrative contract, respectively, can be its independent element, acting as a kind of administrative legal relation.

There are serious prerequisites to identification the institute of administrative contract as a complex legal institute that requires system study from the point of view of different approaches.

The above thoughts and opinions give a reasonable right to talk about the formation of the institute of administrative contract within the framework of administrative law, which has its own legal regulation.

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