The Topical Issues of Public Law

SCIENTIFIC-PRACTICAL INFORMATIONAL EDITION
REGISTERED IN THE ROSKOMNADZOR. REGISTRATION NUMBER - EL. NO. FS 77-48634, 20.02.2012.
IS PUBLISHED MONTHLY. THE MAGAZINE HAS BEEN PUBLISHED SINCE JANUARY, 2012.

No. 4 (34) 2015

The issue allowed for posting on the web site
on the 20th of October 2015

Vypusk dopushhen k razmeshheniju na sajte
20.10.2015

•CONTENTS•

PRINCIPLES OF ADMINISTRATIVE PROCEDURES: COMPARATIVE LAW RESEARCH 3
Davydov K. V.

PROBLEMS OF ADMINISTRATIVE PROCEDURES IN STATE STRATEGIC PLANNING 35
Kudryashova. E. V.

ADMINISTRATIVE ARREST: PROSPECTIVE LINES OF IMPROVEMENT THE LEGAL REGULATION 46
Kuyanova A. V.

THE APPLICATION OF PROCEDURAL REQUIREMENTS FOR ADMINISTRATIVE DECISION-MAKING IN VIETNAM'S JUDICIAL PRACTICE 53
Nguyen Van Quang

ADMINISTRATIVE PROCEDURES: SOME ISSUES OF PUBLIC ADMINISTRATION IN THE FIELD OF MIGRATION 62
Sherstoboev O. N.

REFORM OF ADMINISTRATIVE LAW AND ADMINISTRATIVE REFORM IN JAPAN – ADOPTION OF THE LAW ON ADMINISTRATIVE PROCEDURES 74
Shigeru Kodama

ADMINISTRATIVE PROCEDURES FOR THE EXECUTION OF INDIVIDUAL LEGAL ACTS OF PUBLIC ADMINISTRATION 90
Vasil'eva A. F.

Universal Decimal
Classification 342.9

Davydov K. V.

PRINCIPLES OF ADMINISTRATIVE PROCEDURES: COMPARATIVE LAW RESEARCH

Davydov Konstantin Vladimirovich,
c.j.s (PhD in law), the First vice-rector of private educational institution of higher vocational education "Omsk Law Academy", Omsk.

Based on the analysis of the Anglo-Saxon doctrines of "natural justice" and "due process" the author summarizes their limited applicability to the Russian rule of law. The article shows the evolution of all the basic principles of administrative procedures, limits to the scope of their action and the logic of possible evolution in the future.

It is noted that in the absence of a special framework normative legal act – the Law on Administrative Procedures – relevant principles, under the influence of the European tradition of "good governance", "sprout" out of separate laws and court decisions, develop unsynchronized.

The necessity of adoption a sustainable law on administrative procedures, backed by an adequate doctrine, is substantiated.

Keywords: administrative procedures, principles of administrative procedures, "natural justice", "due process", "good administration", the principle of proportionality, legitimate expectations, the right to be heard, the justification of an administrative act, law on administrative procedures.

It is difficult to overestimate the importance of legal principles at all stages of legal regulation. Norm-setting, law-enforcement activity of public administration, as well as administrative court procedure is pierced by principles of not material, but crucially important legal "substance". The principles determine the formation of legal system, legal institutes. The principles directly operate within the analogy of law. Application of the principles of law plays a crucial role in the evaluation of other legal phenomena.

Principles of administrative procedures are intended to:

1) often preceding the adoption of certain laws, anticipating the formation of procedures, to "prepare" the rule of law for their appearance, and "hasten" the legislator;

2) to ensure the known universality of the legislation on administrative procedures; at that, it should be born in mind that the action of principles of administrative procedures can go beyond specific law, they are inherently eager to embrace the maximum range of public relations. And this desire is understandable and even fair, because we are not talking about the principles of a law, but the phenomenon that is more or less fully covers the whole system of administrative procedures of various kinds;

3) to help in establishing balance between legal and non-legal foundations of procedures;

4) to balance public and private interests, including protection of powerless persons against possible abuses of the subjects of management, and on the other hand, to shield public administration from the bad faith of citizens and organizations;

5) finally, the purpose of principles is to ensure the reality, particular regulativity of administrative procedures through the "fine-tuning of law", analogy of law and legislation, as well as in the role of means of assessing allied legal phenomena – especially discretionary administrative acts.

More than half of a century ago, a well-known Russian specialist in theory of law S. S. Alekseev put forward the concept of "legal regimes". If before Russian legal scholars delimited the sectors of national law using only two criteria – the subject and method of legal regulation, then S. S Alekseev suggested one more – principles of a branch[1].This prediction of increasing the role of principles, alas, proved to be a largely unrealized. The very system of the principles of Russian law has never been built. And their role in the mechanism of legal regulation was formulated

1 Alekseev S. S. General Theory of Law [Obshchaya teoriya prava]. Moscow: 1981, vol. 1, pp. 185, 245.

pretty conventionally. And if the experts in certain sectors of the Russian law (e.g. civil one) in alliance with the legislator tried to give the issue some attention, in the Russian administrative law the sectorial principles so largely were left unexplored.

In the case of procedural principles, the situation is more complicated. On the one hand, the principles of public and private process are well known to the Russian rule of law. At that, they quite correspond to all major international standards. So, the provisions of article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms on the right to a fair trial is fully implemented into the Russian criminal (and, to some extent, civil) process[2]. But on the other hand, the very institute of administrative procedures and, in particular, their principles and even the doctrines are still largely scantily explored and poorly understood problem for of the Russian legislator.

But before analyzing them we ask a few provocative questions, which reflect some of the challenges that face the institute of administrative procedures in foreign legal systems.

1. Do the attempts of their legalization, including in the texts of laws, correspond to their essence?

According to Julio Ponce, the development of administrative procedures is a "battle of norms and principles", a constant fight between the restrictions of formalization and informal "mobility", flexibility[3]. Skeptical assessments can be found in a slightly different context. According D. Kenneth, "Principles of legitimacy and legality are criticized by individual researchers for their excessive

2 Article 6 "The right to a fair trial":
1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
b) to have adequate time and facilities for the preparation of his defence;
c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court (legal reference system Konsul'tant Plus).

3 See: Ponce, J. Good Administration and Administrative Procedures, Indiana Journal of Global Legal Studies, 2005. Vol. 12, issue 2, pp. 564-565.

extravagance; they do not work because of the wide distribution of discretionary powers" [4].

It appears that there is no an insuperable abyss. The ways of curbing discretion are, on the one hand, the mechanisms of transparency, public involvement (here the principles of administrative procedures are indispensable), and, on the other hand, proper administrative and, of course, judicial practice. It is the judicial practice is "the great leveler" of the norms and principles. If there is one the legislation on administrative procedures and their principles are not only aside from conflict, but on the contrary, harmoniously complement each other.

However, the principles of administrative procedures must have a certain legal measurement. Therefore, such pseudo-legal principles as "efficiency" are beyond the scope of this study.

2. The next problem stems from the previous and is its particular case. How promising are legislative foundations of administrative procedures in the supranational formations? Does the emergence of such structures mean the transition in the era of mere principles?

It seems that apparent "fascination" by many European researchers with the problem of exactly the principles of administrative procedures is due to the difficulties of creating a unified "classical" legal framework at European Union level. This problem is being actualized also for some post-Soviet countries, including Russia, as the development of integration processes of the Common economic space.

In our view, however, it is far from certain that the supranational level itself a priori paralyzes the idea of formalizing legal requirements. Here you can recall the work of the collective ReNUAL[5]; it is possible that the flourish of principles of administrative procedures (primarily through judicial practice) is another harbinger of emergence of a new legal array in the future. So the bias in favor of the principles – is not a threat to legislation, but a temporary phenomenon, which also allows accumulating a certain critical mass of legal material. Thus, in respect of Russian integration processes, the development of both administrative procedures and their principles is equal and urgent task.

3. The third challenge is the mobility, constant variability of administrative procedures and their principles.

Indeed, for example, the reform of German legislation on administrative procedures of 1996 greatly changed existing accents. And judicial practice often goes

4 Davis Kenneth. Discretionary Justice. University of Illinois Press, 1973, p. 31.

5 ReNEUAL Model Rules on EU Administrative Procedure, 2014. Available at : http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/ReNEUAL-%20Model%20Rules-Compilation%20Books%20I_VI_2014-09-03.pdf (accessed : 10.07.2015).

even further in its experiments. However, it seems, in spite of the mobility, at its core, the principles of administrative procedures are relatively stable. Their "core" can withstand even the strongest strikes of legislator.

4. Finally, the fourth factor. According to Eberhard Schmidt-Assmann, administrative procedures gain the special role when the model of a welfare state, imposing extra high standards of protection the rights and legal interests, contributing to the assistance of population, as well as requiring a relatively efficient work of the state apparatus[6].

We can continue this thesis: the phenomena that we call the administrative procedures, modern principles of administrative procedures is primarily a product of the development of European legal systems of the past few decades, marching in parallel with economic growth in these countries. But does this mean that with the development of the economic crisis, the deteriorating of economic situation in the EU, CIS and Russia the relevance of this phenomenon will decline? Or, are the principles of administrative procedures completely unrealizable in conditions of economic crisis?

We think this question should receive negative response. In itself, the introduction of such a high standard of implementation of public administration, of course, requires a certain preparedness of law and order. However, this is hardly a matter of material development. As has been rightly noted in the draft laws on administrative procedures introduced at the beginning of the 2000s to the Russian parliament, their adoption would not require significant additional expenditures. We add here: the indirect effect could be just an opposite; organization of public administration on the solid ground of a law with a reasonable system of principles is a very positive fact from the point of view of investors (both foreign and domestic). So that administrative procedures are not a money-losing "black hole", but a factor contributing to the growth of investments.

Thus, we can make an interim conclusion: with all the considered contemporary challenges the institute of administrative procedures in general, and their principles in particular, preserves and even heightens its significance.

The palm of victory in the development of procedural principles belongs to the Anglo-Saxon legal system, under which there are two main concepts – the British "natural justice" and American "due process".

The term **"natural justice"** is polysemic, into Russian language it can be translated as "natural fairness", and as "natural justice". British literature sometimes

6 Eberhard Schmidt-Assmann. Structures and Functions of Administrative Procedures in German, European and International Law. Transforming Administrative Procedure, ed. J. Barnes, Sevilla: Global Law Press, 2008, p. 52.

emphasizes the connection between "natural justice" and natural-legal theories (as an antithesis to positivism) with their emphasis on inalienable legal abilities arising from the very nature of a man, not from the whim of the state, as well as with the relevant substantive requirements to such legal regulations. However, despite the reference to almost ancient Greek philosophical concepts, the actual emergence of "natural justice" refers to the XVII century. John Alder connects the beginning of its formation with the Dr. Bonham's Case of 1610, who declared the right of any person, whose rights have been affected by an official decision, on consideration of his case by an impartial court[7].

It appears we can distinguish the following main features of the British approach:

1) famous British distrust of the legislation causes the orientation not on a legal norm, but on less formalized sources – court decisions, customs, as well as legal principles. Even the existing legal provisions tend to undergo significant adjustment with reference to "the rules of natural justice" [8];

2) a pronounced procedural nature of the content of "natural justice", which means:

2.1) on the one hand, its human rights orientation

2.2.) on the other hand, connectedness mainly with judicial activity. It is symptomatic that, as noted in British literature, in recent years many British lawyers instead of the concept of "natural justice" increasingly prefer definition "procedural fairness" [9];

3) finally, we think it would be an exaggeration to claim that in the framework of "procedural fairness" a unified and harmonious system of processual (procedural) principles has been developed.

With this, as its "core" they call two basic principles: **the right to be heard and the right to review by an impartial authorized person (body)**. For the beginning let's stop at the first procedural guarantee.

The actual amount and value of this principle varies from one to another historical era. So, throughout the 19th century, its significance was being gradually declined, and during World War II, for obvious reasons, it was further reduced.

7 Alder J. General Principles of Constitutional and Administrative Law. 4th Edition, 2002, p. 388. But another researcher – Martina Kunnecke – as the first precedent provides the Bagg's Case of 1615, where the person was deprived of the house without notice and providing an opportunity to express its position (Kunnecke M. Tradition and Change in Administrative Law. An Anglo-German Comparison, 2007, p. 138).

8 "... The fact that legislation contains certain provisions that are "commensurated with some rules of natural justice" does not necessarily exclude or displace a wider application of these rules in a particular context: see: Annetts v. McCann (1990); Valley Watch Inc. v. the Minister of Planning (1994)" (see: Essential Administrative Law, 2nd edition, prof. D. Barker (ed.), Sydney, London: 2001, p. 41.)

9 Essential Administrative Law, 2nd edition, prof. D. Barker (ed.), Sydney, London: 2001, p. 26.

And the "renaissance" of procedural fairness is associated with the case of "Ridge v. Baldwin" of 1964, which, among other things, initiated the spread of procedural guarantees, which were earlier exercised exclusively by courts, and also for the activity of non-judicial bodies of public administration[10].

Of course, the right to a hearing is not absolute, it does not apply to the following cases:

1) situations involving national security (CCSU v. Minister for the Civil Service (1985));

2) need for urgent action (R. v. Secretary of State for Transport ex parte Pegasus Holdings Ltd (1988));

3) when a case affects a large number of people and the hearing is impossible. On the other hand, situations where the decision of the authorities (such as the closure of a nursing home) directly affect the interests of the people, there is a right to collective consultations, though they are not hearing on an individual case (R. v. Devon County Council ex parte Baker (1995))[11];

4) when it is expressly provided for by law;

5) when the legislation establishes specific foundations for hearing, which are exhaustive;

6) hearings are not needed in respect of preliminary decisions;

7) when the violation of "procedural fairness" does not affect the substantive correctness of decision, as well as some other cases[12].

The requirement of **"honesty" (impartiality)** is rather hardly formalized and not exclusively procedural in nature. It is used in different situations with different meaning. It is not only the removing from consideration of a case of officials who are participants' relatives or otherwise interested in the proceedings, but also about the meaningful evaluation of certain legal actions (for example, whether it was "fair" to exclude a specific competitor from participation in a contest to license) [13].

Finally, in the framework of "natural justice", such a universally recognized principle of the European continent, as **the duty of decision motivation** with great

10 Brighton's Police officer was dismissed by local police authorities in absentia (without hearing). The authorities had the power to dismiss because of the lack of conformity with set requirements. The House of Lords decided that the sacked had the right to a hearing of his case by an administrative authority for a number of reasons (dismissal not from a ordinary job, but related to the implementation of public functions; the power to dismissal was not completely discretionary, but should be linked to certain grounds specified in the law).

11 Alder, J. General Principles of Constitutional and Administrative Law. Fourth Edition, 2002, p. 390.

12 De Smith, S. A. Judicial Review of Administrative Action, 1995, p. 475-504; Kunnecke M. Tradition and Change in Administrative Law. An Anglo-German Comparison, 2007, p. 142.

13 More details on this issue see: Kunnecke M. Op. cit. pp. 143-144.

difficulty is making its way. In British law so far this requirement (as well as in Russia) has not acquired a universal nature. This situation is being actively discussed and critiqued in British literature. According to M. Kunnecke, since the decision of 1968 on the case Padfield v. Minister of Agriculture, Fisheries and Food, the courts gradually develop this principle; and the number of cases, in which the courts have recognized the lack of motivation "dishonest", "unfair", grows[14]. At the same time, as noted by Hermann Pünder, although the violation of the principles of "natural justice" can serve as a basis for cancellation of decision, but (like in the American and German theories of (hardly) significant procedural errors) the real cancellation of decision is possible only in cases when procedural violations have damaged the essence of the decision[15].

The American tradition of **"due process"** is rooted in the 5th[16] and 14th[17] amendments of the Constitution of the United States. Unlike the British concept of "procedural fairness", American principles rely also on the Law on Administrative Procedures of 1946. Like the British model, it is largely about a human rights-based approach[18], the volume of which is constantly adjusted by judicial practice.

According to H. Pünder, **the right to hearing** does not even apply to all cases of adoption of acts directly affecting the rights of powerless entities, but only to some adverse acts. At that, there is no common understanding of "adverse" act. Thus, the denial of the right of ownership is qualified as such only in cases where citizens have been granted social privileges and they are cancelled or not prolonged[19].

14 More details on this issue see: Kunnecke M. Op. cit. pp. 144-146.

15 Pünder H. German Administrative Procedure in a Comparative Perspective – Observations on the Path to a Transnational "Ius Commune Proceduralis" in Administrative Law, Jean Monnet Working Paper, NY: 2013, p. 19.

16 No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.: Constitutions of Foreign States: Study guide [Konstitutsii zarubezhnykh gosudarstv: Uchebnoe posobie]. 4th edition, updated and revised, compiler professor V. V. Maklakov. Moscow: BEK, 2002, pp. 359-360.

17 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.: Constitutions of Foreign States: Study guide [Konstitutsii zarubezhnykh gosudarstv: Uchebnoe posobie]. 4th edition, updated and revised, compiler professor V. V. Maklakov. Moscow: BEK, 2002, p. 362.

18 Ponce, J. Good Administration and Administrative Procedures. Indiana Journal of Global Legal Studies, 2005. Vol. 12, issue 2, p. 576.

19 At that, the "denial" is more obvious in a situation where a person has already received a benefit, and then the decision is cancelled. On the contrary, if a person has not received benefits yet, the denial is less obvious.

Decision motivation (in accordance with § 555 (e) of the LAP of the United States, 1946) shall take place only in cases where a written request of the person concerned is rejected; US legislation does not apply this requirement to all other types of administrative acts. At that the rule on decision motivation is usually derives from the right to hearing. Position of the American legislator proceeds from the fact that the main task of the motivation is to make sure that the circumstances used in the final act have been examined during the hearing.

Despite the fact that the practice of American courts gradually extends the procedural guaranties[20], the American approach, like the British, to a certain extent limits the scope and amount of procedural guaranties, i.e. the principles of administrative procedures, while avoiding any exhaustive their regulation.

If the Anglo-Saxon legal orders were initially based on judicial procedures, gradually extrapolating judicial principles on the activity of public administration, then the recent decades in the EU countries the concept of **"Good Administration"**, initially created for the field of public administration, has received a wide spreading. According to Schmidt-Assmann, "good administration" is a set of common procedural standards, applicable both to the activities of supranational administration of the EU and national European legal orders[21]. Hans Peter Nehel was one of the first who stressed in European research literature that the principles of "good administration" are mostly of a procedural nature; substantive-legal basis here is secondary[22]. Notable the thesis of Jorge Agudo Gonzalez: procedural guaranties "good administration", which have now become so natural for European countries, is the result of "alloy" of continental-legal doctrines and the concept of "natural justice". Moreover, according to the specified author, the acts of supranational bodies (European Commission, Court of Justice of the EU) that created the legal framework of "good administration" often were taken under the pressure of American business and American antitrust legislation[23].

It seems that here we see the debates on the protection of legitimate interests that have reached its logical peak in the provisions of the Law on Administrative Procedures of FRG of 1976 on revocation of legitimate favorable and cancellation of illegal favorable acts (to which we will return later).

20 H. Pünder. Op. cit. pp. 13-15.

21 Eberhard Schmidt-Assmann. Structures and Functions of Administrative Procedures in German, European and International Law. Transforming Administrative Procedure, ed. J. Barnes, Sevilla: Global Law Press, 2008, pp. 62-63.

22 H. P. Nehel. Good Administration as procedural right and/or general principle? in: Legal Challenges in EU Administrative Law. Towards an integrated Administration, ed. H. C. H. Hofmann, A. H. Türk, Cheltenham, UK, (Northampton, USA), 2009, p. 323; H. P. Nehel. Principles of Administrative Procedure in EC Law, Oxford: Hart Publishing, 1999, p. 15.

23 J. A. Gonzalez. The Evolution of Administrative Procedure Theory in "New Governance". Key Point, 2013. Review of European Administrative Law, Vol. 6, no. 1, pp. 82-84.

What is "good governance"? Of course, on the one hand, we can talk about the right of citizens to "good administration" [24], on the other hand, about a certain integral principle. However, it seems to us that there is a more equitable position that "good governance" is considered not as something syncretic, but as a system of principles, procedural rights and guarantees[25].

What does form the legal basis for "good governance"? Some European States have enshrined certain procedural principles even in the texts of their constitutions. A very interesting example of Italy: here the legislator in article 97 of the Constitution of 1947 (i.e. long before the birth of the Pan-European doctrine of "good governance") obliged the executive bodies ("agencies") to observe impartiality and "buon andamento". As noted by J. Ponce, the latter term is deciphered by Italian scientists exactly as the duty of "good governance" ("buona ammistrazione"). The practice of the Italian Constitutional Court puts different content in this phenomenon: proper organization of public administration, formation of procedures required for the implementation of relevant public functions, as well as taking right decisions by gathering and preliminary analysis of all the relevant information[26]. You can also find other examples of attempts to consolidate, at least, separate elements of "good governance" in the texts of national constitutions[27].

However, the emergence of "good administration" as a relatively holistic legal structure have to be associated not so much with the individual and poorly coordinated experiments of national legislators as with the activity of European supranational bodies.

Firstly, we are talking about several fundamental acts of the Council of Europe. Indeed, it is difficult to overestimate the importance of the resolution of the Council of Europe from September 28, 1977 "On The Protection Of The Individual In Relation To The Acts Of Administrative Authorities". This Act rightly stressed the tendency of increasing role of public administration, procedures of adoption administrative acts. At the same time there has been made a logical conclusion:

24 According to J. Ponce, one of the first cases of the Court of First Instance, which dealt with verification of (and at the same time – consolidation for the citizens) the right to "good governance", can be considered Case T-54/99, Max. Mobil Telekommunikation Service GmbH v. Commission (2002) (for more detail see: J. Ponce. Op. cit. pp. 585-586).

25 See for example: Swedish Agency for Public Management, Principles of Good Administration in the Member States of the European Union, 2005 (www.statskontoret.se).

26 J. Ponce. Op. cit. p. 556.

27 Here we can recall articles 31, 103 of the Spanish Constitution of 1978, according to which the public administration must act objectively and impartially, in accordance with the principles of effectiveness, economical efficiency, coordination and prohibition of arbitrariness.
Article 21 of the Constitution of Finland of 1999 provides for that the rules relating to publicity of process (procedures), including – the right to be heard, the right to receive a reasoned decision and the right to appeal, as well as other guarantees of fair trial and "good administration", should be established by law.

in such a situation, it is necessary to strengthen the position of citizens in their relations with the authorities and, consequently, to strengthen their procedural rights and guarantees. The Resolution proclaimed the following five principles:

1) the right to be heard;
2) the right of access to information;
3) the right to legal assistance and representation;
4) justification of an administrative act (its motivation);
5) specifying of remedies (appeal).

As noted in research literature, this resolution became an important step in the formation of legal basis for the main procedural principles that form the "core" of the right to "good governance" [28]. Here we can mention the Recommendation of the Council of Europe (adopted by the Committee of Ministers on March 11, 1980) "Concerning the Exercise of Discretionary Powers by Administrative Authorities". The resolution, among other principles, gave a particular attention to:

1) impartiality and objectivity;
2) equality and prohibition of discrimination;
3) maintaining a balance between the legitimate purposes and restrictions on the rights and freedoms of citizens;
4) taking a decision within a reasonable period of time[29].

The next step in juridization of "good governance" should be the Charter of Fundamental Rights of the European Union of 2000, which enshrines in article 41 the positions on the right to "good governance" (to the analysis of which we will return later) [30].

However, although article 41 of the Charter is considered (quite deservedly) as the main "pillar" and the principles of "good governance", the logical continuation and at the same time – "the crown" of all the above-mentioned resolutions, this procedural concept has got another "pillar" – "Code of Good Administrative Behaviour" [31]. The European Ombudsman, in his time, has taken an attempt to counteract antithesis of "good administration" – "maladministration". The emergence of this document (approved, by the way, by the European Parliament in 2001) is due to the need to clarify too general prescriptions of article 41 of the Charter. At that, as it is highlighted both in the research literature[32] and even in the preamble to the "code", we are not talking about any specified "classical" binding legal norms.

28 Swedish Agency for Public Management, Principles of Good Administration… p. 11.
29 https://wcd.coe.int/ViewDoc.jsp?id=678043 (accessed : 10.07.2015).
30 http://www.europarl.europa.eu/charter/pdf/text_en.pdf (accessed : 10.07.2015).
31 http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1 (accessed : 10.07.2015).
32 Swedish Agency for Public Management, Principles of Good Administration… pp. 91-92.

On the contrary, even the very term "code" is used with a certain degree of conventionality; this set of recommendations, some "horizontal principles"; "soft law" of administrative procedures of the EU.

Thus, both article 41 of the Charter and the Code of good governance are not traditional legal sources[33]. It seems quite logical, taking into account the very nature of legal principles – this changeable, elusive and "immaterial" "soul" of written law.

Therefore, a great role in the formation and development of the principles of "good governance" was played by judicial practice[34] that develops, in addition to the above mentioned, a number of relatively new principles of: proportionality, protection of legitimate interests (expectations), etc.

So, what are the principles that constitute the "body" of "good governance"? It is difficult, if at all possible, to give an exact answer to this question. Various studies, as though competing, provide the growing varieties; in some analytical documents we can find mention of 26 or even 44 principles[35].

As "traditional" and the most common we list the following "principles", requirements, rights and guarantees:

1) fair and impartial consideration of a case within a reasonable time (part 1 article 41 of the Charter; article 8 of the Code of good governance);

2) the right to be heard before the adoption of an act capable to cause adverse consequences for a person (part 2 article 41 of the Charter; article 16 of the Code);

3) the right of access to a case file, in case if a taken measure may affect the legal status of a person (part 2 article 41 of the Charter);

4) duty to motivate taken decisions in writing (part 2 article 41 of the Charter, article 18 of the Code);

5) the right of access to documents (article 42 of the Charter);

6) legality (article 4 of the Code);

7) prohibition of discrimination (article 5 of the Code);

8) principle of proportionality (article 6 of the Code);

9) duty of service orientation (article 12 of the Code);

33 This thesis is supported by practicians and research scientists; see: Swedish Agency for Public Management, Principles of Good Administration… p. 15; Eberhard Schmidt-Assmann. Structures and Functions of Administrative Procedures in German, European and International Law. Transforming Administrative Procedure, ed. J. Barnes, Sevilla: Global Law Press, 2008.

34 See, for example: Pünder H. German Administrative Procedure in a Comparative Perspective – Observations on the Path to a Transnational "Ius Commune Proceduralis" in Administrative Law, Jean Monnet Working Paper, NY: 2013, p. 23.

35 See detailed review: Swedish Agency for Public Management, Principles of Good Administration… p. 12.

10) prohibition of abuse of law (article 14 of the Code);

11) duty to indicate the remedies to persons with the right to appeal (article 19 of the Code);

12) duty to notify individuals about a taken decision (article 20 of the Code);

13) duty to document, record, protocol procedures (articles 23, 24 of the Code).

Each position plays its role and enriches the system. However, amidst all this diversity, I think, we can distinguish two basic principles – the right to be heard and the duty to justify administrative acts. Let's consider them in detail.

1. *The right to be heard*.

This requirement has started in different legal orders with unequal speed, its volume is changing (as well as the system of exceptions to its actions); methods of legalization (enshrining) of this principle are also different. Thus, in France, as noted by D. Captain, the first decisions of State Council, formalizing appropriate guaranties, began to emerge in 1945, they were given constitutional status by the Constitutional Council of France in 1990 (judgment on the case of the Finance Law of 1990), in parallel there were taken efforts for their inclusion in the texts of certain normative legal acts[36]. However, in most European countries (and now in many other countries around the world), the principle of hearing on an administrative case is "entrenched" in the specialized legislation on administrative procedures. Of course, its volume depends on the type of procedural relations: its maximum development it obtains in formal procedures (like planning). But even for informal procedures there is a certain minimum standard. It seems that part 4 paragraph 43 of the Law on Administrative Procedures (hereinafter – LAP) of Austria can serve as a classic example of such phenomenon: "Each party, in particular, should be given the opportunity to provide and to prove all aspects relating to the case, to ask questions to the witnesses and experts, as well as to speak openly and on the discussed facts that have been provided by other parties to the procedure, witnesses and experts, on other petitions and on the results of official presentations" [37].

Of course, this principle is not absolute. So, parts 2, 3 paragraph 28 of the FRG LAP of 1976, establishes that a hearing may be cancelled if:

36 See: Kapitan D. Principles of Administrative Process in Russia and France [Printsipy administrativnogo protsessa v Rossii i vo Frantsii]. Administrativnye protsedury i kontrol' v svete evropeiskogo opyta – Administrative Procedures and Monitoring in view of European Experience, under edition of T. Ya. Khabrieva and Zh. Marku, Moscow: Statut, 2011, pp. 222-223.

37 Collection of Legislation on Administrative Procedures [Sbornik zakonodatel'nykh aktov po administrativnym protseduram]. Almaty: 2013, p. 23.

1) there is a need to take action immediately because of the risk of delaying the procedure or on the basis of the interests of society;

2) the hearing could put into question the observance of a reasonable deadline for taking a decision;

3) discrepancies with the actual information, which has been provided in petition or explanation of a party, are unambiguously in his favor;

4) administrative body intends to issue a general directive or identical administrative acts in a large numbers or publish them with help of automated means;

5) there is a need to take measures for execution through an administrative procedure;

6) the hearing is not held, if it goes against the need to respect the interests of society[38].

However, sometimes the restrictions are formulated so vaguely that the efficiency of the principle becomes unobvious. In particular, according to part 2 article 34 of the Law on Administrative Procedures of Finland, the decision on a case could be taken without hearing the parties, if:

1) the claim was declared inadmissible or immediately rejected as unfounded;

2) the case concerns employment or voluntary education or training;

3) the case concerns providing material benefits, based on the personal qualities of the applicant;

4) the hearing may constitute a threat to the goals pursued by the decision on this case, or delay in the consideration of the case associated with the hearing of the case is linked to a serious threat to human health, public safety or environmental risk; either

5) the claim not relating to other parties was met; or it's obviously clear that there is no need for a hearing for other reason[39].

2. *Duty of the subject of administration to justify administrative act*.

According to the just remark of H. Maurer, this principle (requirement) aims the following objectives. Firstly and mainly it forces administration to analyze their own position more attentively and more carefully refer to the legislation and the facts of the case. Secondly, it gives citizens the opportunity to better familiarize themselves with an act and make a decision – to challenge it or not. Finally, thirdly, provision of motives facilitates the work of appeal administrative and

38 Collection of Legislation on Administrative Procedures [Sbornik zakonodatel'nykh aktov po administrativnym protseduram]. Almaty: 2013, p. 165.

39 Ibid p. 373.

judicial bodies[40]. The requirement of justification in itself is quite abstract. So, you can welcome the attempts by some lawmakers to concretize the provisions that can be actually considered as justification. As a successful example we may consider part 2, 3 article 61 of the LAP of Azerbaijan: "In justification, there should be noted factual and legal circumstances of a case, evidence confirming or rejecting the given circumstances, as well as laws and other normative-legal acts to which references have been made in making an administrative act. In case of adoption an administrative act within the framework of discretionary powers, the administrative authority shall accurately and clearly justify its views" [41].

However, like any other procedural principle the requirement to justify an act has limits. So, according to part 2 p 39 of the LAP of FRG, justification is not required if:

1) administrative body meets the petition or the will, and the administrative act does not affect the rights of third parties;

2) the person, who is an addressee of the administrative act or whose interests it affects, already knows the opinion of administrative body about the factual and legal circumstances of the case, and this opinion is known to him without grounds;

3) administrative authority issues identical administrative acts in large quantities, or publishes administrative acts by using technical means, and justification is not required in each particular case;

4) it is provided for by a legal norm;

5) general order is publicly announced[42].

It is easy to see: like in the British rule of law the continental European tradition largely comes from derivation of the principle of justification of an act out of the right to be heard. At that, it seems possible to find another parallel: there is a close genetic relationship between the duty of the justification of an act and the possibility of its appeal. If an administrative act cannot be challenged (for example, an intermediate act that does not affect the further course of the procedure), it seems to us it does not need to be justified. On the contrary, an act resolving a case on its merits or preventing its further consideration (e.g., denial of application, cessation of proceedings on the case, refusal to refer a case to a competent person), under a general rule, must be justified.

40 Cit. by: Kunnecke M. Tradition and Change in Administrative Law. An Anglo-German Comparison, 2007, p. 149-150.

41 Collection of Legislation on Administrative Procedures [Sbornik zakonodatel'nykh aktov po administrativnym protseduram]. Almaty: 2013, p. 71.

42 Op. cit. pp. 171-172.

So, "good governance" – a collection of primarily procedural requirements that are not of the same level and not always homogeneous. On the one hand, their volume is very different: from ones that are relatively "large", rich in content (such as the right to a hearing), up to discrete ones, "small" (for example, the duty of record-keeping within the framework of an administrative case). On the other hand, the degree of their formalizability also varies. From relatively legally oriented (requirement to provide information and documents to parties), up to the provisions seemingly lacking legal content (for example, service orientation). Legal framework of "good governance" originated at the supranational level, but, as seems, largely for this reason the Pan-European requirements so far are extremely abstract. Their specifically legal content is documented by judicial decisions and national legislators.

At that, the very methodology of designing the concept of "good governance" is remarkable: inductively, from private to general the legislator and law enforcer for decades, like a designer, have been making a sophisticated model from relatively simple elements. What is more, not all of them can be considered as principles; rather, we are talking about some "basic legal units" (requirements) that are usually of strictly practical nature. But at the same time it shows the amazing strength and flexibility of Good Administration. We think in this case we are dealing with an unlikely conscious application of the laws of general theory of systems, in particular, the "law of hierarchical compensations" of E. A. Sedov[43]. This technique through varying the original variables allows one to build an arbitrarily complex system, including a legal one. It seems that this experience can be very promising for the Russian law and order, including – in the formation of the institute of administrative procedures.

Speaking of European legal traditions of administrative procedures and their principles, we have to, at least briefly, mention about German legal tradition.

A somewhat paradoxical situation in respect of principles remains here. On the one hand, the latter are not summarized in the LAP of FRG of 1976 (although at least certain provisions, of course, are enshrined in various articles); thus, the principles and some of their elements are "scattered" throughout the text of the law. Here is an obvious influence of the historical specificity of the emergence of

43 "Law of hierarchical compensations" (E. A. Sedov) records that "the actual increase in diversity at the highest level is ensured by its effective limitation at the previous levels" (Sedov E. A. Information and Entropy Properties of Social Systems [Informatsionno-entropiinye svoistva sotsial'nykh system]. ONS – Social Sciences and Modernity, 1993, no. 5, p. 92). If it is extremely simplified, the meaning comes down to the fact that the construction of a complex system is possible from simpler elements. And the simpler the original elements, the more complex a new system may emerge.

German legislation on administrative procedures – its secondariness, derivation from judicial practice[44].On the other hand, the absence of relevant provisions in the general part of the law does not prevent their real existence in law-enforcement practice. As noted by I. Deppe, "In Germany… the principles were derived by lawyers and jurists from the Constitution. They are more important than any law, and often decide the outcome of a case when private and public interests come in conflict" [45].

Above, within the analysis of Good Administration, there has already been considered a number of fundamental principles of administrative procedures. Briefly let's look at some different principles, the development of which in the European legal system owes exclusively (mostly) German law and order.

1. Prohibition of formalism.

The inadmissibility of absolutization of form over content is a problem that requires an independent study. It should be noted here: in our opinion, it is expedient to expand the content of this principle; its value to some extent is underestimated. This, for example, is about a response to the abuse not only by officials but also by citizens. Moreover, K. Eckstein's recommendations appear true: in case of abuse it is necessary not only to deny the meeting of demands on the merits of a case but also, for example, place the burden of costs on unfair participants, as well as to deny individual procedural means and possibilities (such as delaying effect of a complaint), etc.[46] It seems that a number of other principles characterized as independent ("greater includes the lesser", "prohibition arbitrariness", etc.) is just some facets of this general principle.

2. The principle of protection of legitimate expectations.

Legitimate expectations are a phenomenon long known to the German public law[47]. It was developed in the 19th century in the practice of the Higher Administrative

44 Actually, in due time, there were very seriously debates on the possibility of adopting a unified LAP in Germany (see: H. Pünder. Op. cit.). Apparently, there is still some caution to codification.

45 Deppe I. Towards the Reform of Administrative Law and the Draft Law "On Administrative Procedures" [K reforme administrativnogo prava i zakonoproektu «Ob administrativnykh protsedurakh»]. Administrativnaya reforma v respublike Uzbekistan: opyt i problemy pravovogo regulirovaniya. Materialy Mezhdunarodnogo simpoziuma 29-30 sentyabrya 2007 g. – Administrative Reform in the Republic of Uzbekistan: Experience and Problems of Legal Regulation. Proceedings of the International Symposium, 29-30 September 2007, Tashkent: 2008, p. 27.
Similar statements can be found in works of other German researchers (see, for example: Eberhard Schmidt-Assmann. Op. cit. pp. 51-53).

46 See: The Federal Law "On Administrative Procedures": initiative project with developers' comments [Federal'nyi zakon «Ob administrativnykh protsedurakh»: Initsiativnyi proekt s kommentariyami razrabotchikov]. Prolusion of K. Eckstein, E. Abrosimov, Fund "Constitution", Moscow: Kompleks-Progress, 2001, p. 184.

47 Thomas R. Legitimate Expectations and Proportionality in Administrative Law. Oxford, 2000. P. XI.

Court of Prussia[48]. As is known, the principle of prohibition of violations of legitimate expectation is that a person whose rights have been affected by a decision should not suffer from sudden change of opinion or policy of a public authority, the rights of such a person should be compensated. The doctrine of legitimate expectations applies in situations where an available norm, previous administrative practice or other circumstances (for example, a body's promise) allows a faithful person to rely on certain legal effects[49]. It seems that these requirements are comprehensively reflected in the part 2 paragraph 48 (cancel of an unlawful favourable act), as well as in parts 2, 3 paragraph 49 (revocation of a lawful positive act) of the LAP of FRG of 1976. However, this principle is somewhat broader, for example, in Germany they presume that in the event when an administrative body changes its previous practice individuals must be given the opportunity to state their position in hearings[50], as well as such decisions are subject to a mandatory written justification[51].

3. Finally, another creation of German law and order the principle of proportionality.

According to Armin von Bogdandi and Peter M. Huber, constitutionalization of the administrative law largely started with this principle. Being founded in the Prussian police law, over time it "escaped" to freedom, covered the whole administrative law (including, of course, administrative procedures), and then began its victorious march in other public sectors, as well as entered in the dogmatics of fundamental rights; through the European Convention on Human Rights and the practice of European courts it was transferred to other European legal orders[52]. Perhaps, today, the principle of proportionality can be attributed to one of the most important "cross-cutting" principles, including in the application of administrative procedures. It is a synthesis of the principles of legality and feasibility (reasonableness). If judicial practice is a "great conciliator" between the law norm and principles, then proportionality is a universal balancer of all the major legal phenomena, including the principles of procedures in relation to each other.

48 Singh M. P. German administrative law in common law perspective. New York: 2001, pp. 150-161.

49 See, for example: Mel'nichuk G. V. Valuation Standards of Discretionary Acts in Administrative Law of Germany [Standarty otsenki diskretsionnykh aktov v administrativnom prave Germanii]. Zakonodatel'stvo – Legislation, 2011, no. 10, p. 88.

50 Singh M. P. Op. cit. p. 150.

51 This rule, for example, is directly enshrined in part 3 article 45 of the LAP of Finland (see: Collection of Legislation on Administrative Procedures [Sbornik zakonodatel'nykh aktov po administrativnym protseduram]. Almaty: 2013, p. 376).

52 A. von Bogdandi, Khuber P. M. State, Public Administration and Administrative Law in Germany [Gosudarstvo, gosudarstvennoe upravlenie i administrativnoe pravo v Germanii]. Daidzhest Publichnogo Prava – Public Law Digest, 2014, no. 1 (3), p. 46.

What of the above mentioned traditions is more applicable to the law of administrative procedures of the CIS countries, including Russia? We will not be original with the answer: of course, the tradition of continental Europe. Here some conceptual issues arise.

The first one: is there a need to consolidate the principles of administrative procedures in a special legislation, or to concentrate solely on judicial practice? We think the answer is obvious. As rightly noted in the research literature, the experience of the vast majority of European countries is based on the "legalization" of the principles of procedures by relevant laws[53]. There is a profound meaning, because exactly the legislator can put "the last point" in lengthy and not always constructive discussions about whether, for example, the constitutional duty of motivation applies only to judicial decisions or also to administrative acts (as it was, for example, in Italy) [54]. In General, it is the legislative framework is the most preferable from the point of view of the interests of citizens, which are not always able to understand the nuances of judicial practice[55]. Let us add: even if they immediately became experts in jurisprudence, references to judicial precedents would not be convincing for officials-norm makers.

For Russia and other post-Soviet countries it is even more relevant, given the fact that here the formation of legislation on administrative procedures goes, if one is fortunate, in parallel with judicial practice (and often precedes the latter). One can agree not only with the thesis on the feasibility of legislative consolidation of principles[56], but also with the fact that these must be maximally specified not only in general provisions, but also in other, special, articles of laws. More specifically they are reflected, the higher probability of their practical implementation[57].

In our opinion, such a formalization of the principles should include the following elements:

1) range of subjects of this principle;
2) general content of the principle;

53 Swedish Agency for Public Management, Principles of Good Administration… pp. 72-74.

54 Guido Corso, Administrative procedures: twenty years on. Italian Journal of Public Law, Vol. 2, no. 2/2010, pp. 274-275.

55 Swedish Agency for Public Management, Principles of Good Administration… p. 77.

56 See, for example: The Federal Law "On Administrative Procedures": initiative project with developers' comments [Federal'nyi zakon «Ob administrativnykh protsedurakh»: Initsiativnyi proekt s kommentariyami razrabotchikov]. Prolusion of K. Eckstein, E. Abrosimov, Fund "Constitution", Moscow: Kompleks-Progress, 2001, p. 9.

57 See: Pudel'ka I., Deppe I. General Administrative Law in the States of Central Asia – a Brief Review of the Current Status [Obshchee administrativnoe pravo v gosudarstvakh Tsentral'noi Azii – kratkii obzor sovremennogo sostoyaniya]. Available at : http://ruleoflaw.en/wp-content/uploads/2014/01/130708-Pudelka-Deppe-study_r.pdf (accessed : 10.05.2015).

3) order of application (unless, of course, it is possible to describe);
4) exclusion from the action;
5) consequences of violation.

Of course, the applicability of this algorithm is inversely proportional to the abstractness of the principle; therefore, the less it is applicable the more general, fundamental the principle is (e.g., the principle of justice). On the other hand, for private "principles" (procedural requirements) like motivation of an administrative act or the principle of transparency, prohibition of abuse of rights, this model is adequate. However, of course, any attempts to formalize principles should take into account objective obstacles. Firstly, even the most perfect system of principles cannot be exhaustive. As rightly stressed, for example, in the developed under the leadership of K. Eckstein draft of the relevant federal law, procedures must be based on the procedural guarantees provided for in the RF Constitution, international agreements, as well as the generally recognized principles of law and constitutional state that are enshrined in the legislation, developed by science and formulated by judicial practice; their enumeration in a law shall not be interpreted as impairing of other principles[58]. Secondly, despite the fact that in the Russian legal order the initial impulse, as a rule, is given by the legislator, it would be too naive to overly rely on the potential of law norm in regulating such a particular legal matter as principles. The role of law-enforcement practice here simply cannot be overstated.

Analysis of the principles of administrative procedures in various post-Soviet legal orders shows multidirectional trends. There are frankly failed examples. As, for example, the experience of Uzbekistan, where, it seems, they have formed a national tradition to discuss various projects of LAP in order then don't adopt them. Moreover, at some stage of discussions of such projects, the principles of administrative procedures were simply deleted, that caused a fair criticism of the expert community[59].

It seems that Belarusian approach is quite representative. The LAP of Belarus enshrines in article 4 a set of principles (legality, equality of interested persons before the law, priority of the interests of interested persons, transparency of administrative procedures, promptness and availability of administrative procedures,

58 The Federal Law "On Administrative Procedures": initiative project with developers' comments… p. 36-37.

59 See, for example: Starilov Yu. N. Administrative Procedures as a Remedy for Ensuring the Rule of Law in Public Administration [Administrativnye protsedury kak pravovoe sredstvo obespecheniya zakonnosti publichnogo upravleniya]. Iz publikatsii poslednikh let: vospominaniya, idei, mneniya, somneniya…: sbornik izbrannykh nauchnykh trudov – From Recent Publications: Memories, Ideas, Opinions, Doubts...: collection of selected scientific papers, Voronezh: publishing house of Voronezh State University, 2010, p. 490.

declarative one stop principle and cooperation in the implementation of administrative procedures)[60]. However, the latter are not always "fit" specific articles of the law. However, the analysis of the LAP allows us to find a number of guarantees of Good Administration:

1) duty of motivation of an administrative act (part 2 article 26);

2) duty of notification of interested parties about a taken act (article 27);

3) right to familiarization with documents (article 10)[61].

However, the LAP of Belarus upholds traditional for post-Soviet legislation inquisitorial, absentee nature of proceedings. Such a fundamental principle as the right to be heard cannot be found here. Moreover, the procedures for consideration of a case are not regulated at all. And this is not just a gap of the law, but a conceptual defect of the very concept of administrative procedures.

Finally, at the post-Soviet space you can find exemplary LAPs, with flawless (or almost flawless) legislative technique of procedural principles. So, the LAP of Azerbaijan does not only formalize procedural guaranties of "good governance" (they are enshrined in chapter III of the law: the right to petition; the right to participate in the proceedings; the right to familiarize with the administrative proceedings files, and so on), but also tries to allocate more general principles. In chapter II of the law in the best German traditions they enshrine the principle of protection of confidence, the principle of proportionality, prohibition of the abuse of formal requirements, "the principle of coverage of larger by less", the principle of reliability, and finally, they even have attempted to determine the order of exercise of discretion powers[62]. The named directives also harmonize with the special norms of the law. And there is still an open question concerning the extent of effectiveness of administrative procedures' principles, their credibility for law enforcers.

What is the situation with the principles of administrative procedures in Russia?

The absence of a special law is a tragic and slowly recovered gap that undermines the very concept of administrative procedures. It is not only the fragmentation of legal sources (the vast majority of which is formed from by-laws – the so-called administrative regulations of executive bodies), but also the continuing self-isolation of the Russian legal order. The principles of "good governance" (as well as "natural justice") smash through with great difficulty.

60 Collection of Legislation on Administrative Procedures [Sbornik zakonodatel'nykh aktov po administrativnym protseduram]. Almaty: 2013, pp. 129-130.

61 The mechanism of its realization in the very law, however, is absent.

62 Ibid, pp. 54-59.

So, the first steps in this direction were made by the Constitutional Court of the RF that in several of its decisions formulated a number of the principles of a constitutional state. Among these were considered the principles of equality and justice, and on their basis – the requirements of certainty, clarity and unambiguousness of law norms[63] (which are apparently addressed more to the legislator rather than to the law enforcer). Because of their excessive abstractness, these principles are at best indirectly influence on administrative procedures, and at worst – do not play for them any significant role.

An important step in creating relatively universal requirements to administrative procedures in Russia has become the Federal Law No. 210-FL from 27.07.2010 "On the Organization of the Provision of State and Municipal Services"[64]. The principles formulated by it (legality of provision state (municipal) services; declaratory order of request; legitimacy of levying duties; transparency in activity of agencies and organizations that provide state (municipal) services; availability of provision public and municipal services, including for persons with disabilities; the possibility of obtaining state and municipal services in electronic form) are rather local, at least due to the limitation of the subject of the law. Also, these principles are not always specified in its special provisions.

However, at least some requirements of "good governance", we can find here. Thus, a number of articles of the law (e.g., article 7) prohibit require submission of documents and information that by virtue of the legislation are in possession of bodies (organizations) directly providing state (municipal) services or others. I think here we can talk about the particular case of the principle of prohibition of abuse of rights, prohibition of super formalism (that, alas, is very relevant for Russian legal order). According to article 8 of the aforementioned law, written requests sent to an unaccredited body are not returned to the applicant but forwarded to a competent authority (and again, we can talk about the private aspect of the ban on administrative chicanery).

The principle of procedures coordination[65], on the one hand, is partly reflected

63 See: Decision of the Constitutional Court of the Russian Federation No. 11-P from 15.07.1999 [Postanovlenie Konstitutsionnogo Suda RF ot 15.07.1999 № 11-P]; Decision of the Constitutional Court of the Russian Federation No. 9-P from 27.05.2003 [Postanovlenie Konstitutsionnogo Suda RF ot 27.05.2003 № 9-P]; Decision of the Constitutional Court of the Russian Federation No. 8-P from 12.05.2008 [Postanovlenie Konstitutsionnogo Suda RF ot 12.05.2008 № 8-P]; Decision of the Constitutional Court of the Russian Federation No. 15-P from 13.07.2010 [Postanovlenie Konstitutsionnogo Suda RF ot 13.07.2010 № 15-P]; Decision of the Constitutional Court of the Russian Federation No. 19-P from 18.07.2012 [Postanovlenie Konstitutsionnogo Suda RF ot 18.07.2012 № 19-P].

64 Rossiiskaya gazeta – Russian Gazette, 2010, July 30.

65 The Federal Law "On Administrative Procedures": initiative project with developers' comments… pp. 65-67.

in article 7[1] of the law of 2010 (establishing requirements to inter-ministerial informational interaction in the provision of public and municipal services), and on the other hand, the so-called multifunction centers (MFC) contribute its implementation. However, even here we can talk only about the infancy of this principle, since the process of genuine "binding" departments in the implementation of administrative procedures is reduced only to private cooperation concerning individual documents. The creation of holistic administrative procedures is "stuck".

Separately, we emphasize: introduction of the relevant requirements (principles) of the law of 2010 entails administrative responsibility under article 5.63 of the RF Code on Administrative Offences, what at its time was an unprecedented step for the Russian legislator[66].

The principle of impartiality, which is so familiar to the Russian judicial process, is being integrated in the system of administrative procedures little by little, "from the inside". We are talking primarily about the so called "conflict of interests". Ban on committing any legally significant actions by public servants in situations where they can bring him an illegal tangible or intangible benefit was originally enshrined in the Federal Law No. 79-FL from 27.07.2004 "On Public Civil Service of the RF"[67], but actually became incorporated into management practice not earlier than in 2008-2009. Currently it applies not only to state and municipal servants, but also, in accordance with the Federal Law No. 273-FL from 25.12.2008 "On Combating Corruption" [68], to workers of other organizations that implement public functions. Its violation, in the absence of signs of corpus delicti, brings disciplinary responsibility in the form of dismissal, and courts gradually develop practice on this category of cases[69]. But so far in Russia this principle has not been formed as a general rule for administrative procedures.

66 The history of development of appropriate tort norms see: Davydov K. V. Administrative Responsibility of Public Servants for Violation of Administrative Procedures of Execution Public Functions and Provision of Public Services [Administrativnaya otvetstvennost' gosudarstvennykh slu-zhashchikh za narushenie administrativnykh protsedur ispolneniya gosudarstvennykh funktsii i predostavleniya publichnykh uslug]. Aktual'nye problemy administrativnoi otvetstvennosti: materialy vserossiiskoi nauchno-prakticheskoi konferentsii – Actual Problems of Administrative Responsibility: materials All-Russian scientific-practical conference (Omsk, May 19, 2011), under edition of Solovey, Omsk: Omsk Law Institute, 2011, pp. 127-134.

67 Rossiiskaya gazeta – Russian Gazette, 2004, July 31.

68 Rossiiskaya gazeta – Russian Gazette, 2008, December 30.

69 Review of consideration cases for 2012-2013 on disputes concerning cases on bringing public and municipal servants to disciplinary responsibility for committing corruption offenses: approved by the Presidium of the Supreme Court of the Russian Federation 30.07.2014 [Obzor praktiki po rassmotreniyu v 2012 - 2013 godakh del po sporam, svyazannym s privlecheniem gosudarstvennykh i munitsipal'nykh sluzhashchikh k distsiplinarnoi otvetstvennosti za sovershenie korruptsionnykh prostupkov: utv. Prezidiumom Verkhovnogo Suda RF 30.07.2014]. Byulleten' trudovogo i sotsial'nogo zakonodatel'stva RF – Newsletter of the Labour and Social Legislation, 2014, no. 9.

The entire normative legal acts are devoted to the principle of glasnost' (openness), including the Federal Law No. 8-FL from 09.02.2009 "On Providing Access to Information about Activity of Public Authorities and Local Self-government Bodies" [70]. However, the content of this principle is understood in quite a specific way: we are talking about the placing certain information on the websites of departments, the access of citizens to the meetings of collegial bodies, etc. These norms do not confer on the executive authorities such a duty, which is so natural from the perspective of the concept of Good Administration, as notification of citizens about taking administrative acts affecting their legal status. It is symptomatic that even higher courts do not recognize such a citizens' right. At least outside the jurisdictional relations, as well as relations on implementation of justice. Let's consider the following case as an example. Resolution of the Government of Transbaikal region No. 156 from 12.04.2012 approved the procedure for granting subsidies to peasant (farmer) enterprises. However, there was set a duty of notification of citizens only about refusal to register their enterprises. The Prosecutor's Office, appealing this act, among other things, pointed to the lack of responsibility of the regional executive body to notify individuals about the inclusion of their peasant (farm) enterprises in the register of beneficiaries of subsidies, which, in its opinion, created legal uncertainty and unwarranted discretion. The Court of First Instance and then the Supreme Court of the Russian came to the opposite conclusion[71], thus limiting the requirement to inform citizens about taken decisions only to adverse acts[72].

The duty to justify administrative acts, as mentioned above, is one of the fundamental procedural principles of Good Administration, gradually penetrating also in Anglo-Saxon legal orders. Its volume varies, but the greatest distribution was given to the German approach of justification of primarily negative (adverse) acts.

In the Russian legislation this principle is not recognized as a general, whereas in some of the federal normative acts we can find its traces. So, according to article 14 of the Federal Law No. 99-FL from 04.05.2011 "On Licensing of Certain Activities" in the event of a decision to refuse to grant a license the licensing body, within

70 SZ RF – Collection of Laws of the RF, 2009, no. 7, article 776.

71 Ruling of the Constitutional Court of the Russian Federation No. 72-APG12-10 from 12.12.2012 [Opredelenie Verkhovnogo Suda RF ot 12.12.2012 g. № 72-APG12-10]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

72 On the one hand, such a limitation is common for many European legal orders. Here we can recall, for example, article 54 of the LAP of Finland (Collection of Legislation on Administrative Procedures [Sbornik zakonodatel'nykh aktov po administrativnym protseduram]. Almaty: 2013, p. 379). On the other hand, it seems more appropriate for the post-Soviet legal orders to use an expansive approach, where the duty of notification applies also to favorable acts (Collection of Legislation on… p. 71)

three working days from the date of this decision, gives or sends to the license applicant through the post with advice of delivery the notification of refusal to grant a license with a reasoned justification of the reasons for refusal, and with reference to specific provisions of normative legal acts and other documents that are the basis of such refusal[73].

However, the lack of consistency in the management of principles of administrative procedures even here plays a cruel joke with the Russian legal order. If the Federal legislator gradually embeds the requirement to justify administrative acts (at least towards negative acts), the legislation of the subjects of the Russian Federation, municipalities, as well as law enforcer do not rush to recognize such a procedural rule for citizens. Let's give as an example the following case. Resolution of the Novosibirsk Mayor's Office from 27.10.2010 approved the procedure for the preparation of legal acts of Novosibirsk Mayor's Office on the providing of land for construction in the territory of the city of Novosibirsk. However, this act did not establish the duty of the Mayor's Office to justify the denial of providing a land plot. The prosecutor appealed to the Court of First Instance with the demand to enshrine this duty. However, the Courts of First and Second Instance refused to meet the demand of the prosecutor on the following grounds. Firstly, the Russian procedural legislation does not provide the courts powers to bind state and municipal authorities to make amendments in normative legal acts. However, the relevant provisions could be recognized contrary to the legislation (e.g., on combating corruption, as urged by the prosecutor's office). However, here the courts made the following assertions: the duty of motivation of each act is superfluous, since the contested normative legal act set an exhaustive list of grounds for refusal (this is a very weak argument, taking into account at least the abstractness of such grounds as "non-conformity of an alleged object placement with town-planning and other terms of use of territories"). Finally, the advice of Cassation Instance[74] to demand for familiarization the minutes of meetings of commissions with reference to article 29 of the Russian Constitution of 1993, the Federal Law "On Information, Information Technologies and Protection of Information" and the Federal Law "On the Order of Consideration Requests of the Citizens of the Russian Federation" looks frankly sarcastic (if only because there is no guarantee of unambiguous formulation in these protocols of the final position with all necessary arguments, not to mention the fact that these protocols can be corny absent).

73 Rossiiskaya gazeta – Russian Gazette, 2010, May 6.

74 See: Cassational Ruling of the Novosibirsk Regional Court from March 15, 2010 on the case No. 33-1990/2012 [Kassatsionnoe Opredelenie Novosibirskogo oblastnogo suda ot 15.03.2012 g. Po delu №33-1990/2012]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

Principle of protecting trust that had emerged in the judicial practice of Germany did not received full enshrining in the Russian administrative legislation (unlike, for example, civil legislation establishing, among other things, restrictions on the application of new legal norms to civil relations already existing at the time of their introduction).

On the other hand, the practice of the Constitutional Court of the Russian Federation is gradually introducing this principle in the Russian legal system[75]. However, its scope covers mainly norm-setting. Even if law enforcement administrative acts are verified, it is, as a rule, a parallel process, within the framework of judicial norm-control. But even here the courts are quite careful.

So, citizen Agayev M. Sh. O., having used an opportunity provided by the regional legislation, filed an application for the providing him a land plot. The application was satisfied by the Barnaul Mayor's Office, there was made an act of choosing an appropriate land plot for construction. During the processing of documents for construction of a store the Russian Federation legislation changed, all such operations with land began to be carried out only at auction. And when the citizen requested in the executive body of the subject (management of property relations of the Altai territory) with a application on the preliminary agreement of the store placement on the specified land plot, he was denied. The courts of all instances (up to the Supreme Court of the Russian Federation)[76] being based on priority of public interest refused to recognize the citizen's right to the protection of trust. And although changes in the legislation should be recognized progressive, such approach, in our view, still seems quite questionable.

Finally, the principle of proportionality, having constitutionally legal basis in the Russian Federation (article 55 of the Constitution of the Russian Federation 1993)[77], at present is mostly applied not so much in regulatory managerial

75 Decision of the Constitutional Court of the Russian Federation No. 8-P from 24.05.2001 [Postanovlenie Konstitutsionnogo Suda RF ot 24.05.2001 g. № 8-P]; Ruling of the Constitutional Court of the Russian Federation No. 89-O from 4.04.2006 [Opredelenie Konstitutsionnogo Suda RF ot 4.04.2006 g. № 89-O]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

76 Ruling of the Supreme Court of the Russian Federation No. 51-G11-28 from 12.10.2011 [Opredelenie Verkhovnogo Suda RF ot 12.10.2011 № 51-G11-28]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

77 Part 3 article 55: The rights and freedoms of man and citizen may be limited by the federal law only to such an extent to which it is necessary for the protection of the fundamental principles of the constitutional system, morality, health, the rights and lawful interests of other people, for ensuring defence of the country and security of the State. The Constitution of the Russian Federation of 1993 [Konstitutsiya RF 1993 goda]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

legal relations, but more in jurisdictional administrative ones, and the Russian doctrine of that principle is still in its infancy[78].

So, the Russian legal order is not "hopeless". Within the framework of the legislation and judicial practice (primarily, the Constitutional Court of the Russian Federation) we can see a gradual rooting of certain principles of Good Administration like prohibition of formalism, the principle of proportionality, etc. However, such principles and guarantees of citizens' rights in administrative procedures as the motivation of administrative acts, the right to be heard (i.e., all that what constitutes the "core" of "good governance") have not yet found their legal reflection. At that, the analysis of judicial practice does not inspire an excessive optimism. It is pointless to hope that Russian courts, in the absence of special legal norms, can formulate appropriate legal positions obligating the administration. Therefore, the further stage in the evolution of administrative procedures and their principles will be associated primarily with the will of the legislator. And only then – with the position of law enforcers.

78 See, for example: Tolstykh V. L. Constitutional Justice and the Principle of Proportionality [Konstitutsionnoe pravosudie i printsip proportsional'nosti]. Rossiiskoe pravosudie – Russian Justice, 2009, no.12, pp. 47-56; Sherstoboev O. N. The Principle of Proportionality as a Prerequisite to the Expulsion of Foreign Nationals outside the Country of their Stay: the Limits of Right Constraint [Printsip proportsional'nosti kak neobkhodimoe uslovie vysylki inostrannykh grazhdan za predely gosudarstva ikh prebyvaniya: predely pravoogranicheniya]. Rossiiskii yuridicheskii zhurnal – Russian Legal Journal, 2011, no. 4, pp. 51-59; Sherstoboev O. N. The Theory of Interests in Administrative-legal Dimension: through the Example of Expulsion Foreign Nationals Outside the Host State [Teoriya interesov v administrativno-pravovom izmerenii: na primere vysylki inostrannykh grazhdan za predely prinimayushchego gosudarstva]. Rossiiskii yuridicheskii zhurnal – Russian Legal Journal, 2014, no. 3, pp. 99-108.

References:

1. Convention for the protection of human rights and fundamental freedoms. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

2. The Constitution of the Russian Federation of 1993 [Konstitutsiya RF 1993 goda]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

3. *The Federal Law "On Administrative Procedures": initiative project with developers' comments* [Federal'nyi zakon «Ob administrativnykh protsedurakh»: Initsiativnyi proekt s kommentariyami razrabotchikov]. Prolusion of K. Eckstein, E. Abrosimov, Fund "Constitution", Moscow: Kompleks-Progress, 2001.

4. Alder J. *General Principles of Constitutional and Administrative Law*. 4th Edition, 2002.

5. Alekseev S. S. *General Theory of Law* [Obshchaya teoriya prava]. Moscow: 1981, vol. 1.

6. A. von Bogdandi, Khuber P. M. State, Public Administration and Administrative Law in Germany [Gosudarstvo, gosudarstvennoe upravlenie i administrativnoe pravo v Germanii]. *Daidzhest Publichnogo Prava – Public Law Digest*, 2014, no. 1 (3).

7. Cassational Ruling of the Novosibirsk Regional Court from March 15, 2010 on the case No. 33-1990/2012 [Kassatsionnoe Opredelenie Novosibirskogo oblastnogo suda ot 15.03.2012 g. Po delu №33-1990/2012]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

8. *Collection of Legislation on Administrative Procedures* [Sbornik zakonodatel'nykh aktov po administrativnym protseduram]. Almaty: 2013.

9. *Constitutions of Foreign States: Study guide* [Konstitutsii zarubezhnykh gosudarstv: Uchebnoe posobie]. 4th edition, updated and revised, compiler professor V. V. Maklakov. Moscow: BEK, 2002.

10. Davydov K. V. Administrative Responsibility of Public Servants for Violation of Administrative Procedures of Execution Public Functions and Provision of Public Services [Administrativnaya otvetstvennost' gosudarstvennykh sluzhashchikh za narushenie administrativnykh protsedur ispolneniya gosudarstvennykh funktsii i predostavleniya publichnykh uslug]. *Aktual'nye problemy administrativnoi otvetstvennosti: materialy vserossiiskoi nauchno-prakticheskoi konferentsii – Actual Problems of Administrative Responsibility: materials All-Russian scientific-practical conference* (Omsk, May 19, 2011), under edition of Solovey, Omsk: Omsk Law Institute, 2011.

11. Davis Kenneth. *Discretionary Justice*. University of Illinois Press, 1973.

12. De Smith, S.A. *Judicial Review of Administrative Action*, 1995.

13. Decision of the Constitutional Court of the Russian Federation No. 11-P from 15.07.1999 [Postanovlenie Konstitutsionnogo Suda RF ot 15.07.1999 № 11-P]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

14. Decision of the Constitutional Court of the Russian Federation No. 8-P from 24.05.2001 [Postanovlenie Konstitutsionnogo Suda RF ot 24.05.2001 g. № 8-P]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

15. Decision of the Constitutional Court of the Russian Federation No. 9-P from 27.05.2003 [Postanovlenie Konstitutsionnogo Suda RF ot 27.05.2003 № 9-P]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

16. Decision of the Constitutional Court of the Russian Federation No. 8-P from 12.05.2008 [Postanovlenie Konstitutsionnogo Suda RF ot 12.05.2008 № 8-P]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

17. Decision of the Constitutional Court of the Russian Federation No. 15-P from 13.07.2010 [Postanovlenie Konstitutsionnogo Suda RF ot 13.07.2010 № 15-P]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

18. Decision of the Constitutional Court of the Russian Federation No. 19-P from 18.07.2012 [Postanovlenie Konstitutsionnogo Suda RF ot 18.07.2012 № 19-P]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

19. Deppe I. Towards the Reform of Administrative Law and the Draft Law "On Administrative Procedures" [K reforme administrativnogo prava i zakonoproektu «Ob administrativnykh protsedurakh»]. *Administrativnaya reforma v respublike Uzbekistan: opyt i problemy pravovogo regulirovaniya. Materialy Mezhdunarodnogo simpoziuma 29-30 sentyabrya 2007 g. – Administrative Reform in the Republic of Uzbekistan: Experience and Problems of Legal Regulation. Proceedings of the International Symposium, 29-30 September 2007*, Tashkent: 2008.

20. Eberhard Schmidt-Assmann. Structures and Functions of Administrative Procedures in German, European and International Law. *Transforming Administrative Procedure*, ed. J. Barnes, Sevilla: Global Law Press, 2008.

21. *Essential Administrative Law*, 2nd edition, prof. D. Barker (ed.), Sydney, London: 2001.

22. Guido Corso, Administrative procedures: twenty years on. *Italian Journal of Public Law*, Vol. 2, no. 2/2010.

23. H. P. Nehel. Good Administration as procedural right and/or general principle?, in: *Legal Challenges in EU Administrative Law. Towards an Integrated*

Administration, ed. H. C. H. Hofmann, A. H. Türk, Cheltenham, UK, (Northampton, USA), 2009.

24. H. P. Nehel. *Principles of Administrative Procedure in EC Law*, Oxford: Hart Publishing, 1999.

25. J. A. Gonzalez. The Evolution of Administrative Procedure Theory in "New Governance". Key Point, 2013. *Review of European Administrative Law*, Vol. 6, NR. 1.

26. Kapitan D. Principles of Administrative Process in Russia and France [Printsipy administrativnogo protsessa v Rossii i vo Frantsii]. *Administrativnye protsedury i kontrol' v svete evropeiskogo opyta – Administrative Procedures and Monitoring in view of European Experience*, under edition of T. Ya. Khabrieva and Zh. Marku, Moscow: Statut, 2011.

27. Kunnecke M. *Tradition and Change in Administrative Law. An Anglo-German Comparison*, 2007.

28. Mel'nichuk G. V. Valuation Standards of Discretionary Acts in Administrative Law of Germany [Standarty otsenki diskretsionnykh aktov v administrativnom prave Germanii]. *Zakonodatel'stvo – Legislation*, 2011, no. 10.

29. Ponce, J. Good Administration and Administrative Procedures. *Indiana Journal of Global Legal Studies*, 2005. Vol. 12, issue 2.

30. Pudel'ka I., Deppe I. *General Administrative Law in the States of Central Asia – a Brief Review of the Current Status* [Obshchee administrativnoe pravo v gosudarstvakh Tsentral'noi Azii – kratkii obzor sovremennogo sostoyaniya]. Available at : http://ruleoflaw.en/wp-content/uploads/2014/01/130708-Pudelka-Deppe-study_r.pdf (accessed : 10.05.2015).

31. Pünder H. German Administrative Procedure in a Comparative Perspective – Observations on the Path to a Transnational "Ius Commune Proceduralis" in Administrative Law, Jean Monnet Working Paper, 2013, NY.

32. ReNEUAL Model Rules on EU Administrative Procedure, 2014. Available at : http://www.reneual.eu/publications/ReNEUAL%20Model%20Rules%202014/ReNEUAL-%20Model%20Rules-Compilation%20Books%20I_VI_2014-09-03.pdf (accessed : 10.07.2015).

33. Review of consideration cases for 2012-2013 on disputes concerning cases on bringing public and municipal servants to disciplinary responsibility for committing corruption offenses: approved by the Presidium of the Supreme Court of the Russian Federation 30.07.2014 [Obzor praktiki po rassmotreniyu v 2012 - 2013 godakh del po sporam, svyazannym s privlecheniem

gosudarstvennykh i munitsipal'nykh sluzhashchikh k distsiplinarnoi otvetstvennosti za sovershenie korruptsionnykh prostupkov: utv. Prezidiumom Verkhovnogo Suda RF 30.07.2014]. *Byulleten' trudovogo i sotsial'nogo zakonodatel'stva RF – Newsletter of the Labour and Social Legislation*, 2014, no. 9.

34. *Rossiiskaya gazeta – Russian Gazette*, 2004, July 31.

35. *Rossiiskaya gazeta – Russian Gazette*, 2008, December 30.

36. *Rossiiskaya gazeta – Russian Gazette*, 2010, July 30.

37. *Rossiiskaya gazeta – Russian Gazette*, 2010, May 6.

38. Ruling of the Constitutional Court of the Russian Federation No. 89-O from 4.04.2006 [Opredelenie Konstitutsionnogo Suda RF ot 4.04.2006 g. № 89-O]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

39. Ruling of the Supreme Court of the Russian Federation No. 51-G11-28 from 12.10.2011 [Opredelenie Verkhovnogo Suda RF ot 12.10.2011 № 51-G11-28]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

40. Ruling of the Constitutional Court of the Russian Federation No. 72-APG12-10 from 12.12.2012 [Opredelenie Verkhovnogo Suda RF ot 12.12.2012 g. № 72-APG12-10]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

41. Sedov E. A. Information and Entropy Properties of Social Systems [Informatsionno-entropiinye svoistva sotsial'nykh system]. *ONS – Social Sciences and Modernity*, 1993, no. 5.

42. Sherstoboev O. N. The Principle of Proportionality as a Prerequisite to the Expulsion of Foreign Nationals outside the Country of their Stay: the Limits of Right Constraint [Printsip proportsional'nosti kak neobkhodimoe uslovie vysylki inostrannykh grazhdan za predely gosudarstva ikh prebyvaniya: predely pravoogranicheniya]. *Rossiiskii yuridicheskii zhurnal – Russian Legal Journal*, 2011, no. 4.

43. Sherstoboev O. N. The Theory of Interests in Administrative-legal Dimension: through the Example of Expulsion Foreign Nationals Outside the Host State [Teoriya interesov v administrativno-pravovom izmerenii: na primere vysylki inostrannykh grazhdan za predely prinimayushchego gosudarstva]. *Rossiiskii yuridicheskii zhurnal – Russian Legal Journal*, 2014, no. 3.

44. Singh M. P. *German administrative law in common law perspective*. New York: 2001.

45. Starilov Yu. N. Administrative Procedures as a Remedy for Ensuring the Rule of Law in Public Administration [Administrativnye protsedury kak

pravovoe sredstvo obespecheniya zakonnosti publichnogo upravleniya]. *Iz publikatsii poslednikh let: vospominaniya, idei, mneniya, somneniya…: sbornik izbrannykh nauchnykh trudov – From Recent Publications: Memories, Ideas, Opinions, Doubts...: collection of selected scientific papers*, Voronezh: publishing house of Voronezh State University, 2010.

46. *Swedish Agency for Public Management, Principles of Good Administration in the Member States of the European Union*, 2005 (www.statskontoret.se).

47. *SZ RF – Collection of Laws of the RF*, 2009, no. 7, article 776.

48. Thomas R. *Legitimate Expectations and Proportionality in Administrative Law*. Oxford: 2000. P. XI.

49. Tolstykh V. L. Constitutional Justice and the Principle of Proportionality [Konstitutsionnoe pravosudie i printsip proportsional'nosti]. *Rossiiskoe pravosudie – Russian Justice*, 2009, no.12.

50. *https://wcd.coe.int/ViewDoc.jsp?id=678043* (accessed : 10.07.2015).

51. *http://www.europarl.europa.eu/charter/pdf/text_en.pdf* (accessed: 10.07.2015).

52. *http://www.ombudsman.europa.eu/en/resources/code.faces#/page/1* (accessed : 10.07.2015).

Universal Decimal
Classification 351/354

Kudryashova. E. V.

PROBLEMS OF ADMINISTRATIVE PROCEDURES IN STATE STRATEGIC PLANNING

Kudryashova Ekaterina Valer'evna,
c.j.s. (PhD in law), Associate professor, lawyer of the Bar Chamber of Moscow region.

The article is devoted to the development of administrative procedures for the state strategic planning. This issue is becoming especially relevant as recently a framework law on state strategic planning came into force in Russia. The author asserts that state strategic planning needs contemporary administrative procedures providing efficient communication between state and society.

Keywords: strategic planning, public interest, administrative procedures, administrative law.

In Russia, since the beginning of the XXI century, a new strategic approach to planning has appeared – socio-economic, financial and other forms of planning have become strategic.

During the XX century planning as a managerial tool has gradually evolved.[1] Evolution of planning went from the planning of ongoing internal processes to the planning directed outwards, that is, taking into account external factors. Managerial practice has shifted from the planning of current activity to long-term planning, and from the long-term planning to strategic planning.

Long-term planning was carried out by transferring previous patterns and structural characteristics to the future. To navigate in the heightened uncertainty of the future there has appeared a need to change the very source principle of planning: strategic plan comes from the future to the present and not from the past to the future.[2] Long-term planning is characterized by an assumption that the future

1 See: Kudryashova E. V. Modern Mechanism of Legal Regulation of State Planning (through the example of state financial planning) [Sovremennyi mekhanizm pravovogo regulirovaniya gosudarstvennogo planirovaniya (na primere gosudarstvennogo finansovogo planirovaniya)]. Moscow: BIBLIO-GLOBUS, 2013.

2 See: Introductory article to the book of Asnoff I. Strategic Management [Strategicheskoe upravlenie]. Moscow: Ekonomika, 1989.

can be measured by extrapolation of the historical growth trends. There is no an assumption about growth and about the fact that the future will be better than the past in strategic planning, at the same time, it is believed that the future is not an improved, expanded, etc. version of the past.[3] Thus, planning has become a qualitatively new – "strategic planning" from the uncertain future to the present.

Strategic planning is the management of future risks, not all of which are known at the time of taking a planning decision. Managing entity determines the desired state of social relations in the future (for example, a mayor determines a strategic goal – the city has to become industrialized, that is, he determines the desired state of the system in the future), then within the stated strategic objective they take concrete decisions aimed at achieving this state (allocation of land for the construction of industrial enterprises, setting of investment incentives, and so on). Strategic planning is exercised by both legal and political methods.[4] The volume of legal regulation, including administrative one, differs for different types of planning.

Federal Law "On the Strategic Planning in the Russian Federation" was adopted in 2014.[5] Russian legislator has laid the foundation for building a system of strategic planning, which linked together all types of planning: socio-economic, financial, territorial, sectoral, etc. The Law is a framework and sets only the key concepts, principles. Formation of administrative procedures in the field of planning – is the next stage of the legal regulation, which, at present, is under development.

On the basis of the framework law, it is necessary to define logically separated, administrative actions that are binded by an overall objective and legal result[6], and enter to the organization and functioning of public authorities the proper procedure of administrative actions exercising.[7] After the adoption of the framework law on strategic planning timely a question arises about the general approaches to administrative procedures for strategic planning.

3 Kuznetsova E. I. Strategic Analysis in the State Management of National Economy: Monograph [Strategicheskii analiz v sisteme gosudarstvennogo upravleniya natsional'noi ekonomikoi: monografiya]. Moscow: Unity-Dana, Zakon i pravo – State and Law, 2006, p. 59.

4 Kudryashova E. V. Correlation of Law and Policy in the Social Regulation of the State Financial Planning [Sootnoshenie prava i politiki v sotsial'nom regulirovanii gosudarstvennogo finansovogo planirovaniya]. Nalogi i finansovoe pravo – Taxes and Financial Law, 2014, no. 7, pp. 221-229.

5 Federal Law No. 172-FL from June 28, 2014 "On the Strategic Planning in the Russian Federation" dated June 28, 2014 [Federal'nyi zakon «O strategicheskom planirovanii v Rossiiskoi Federatsii» ot 28 iyunya 2014 № 172-FZ]. Rossiiskaya gazeta – Russian Gazette, no. 146 from July 3, 2014.

6 Davydov K. V. Administrative Regulations of the Federal Bodies of Executive Power of the Russian Federation: Theory Issues [Administrativnye reglamenty federal'nykh organov ispolnitel'noi vlasti Rossiiskoi Federatsii: voprosy teorii]. Under edition of Yu. N. Starilov, Monograph, Moscow: 2010, p. 29.

7 Starilov Yu. N. Administrative Law: Textbook [Administrativnoe pravo: Uchebnik]. Under edition of B. V. Rossinskii, Yu. N. Starilov, Moscow: 2009, p. 677.

In the twenty-first century in literature they began to write about the transition to a new administrative law – administrative law of the third generation. As a determining trend of the administrative law of the third-generation scientists call the tendency to blur the boundaries between rule-making and law-enforcement.[8] New administrative procedures, new not so much in form as in content, form within the framework of the new administrative law. There is a quote from the report of the Spanish professor Javier Barnes from Seville about the nature and content of the administrative procedures of the third generation: "Administrative procedures in the context of new forms of governance cannot longer imitate "judicial process" in the case of proceedings on an administrative offense, or "legislative process" as it can be seen in the publication of by-laws. Modern administrative procedures require their own identity in the legal field, turning into a single loop, process without a clear beginning and end. As a result, administrative procedures begin in the preliminary stages and continue later in the relevant activities, whether issuing of norms, taking decisions or other activity until they reach a certain effect or outcome. Legislation on new administrative procedures should acquire a pronounced "administrative" nature, in contrast to the quasi-legislative or quasi-judicial one. It should reflect the features of new forms of governance and include the whole cycle of forming a coherent approach of authorities (public policy). New methods of regulation have greatly contributed to the obsolescence of the traditional separation between law-making and law-enforcement".[9] Javier Barens compares the old and new administrative procedures for various reasons, but we will focus just on two. In his opinion, the nature of the old administrative procedures was limited to ensuring of taking a decision, the new administrative procedures in the context of new forms of governance constitute something greater – they can be understood

8 Javier Barnes. Towards a third generation of administrative procedure. Under edition of S. Rose-Ackerman, P.L. Lindseh, Comparative Administrative Law. Northampton: Edward Elgar Publishing Inc. 2010, pp. 336-356.

9 Javier Barnes. Transforming Administrative Procedure. Towards the third generation of administrative procedures / Paper of Workshop on Comparative Administrative Law, Yale Law School, May 7-9, 2009, p. 26. (http://www.law.yale.edu/documents/pdf/CompAdminLaw/Javier_Barnes_CompAdLaw_paper_(rev).pdf (accessed : 05.06. 2015)). "Administrative procedure in the context of the new forms of governance can no longer emulate "courtroom procedure," as in the case of adjudication, nor "legislative procedure," as seen in traditional executive regulations. Contemporary administrative procedure is searching for its own identity in the legal world, evolving into a cyclical unity, a process without a clear beginning or end. As a result, administrative procedure begins in the preliminary phases and continues during the activity in question, whether it be rulemaking, decision-making or any other, until it reaches its eventual effects or consequences. The new administrative procedure legislation must acquire a marked "administrative" nature, as opposed to a "judicial" or "legislative" one. It must be capable of representing the peculiarities of the new forms of governance, and encompass the entire cycle of public policy. The new regulatory methods, in many cases, have made obsolete the traditional separation between establishing a regulation or a law and its implementation".

as a "system of communication between the administration and a citizen". The old administrative procedures ensured taking of a decision[10], and the new administrative procedures contribute to the formation of the "approach of public authorities to the solving of a problem"[11].

Existing administrative procedures in the field of planning have been being related to quasi-judicial ("trial-type"). The public is informed about the intention of the authorities to take a decision. Public announcement shall include all the necessary information from the point of view of law and fact. Further hearings are held before administrative decision-making body. Under this procedure, the parties are given the opportunity to present their points of view and confirm them by evidence. A record containing information provided to the persons concerned is drawn up on the results of the hearings. Authorities shall take a decision with the statement of justification. This procedure adds a "democratic legitimacy" to the decision taken.[12]

Let us ask ourselves, what does in reality such a quasi-judicial procedure provide? Obviously only an organized participation of concerned persons, and it was enough before. In publications devoted to the problems of compliance with the public interest in state and municipal planning they put forward the concept of "participation", according to which, whatever the result of planning, if there is a possibility to involve all persons concerned in the taking of a decision – the decision is considered made within the public interest. This concept is contraposed to the concept, which focuses on the protection of the rights of each individual and demand of fair compensation to anyone, whose rights have been violated.[13] In both cases, it is quite enough to adequately inform the public of intent to adopt a planning decision and ensure the participation.

Having designated a modest role of law in the field of planning, the famous English legal scholar P. Craig offers three ideologies that can determine this modest role of law and, therefore, administrative procedures. Firstly, the law can provide protection of private property. Secondly, the law can protect public interests, even if it is in conflict with the protection of private property. Thirdly, the function of law in the field of planning may be the ensuring of public participation in decision-making that may contradict the two previous tasks. The latter approach

10 decision

11 Public policy solution

12 Hermann Pünder. German Administrative Procedure in a Comparative Perspective – Observations on the Path to a Transnational "Jus Commune Proceduralis" in Administrative Law. Jean Monnet Working Paper 26/13, New York: 2013, p. 11.

13 Heather Campbel, Robert Marshall. "Utilitarism's bad Breath? A Re-evaluation of the Public Interest Justification for Planning", Vol 1 (2). Planning Theory (2002), p. 163-187.

is sometimes called as "populist" one.[14] Thus, administrative procedure could stop at participation and involvement.

Administrative procedure is aimed at the adoption of a decision, and easily may limit itself to "involvement" or "participation" in combination with subsequent compensation, and may only be limited to harm compensation for those whose rights are violated by a decision taken. In most cases the adoption of a planned decision involves the old understanding of administrative procedures as tools providing the taking of a decision for the sake of the decision itself, but not for the solution of a problem and ensuring communication between the authorities and citizens.

"Political failure" of administrative procedures in the field of planning became clearly manifested in the XXI century.

Studies on the results of the mega-projects of the Olympic Games, including in Canada (Vancouver), suggest that the administrative procedures related to the call to public opinion often do not show and do not take into account this opinion.[15] The opinion of the residents is not taken into account, and often people concerned are not involved. However, it does not particularly worry the authorities, since it is considered that society will always be to some extent dissatisfied as "a dog always barking at its paws".

A planning decision taken in compliance with all administrative procedures (with the involvement of experts and conduct of public hearings) may, however, cause riots and lead to political demands. There are examples from very various jurisdictions – the decision on the reconstruction of Taksim Square in Istanbul (Turkey), the decision on the construction of a federal highway through the Khimki forest (Russia), the project of reconstruction of the railway station "Stuttgart 21" (Germany).

In all the cases the taken planning decision has a "democratic legitimacy", the decision has been made, but, at that, the communication exchange between the state and society has not happened and the problem has not been resolved. The political consequences of the fact that administrative procedures have ensured the adoption of a decision, but have failed to resolve the issue, as we can see, may be not long in coming.

14 Craig P. P. Administrative law. 5th Edition Reprinted. London: Sweet&Maxwell, 2006, p. 288.

15 L. Porter, M. Jaconelli, J. Cheyne, D. Eby, H. Wagenaar. "Planning Displacement: The Real Legacy of Major Sporting Events"Just a person in a wee flat": Being Displaced by the Commonwealth Games in Glasgow's East End Olympian Masterplanning in London Closing Ceremonies: How Law, Policy and the Winter Olympics are Displacing an Inconveniently Located Low-Income Community in Vancouver Commentary: Recovering Public Ethos: Critical Analysis for Policy and Planning". Planning Theory & Practice, 2009, 10 (3), pp. 395 – 418.

Interpreting a fairly complex idea of the communication of power and a citizen in relation to strategic planning, we must note the following. The literature on management has always pointed out that an effective managerial impact of planning as a method of management is only possible when the reconciling of the interests, and vice versa: planning will collapse when the absence of a necessary level of trust between authorities and citizens. "Plans have a great mobilization value. Representing the picture of a desired future they form rational expectations of economic agents and stimulate their economic activity in correct direction. This is one of the main functions of plan in the market economy".[16] The mobilization function of plans is closely linked to the level of public confidence in the State. Historical experience shows that a lack confidence in the power paralyzes regulatory effect of any state planning.[17] Depending on the level of confidence in the authorities of the State in the sphere of economy economic entities either rely on the plans proposed by the State, and thereby lead them into action, or, expressing mistrust, do not take into account State planning, thereby reducing the regulatory effect of the plans.

Planning – a specific sphere of public administration, where the harmonization of interests is always spoken about, and the management process goes bottom-up and top-down (so it was during the Soviet period, despite the predominance of prescriptive model – top-down). Meanwhile, in "hard times" administrative authorities especially call on citizens to cooperate, while the idea of communication exchange, co-ordination of interests and cooperation covers all administrative-legal relations. The need for communication between the government and a citizen, the need to harmonize the interests, and hence the need of administrative procedures of the third generation we can associate with more complicated external conditions – a series of economic crises, resource crises and so on.

It would be a delusion to believe that the idea of coordination of interests is something new in administrative law. Pre-revolutionary Russian scientist A. Elistratov, a coeval of the difficult economic and political situation in Russia before the revolution, wrote about the idea of cooperation: "The idea of cooperation in the broad sense of the word should be given in the present system of public interrelations a very important role in the general theory of public law. The more the organization of power for dominion historically gives way to complex technical

16 What and How to Plan in a Market Economy (Round table materials) [Chto i kak sleduet planirovat' v rynochnoi ekonomike (Materialy kruglogo stola)]. Voprosy gosudarstvennogo i munitsipal'nogo upravleniya – Issues of State and Municipal Administration, 2009, no. 4, p. 45.

17 Wood S. Why "indicative planning" failed: British industry and the formation of National economic development council 1960-64. Twentieth Century British History, 2000, Vol. 11, issue 4, pp. 431-459.

organizations of public services, the more space for cooperation of a citizen with authorities" and further, "The idea of cooperation can also greatly help in clarifying the legal sense and meaning of those newly generated forms, in which the organization of public forces is taking place in connection with the modern war. The idea of cooperation strengthens the close relations of an official and citizen. When life experience at every step shows that public services are able to perform its function not otherwise, as with the active cooperation of citizens, awareness that an employee-citizen is the same official must inevitably appear".[18] A. Elistratov stresses the need to introduce the idea of cooperation in crisis.

So, the earlier administrative procedures aimed at the taking of a decision, but not at the resolving of a problem, served only a "populist" task of involving. However, as the experience of political unrest shows the involvement or participation is getting insufficient. New understanding of the content of administrative procedures (administrative procedure of the third generation), if so far in practice have not yet reached the desired level of communication and harmonization of interests, but require to seek to it.

Examining common approaches to administrative procedures in strategic planning it is necessary to recall that planning decisions are the decisions on the management of future risks or "risks decisions". Science offers two approaches to taking risks decisions: decision-making based on experts' opinions and/or involvement of the widest possible range of individuals in decision making.[19] Some types of planning recognize impossibility to involve a broad range of individuals (budget planning), the feature of others is combination of experts support and involvement of persons concerned.

Being based on the approach to the planning decision as to a decision on risks management, we can say that administrative procedures must ensure the involvement of a wide range of individuals, as well as expert support of taking planning decisions. However, in terms of risks management a wide range of individuals is involved not to harmonize interests or to give a "democratic legitimacy" to a decision, but in order to "spray" the risk among the largest range of actors and to shift responsibility for the taken decision at everybody. If the necessary expert support of taking a planning decision is provided, it may happen that awareness of their interests by a wide range of individuals (interests carriers) will take place and it is

18 Elistratov A. An Official and a Citizen [Dolzhnostnoe litso i grazhdanin]. Voprosy administrativnogo prava – Issues of Administrative Law, book 1, Moscow: 1916, p. 83.

19 Lepsius O. Risk Management in Administrative Law [Risikosteuerung durch Verwaltungsrecht]. Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer – Publications of the German Association of Constitutional Lawyers, Band 63. Berlin: De Gruyer Rechtswissenschaften Verlags – GmbH. 2003, pp. 266-315.

even possible that there will be some promotion to the harmonization of interests within planning.

Within this article we note another problem of administrative procedures, which relates more to the organizational and technical sphere of administrative law and is characteristic only for planning. Traditional administrative procedures for taking a specific narrow management decision typically do not provide effective management through planning in connection with the two-tier structure of decisions in planning in general and in strategic planning in particular, with its emphasis on goal-setting.

Planning is always characterized by two levels of decisions – planning decision (the plan of territory development, the plan of socio-economic development, budget and so on), which is aimed at a generalized object of regulation (territory as a whole, socio-economic situation, financial system, and so on) and specific decisions based on a plan and aimed at a narrow range of public relations (allocation of land, building permits, allocation of funds (assignations), and so on). The taking of specific decisions requires a broad discretion, since it is impossible to foresee all external conditions in the process of adopting a plan. What should individual decisions be within the framework of a plan is determined by a managerial entity, but all of them must lead to the achievement of a desired state of social relations (achievement of a strategic objective) by the deadline (planning horizon). Planning decision (plan) in strategic planning is predominant and all decisions within the framework of the plan should be evaluated on the basis of the plan and its objectives.

Two levels of decisions in the field of planning: plan (planning decision) and taken on its basis decisions (decision to purchase land, building permits, and so on (this is true not only towards territorial planning)), are taken on the basis of different or even disparate administrative procedures. As a general rule, individual decisions within the framework of a taken plan must comply with the plan, but the subordination of administrative procedures is difficult to achieve. If there are several levels of government in a state, the situation is complicated by the differences in the administrative procedures of planning at the level of the center and regions. The practice of states has already met the attempts to harmonize procedures, in particular for the most significant infrastructure projects. At the beginning of the XXI century there was an attempt to consistently settle the planning of infrastructure and territories in the UK – there were adopted Planning and Compulsory Purchase Act of 2004 and Planning Act of 2008. In 2008 a notion of Nationally Significant Infrastructure Projects appeared in the Planning Act and a unified state body

Infrastructure Planning Commission was created. The plurality of administrative procedures for infrastructure projects was canceled, and there was created a unified procedure in the jurisdiction of the Commission – in this case, a plan and taking decisions within the framework of the plan were gathered within the framework of one administrative procedure.[20]

On the one hand, the creation of a unified administrative procedure removes the differing vectors of decisions and promotes the consistent implementation of a plan, on the other hand, there is a question concerning a redistribution of powers between levels of government, the unified administrative procedure in the hands of one central agency separates control from interested parties, whose rights may be violated.

In our small study we have identified the most important systemic problem of administrative procedures for strategic planning – the need to move to a new content of administrative procedures. Strategic planning needs administrative procedures of the third generation, which ensure the "resolution of a problem" and the formation of a coherent approach in contrast to the taking of a decision for the sake of the decision. Changes must take place not so much in the form of administrative procedures, but more in their content.

At the same time, it is necessary to solve an organizational-legal problem – the issue of harmonization or unification of administrative procedures of the two levels of decisions: plan and specific decisions within the framework of the plan, which ultimately lead to the achievement of the objectives that are set in the plan.

20 See: Telling and Duxbury's planning law and procedure. Edited by R M C Duxbury, 14th edition, Oxoford University Press, 2010.

References:

1. Federal Law No. 172-FL from June 28, 2014 "On the Strategic Planning in the Russian Federation" dated June 28, 2014 [Federal'nyi zakon «O strategicheskom planirovanii v Rossiiskoi Federatsii» ot 28 iyunya 2014 № 172-FZ]. *Rossiiskaya gazeta – Russian Gazette*, no. 146 from July 3, 2014.

2. Asnoff I. *Strategic Management* [Strategicheskoe upravlenie]. Moscow: Ekonomika, 1989.

3. Javier Barnes. Towards a third generation of administrative procedure. Under edition of S. Rose-Ackerman, P. L. Lindseh, *Comparative Administrative Law*. Northampton: Edward Elgar Publishing Inc. 2010.

4. Javier Barnes. *Transforming Administrative Procedure. Towards the third generation of administrative procedures* / Paper of Workshop on Comparative Administrative Law, Yale Law School, May 7-9, 2009. (http://www.law.yale.edu/documents/pdf/CompAdminLaw/Javier_Barnes_CompAdLaw_paper_(rev).pdf (accessed : 05.06. 2015)).

5. Craig P. P. *Administrative law*. 5th Edition Reprinted. London: Sweet&Maxwell, 2006.

6. Davydov K. V. *Administrative Regulations of the Federal Bodies of Executive Power of the Russian Federation: Theory Issues* [Administrativnye reglamenty federal'nykh organov ispolnitel'noi vlasti Rossiiskoi Federatsii: voprosy teorii]. Under edition of Yu. N. Starilov, Monograph, Moscow: 2010.

7. Elistratov A. An Official and a Citizen [Dolzhnostnoe litso i grazhdanin]. *Voprosy administrativnogo prava – Issues of Administrative Law*, book 1, Moscow: 1916.

8. Heather Campbel, Robert Marshall. "Utilitarism's bad Breath? A Re-evaluation of the Public Interest Justification for Planning", Vol 1 (2). *Planning Theory* (2002).

9. Hermann Pünder. German Administrative Procedure in a Comparative Perspective – Observations on the Path to a Transnational "Jus Commune Proceduralis" in *Administrative Law. Jean Monnet Working Paper* 26/13, New York: 2013.

10. Javier Barnes. *Transforming Administrative Procedure. Towards the third generation of administrative procedures* / Paper of Workshop on Comparative Administrative Law, Yale Law School, May 7-9, 2009. (http://www.law.yale.edu/documents/pdf/CompAdminLaw/Javier_Barnes_CompAdLaw_paper_(rev).pdf (accessed : 05.06. 2015)).

11. Kudryashova E. V. Correlation of Law and Policy in the Social Regulation of the State Financial Planning [Sootnoshenie prava i politiki v sotsial'nom regulirovanii gosudarstvennogo finansovogo planirovaniya]. *Nalogi i finansovoe pravo – Taxes and Financial Law*, 2014, no. 7.

12. Kudryashova E. V. *Modern Mechanism of Legal Regulation of State Planning (through the example of state financial planning)* [Sovremennyi mekhanizm pravovogo regulirovaniya gosudarstvennogo planirovaniya (na primere gosudarstvennogo finansovogo planirovaniya)]. Moscow: BIBLIO-GLOBUS, 2013.

13. Kuznetsova E. I. Strategic Analysis in the State Management of National Economy: Monograph [Strategicheskii analiz v sisteme gosudarstvennogo

upravleniya natsional'noi ekonomikoi: monografiya]. *Zakon i pravo – State and Law*, 2006.

14. L. Porter, M. Jaconelli, J. Cheyne, D. Eby, H. Wagenaar. "Planning Displacement: The Real Legacy of Major Sporting Events"Just a person in a wee flat": Being Displaced by the Commonwealth Games in Glasgow's East End Olympian Masterplanning in London Closing Ceremonies: How Law, Policy and the Winter Olympics are Displacing an Inconveniently Located Low-Income Community in Vancouver Commentary: Recovering Public Ethos: Critical Analysis for Policy and Planning". *Planning Theory & Practice*, 2009, 10 (3).

15. Lepsius O. Risk Management in Administrative Law [Risikosteuerung durch Verwaltungsrecht]. *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer – Publications of the German Association of Constitutional Lawyers*, Band 63. Berlin: De Gruyer Rechtswissenschaften Verlags – GmbH. 2003.

16. Starilov Yu. N. *Administrative Law: Textbook* [Administrativnoe pravo: Uchebnik]. Under edition of B. V. Rossinskii, Yu. N. Starilov, Moscow: 2009.

17. *Telling and Duxbury's planning law and procedure*. Edited by R M C Duxbury, 14th edition, Oxoford University Press, 2010.

18. What and How to Plan in a Market Economy (Round table materials) [Chto i kak sleduet planirovat' v rynochnoi ekonomike (Materialy kruglogo stola)]. *Voprosy gosudarstvennogo i munitsipal'nogo upravleniya – Issues of State and Municipal Administration*, 2009, no. 4.

19. Wood S. Why "indicative planning" failed: British industry and the formation of National economic development council 1960-64. *Twentieth Century British History*, 2000, Vol. 11, issue 4.

Universal Decimal
Classification 342.951

Kuyanova A. V.

ADMINISTRATIVE ARREST: PROSPECTIVE LINES OF IMPROVEMENT THE LEGAL REGULATION

Kuyanova Arina Viktorovna,
c.j.s. (PhD in law), Senior lecturer of the Chair of administrative law and administrative activity of internal affairs bodies at Omsk Academy of the RF MIA.

The article analyzes the controversial provisions relating to the implementation in practice the provisions of the Code on Administrative Offences of the RF, which regulate the procedure of imposition and execution of administrative arrest. The author defines the ways of improving the institute of administrative arrest, formulates proposals clarifying certain provisions of the Code on Administrative Offences of the RF (hereinafter – CAO RF) concerning the procedure of imposition and execution of administrative arrest.

Keywords: administrative arrest, administrative punishment, administrative responsibility, administrative offense.

Administrative arrest is a special kind of administrative punishment, which is imposed by a judge in exceptional cases for certain types of administrative offences, since restricts the rights of citizens to freedom and personal inviolability.

Meanwhile, the results of activity of the federal courts of general jurisdiction and justices of the peace in 2012-2014 years indicate that the punishment in the form of administrative arrest has been imposed by the judges against 19.4% (in 2012), 18.02% (in 2013), 17.54% (in 2014) of persons from the total number of

people subjected to administrative punishment [7]. In 2014, the penalty in the form of administrative arrest was imposed against 1108024 people (an increase of +9.5% in respect of 2013). In addition, a steady tendency of increase in the number of articles, the sanctions of which provide for penalty in the form of administrative arrest, has been noted in the Code on Administrative Offences of the RF (hereinafter – CAO RF).

In accordance with part 1 article 3.9 of the CAO RF [1] (part 1 article 4.13 of the draft Federal Law № 703192-6 "Russian Federation Code on Administrative Offences (General Part)" [8]) administrative arrest lies in the detention of an offender in isolation from society and is set for a period of up to fifteen days, and for violation of the established order of organizing or holding meetings, rallies, demonstrations, marches or picketing or for organization of mass simultaneous holding and movement of people in public places that has entailed a violation of public order, for violating the requirements of state of emergency or the legal regime of counter-terrorism operation or for administrative offenses in the area of legislation on narcotic drugs, psychotropic substances and their precursors up to thirty days.

According to part 2 article 3.9 of the CAO RF (part 1 article 4.13 of the draft CAO RF) administrative arrest may be imposed in exceptional cases. The list of exceptional cases is missing in the CAO RF. We believe that administrative arrest can only be applied when considering the characteristics of offender's individuality and offense the use of other forms of punishment will not provide the implementation of tasks of administrative responsibility or if there are circumstances aggravating administrative responsibility.

Circumstances listed in article 4.3 of the CAO RF cannot be taken into account as aggravating if they are provided for as qualifying signs of certain formulations of administrative offenses.

In our opinion, administrative punishment in the form of administrative arrest should not be appointed in the presence of both mitigating and aggravating circumstances.

It is unacceptable to apply administrative arrest if a person, who committed an offense, is unable to bear the burden of property-related forms of punishment. It is for this reason nowadays there is no unified position on the issue of feasibility of application arrest as a form of administrative punishment in accordance with part 1 article 20.25 of the CAO RF in the legal community [5, 75].

List of persons in respect of whom the administrative arrest cannot be applied is provided in part 2 article 3.9 of the CAO RF. In December 2014 the Decision of the Russian Federation Government No. 1358 from December 12, (in the pursuance

of part 3 article 17 of the Federal Law "On the Order of Serving Administrative Arrest" [2]) approved the list of diseases that prevented the serving of arrest [3], thereby in fact, expanded the range of persons in respect of which a sentence in the form of administrative arrest cannot be applied. However, in practice, in imposing an administrative penalty judges do not always find out whether the person, against whom the proceedings are conducted, has diseases hindering the serving of arrest. As a result, in the course of taking a person, in respect of whom an administrative punishment in the form of administrative was imposed, during the medical examination the diseases hindering the serving of administrative detention get revealed, the duty officer of the place of serving administrative arrest denies admission to a place of serving administrative arrest and makes an entry in the log book. Decision on administrative arrest in fact remains unexecuted.

In accordance with part 1 article 32.8 of the CAO RF, a judge's decision on administrative arrest is executed by the employees of internal affairs bodies immediately after its taking. This situation is often justified by the fact that administrative arrest is preceded by administrative detention.

In accordance with part 1 article 27.3 of the CAO RF, administrative detention as a measure of maintenance of proceedings on cases of administrative offences is aimed at the execution of a decision on the case of an administrative offense. The period of administrative detention is included within the period of administrative arrest (part 3 article 3.9, part 3 article 32.8 of the CAO RF). A record (a decision of a prosecutor) on an administrative offence which entails an administrative arrest shall be delivered to a judge for consideration immediately after drawing it up (issuing it) (part 2 article 28.8 of the CAO RF), and a case on an administrative offence, the commission of which shall entail administrative arrest, shall be considered on the date of receipt of a record of the administrative offence and of other materials of the case, and in respect of a person subjected to administrative detention, shall be considered in 48 hours at most, as of the moment of its detention (part 4 article 29.6 of the CAO RF).

A similar procedure of execution of punishment in the form of administrative arrest was provided for in the Code on Administrative Offences RSFSR (hereinafter – CAO RSFSR) [4]. According to article 303 of the CAO RSFSR, a decision on administrative arrest was executed immediately after its adoption, and in accordance with part 2 article 266 of the CAO RSFSR, the decision of a district court or a judge on imposing an administrative penalty was final and not subject to appeal in the manner of proceedings on cases of administrative offenses, except for cases provided for by legislative acts of the USSR and RSFSR.

In accordance with the Decision of the Constitutional Court of the Russian Federation No. 9-P from May 28, 1999 "On the case of verification of constitutionality of the part 2 article 266 and paragraph 3 part 1 article 267 of the RSFSR Code on Administrative Offences in connection with the complaints of citizens E. A. Arbuzova, O. B. Kolegov, A. D. Kutyrev, R. T. Nasibulin and V. I. Tkachuk", there were no existing legislative acts of the USSR and RSFSR, as well as normative legal acts of the Russian Federation, which would provide for such exceptional cases [6].

In our opinion, the current simplified procedure for the application of administrative arrest – the only kind of administrative punishment restricting human rights and freedoms cannot be justified by any reasons, including the objectives of saving energy and resources that the state has to spend on the search and coercion of persons evading execution of a decision on administrative arrest. However it is difficult to trace a different cause that has influenced the decision of legislator to adopt part 1 article 32.8 of the CAO RF.

It should be noted that the implementation of duty to perform a decision on administrative arrest is protected by the norms of the Russian legislation, in particular part 2 article 20.25 of the CAO RF "Evasion of Execution of Administrative Punishment".

CAO RF does not provide for a mechanism for the suspension of execution of a decision on imposing an administrative punishment in the form of administrative arrest in connection with an appeal on the decision handed down by a judge (part 2, article 31.6 of the CAO RF).

In accordance with part 2 article 30.2 of the CAO RF, an appeal against a decision of a judge to impose an administrative penalty in the form of administrative arrest shall be subject to submission to a superior court on the day of the appeal's receipt, and according to part 3 article 30.5 of the CAO RF, the abovementioned appeal shall be subject to consideration within 24 hours, as of the moment of its filing, if a person, brought to administrative responsibility, is under administrative arrest.

The problem is that despite the clearly perceived in this norm desire of the legislator to speed up the process of considering complaints against the decisions on administrative arrest, review of such complaints within specified time is almost impossible in practice. The time frame of consideration of complaint against the decision on administrative arrest does not contain a real possibility to resolve in a day all the possible petitions, assign and carry out an examination, request additional materials, call people, whose participation is necessary in consideration of the complaint. So much narrowed deadlines for consideration of

a complaint, with the present workload of judges, work on the reduction of the quality of judicial decisions.

In addition, in this situation, a question arises: what is the legal status of the subjects of administrative offence who have filed a complaint, when the execution of penalty against them has already actually started.

In accordance with part 3 article 30.16 of the CAO RF, a complaint against the decision on administrative arrest shall be reviewed within two months from the day of its acceptance by the court. Experience shows that such a long period of consideration of a complaint against the decision on administrative arrest established by the legislator, in most cases, does not allow quick resolving the issue of restoration of violated rights and freedoms of a person, who has already been brought to administrative responsibility and has served his punishment.

In view of the above, taking into account that the legal rules governing the procedure of imposition and execution of administrative arrest must be thought out and not be in contradiction with the provisions of the Constitution of the Russian Federation, we offer:

1. To introduce to the Code on Administrative Offences of the Russian Federation from December 30, 2001, No. 195-FZ, the following amendments:

Part 2 article 3.9 of the CAO RF shall be reworded as follows:

"An administrative arrest shall be established and imposed only in exceptional cases for individual types of administrative offences, and it may not be applied in respect of pregnant women, women having children of fourteen or younger, persons who have not attained the age of eighteen or disabled people of group I and II, in the presence of a disease hindering the serving of administrative arrest, soldiers, citizens, called up for military training, as well as officers having a special rank and serving at Investigative Committee of the Russian Federation, internal affairs bodies, bodies and institutions of the penitentiary system, the State Fire Service, the bodies for control over the circulation of narcotics and psychotropic substances and the customs bodies".

Part 1 article 20.25 of the CAO RF shall be reworded as follows:

"Failure to pay an administrative fine within the time limit enshrined by this Code, – shall involve the imposition of the double amount of the unpaid administrative fine, but not less than two thousand rubles, or compulsory work for a period of up to 50 hours".

2. In order to ensure the execution of the decision on administrative arrest, it is necessary to enshrine in the order of the Ministry of Internal Affairs of the RF No. 83 from February 10, 2014 "On Approval of Internal Regulations in the Places of

Serving an Administrative Arrest" the duty of administration of the place of serving an administrative arrest to ensure the further fulfillment of imposed sentence at the end of treatment of persons subjected to administrative arrest.

3. Section XI "Medical Care of Persons under Administrative Arrest" of the order of the RF MIA No. 83 from February 10, 2014 "On Approval of Internal Regulations in the Places of Serving an Administrative Arrest" shall be added with paragraph 67^1 as follows:

67^1. After the hospital treatment of a person against whom there was imposed a punishment in the form of administrative arrest, the administration of the place of serving of the administrative arrest provides a further execution of the imposed punishment.

4. Given that on January 20, 2015 a group of deputies introduced to the State Duma of the Federal Assembly of the Russian Federation the draft Federal Law No. 703192-6 "Code on Administrative Offences of the Russian Federation (General Part)", article 4.13 of which is devoted to administrative arrest, we consider it appropriate to include provisions that would exclude the possibility of immediate execution of a decision on the imposition of punishment in the form of administrative arrest to the draft of "Code on Administrative Offences of the Russian Federation (General Part)".

Elimination of these contradictions will increase the efficiency of administrative punishment in the form of administrative arrest and will properly protect the rights and legitimate interests of citizens.

References:

1. The Russian Federation Code on Administrative Offences No. 195-FL from December 30, 2001 (in idition of the Federal Law No. 265-FL from July 13, 2015) [Kodeks Rossiiskoi Federatsii ob administrativnykh pravonarushenii ot 30 dekabrya 2001 g. № 195-FZ]. *SZ RF – Collection of Law of the RF*, 2002, no. 1 (part 1), article 1.
2. Federal Law No. 67-FL from April 26, 2013 "On the Order of Serving an Administrative Arrest" [Federal'nyi zakon ot 26 aprelya 2013 g. № 67-FZ «O poryadke otbyvaniya administrativnogo aresta»]. *SZ RF – Collection of Law of the RF*, 2013, no. 17, article 2034.
3. RF Government Decree No. 1358 from December 12, 2014 "On approval of the List of Diseases that Prevent Serving of an Administrative Arrest" [Postanovlenie Pravitel'stva RF ot 12 dekabrya 2014 g. № 1358 «Ob utverzhdenii

perechnya zabolevanii, prepyatstvuyushchikh otbyvaniyu administrativnogo aresta»]. *SZ RF – Collection of Law of the RF*, 2014, no. 51, article 7442.

4. The Code on Administrative Offences of the RSFSR [Kodeks RSFSR ob administrativnykh pravonarusheniyakh]. *Vedomosti VS RSFSR – Gazette of the RSFSR Supreme Court*, 1984, no. 27, article 909.

5. Moiseeva O. V. About the Appropriateness of Application Administrative Arrest as a Form of Administrative Punishment [O tselesoobraznosti primeneniya administrativnogo aresta kak vida administrativnogo nakazaniya]. *Vestnik Tyumenskogo gosudarstvennogo universiteta – Bulletin of the Tyumen State University*, 2013, no. 3.

6. Decision of the Constitutional Court of the Russian Federation No. 9-P from May 28, 1999 "On the case of verification of constitutionality of the part 2 article 266 and paragraph 3 part 1 article 267 of the RSFSR Code on Administrative Offences in connection with the complaints of citizens E. A. Arbuzova, O. B. Kolegov, A. D. Kutyrev, R. T. Nasibulin and V. I. Tkachuk" [Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 28 maya 1999 g. № 9-P «Po delu o proverke konstitutsionnosti chasti vtoroi stat'i 266 i punkta 3 chasti pervoi stat'i 267 Kodeksa RSFSR ob administrativnykh pravonarusheniyakh v svyazi s zhalobami grazhdan E. A. Arbuzovoi, O. B. Kolegova, A. D. Kutyreva, R. T. Nasibulina i V. I. Tkachuka»]. *Rossiiskaya gazeta – Russian Gazette*, from June 9, 1999.

7. *Summary statistics on the activities of the federal courts of general jurisdiction and justices of the peace* [Svodnye statisticheskie svedeniya o deyatel'nosti federal'nykh sudov obshchei yurisdiktsii i mirovykh sudei]. Available at : http://www.cdep.ru (access : 04.06.2015).

8. *http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN= 703192-6&02* (access : 27.05.2015).

Universal Decimal
Classification 351.87

Nguyen Van Quang

THE APPLICATION OF PROCEDURAL REQUIREMENTS FOR ADMINISTRATIVE DECISION-MAKING IN VIETNAM'S JUDICIAL PRACTICE

Nguyen Van Quang
c.j.s. (PhD in law), Hanoi Law University, Vietnam.

Unlike some other countries in the world, Vietnam has not passed a general law of administrative procedures setting out common guiding principles of administrative procedures, common duties of administrators in conducting administrative procedures or fundamental rights of participants in administrative procedures. Detailed administrative procedural rules can be found in many special laws such as Land Law, Building Law, Law on Enterprises or Law on Handling of Administrative Law Offences, and etc. While failure to comply with administrative procedures is one amongst many grounds for review under the law of Vietnam, the absence of a general law of administrative procedures causes certain difficulties for Vietnamese courts to judicially challenge administrative decisions of procedural errors. By analysing the law and practical cases, this paper reveals inadequacies of administrative procedural provisions under the Vietnamese administrative law. It then also addresses several issues of how to improve Vietnamese administrative law in this regard.

Keywords: administrative law of Vietnam, administrative decisions, administrative decisions making, administrative procedures, challenging of administrative decisions.

In the process of making administrative decisions, Vietnamese administrative law generally requires administrators to comply with legally prescribed administrative procedures. The principle of legality which requires the administrative decision-makers to comply with legal rules both substantively and procedurally can be inferred from specific provisions set out by the law of Vietnam. Failure to comply with administrative procedures, consequently, is one amongst many grounds for review under the law of Vietnam.

Unlike some other countries such as Japan or Germany, Vietnam has not passed a general law of administrative procedures setting out common guiding principles of administrative procedures, common duties of administrators in conducting administrative procedures or fundamental rights of participants in administrative procedures. In fact, there was a call for enacting an administrative procedural law in Vietnam but the delay in making this law still remains. The question is whether it is necessary to pass a general administrative procedural law while detailed administrative procedural rules can be found in many special laws such as Land Law, Building Law, Law on Enterprises or Law on Handling of Administrative Law Offences has caused this delay. The absence of a general law of administrative procedures as mentioned above causes certain difficulties for Vietnamese courts to judicially challenge administrative decisions which affect legitimate rights and interests of citizens and due to the failure to procedural requirements. Given this practice, procedural requirements for administrative decision making under Vietnamese administrative law mainly are understood as follows:

(i) Administrative decisions are required to be made within the time limits prescribed by the law;

(ii) Administrative decisions are required to be made under the legally prescribed forms;

(iii) Administrative decisions are required to be made in compliance with any administrative formalities prescribed by the law.

To judicially challenge the legality of administrative decisions in terms of procedural requirements, Vietnamese courts have referred to the three categories as mentioned above. The practical application of those procedural requirements by

Vietnamese courts has revealed several inadequacies of Vietnamese administrative law. By analysing the application of procedural requirements for administrative decision-making in Vietnam's judicial practice, the paper addresses several issues of how to improve Vietnamese administrative law in this regard.

1. Challenging the legality of administrative decisions by Vietnamese courts on the ground of failure to comply with administrative procedures

Essentially, Vietnamese courts strictly follow the rule that an administrative decision will be held invalid if it does not comply with any procedural requirement regardless whether it is a minor or substantial or insubstantial error.[1] The case *Lan Huong and Thanh Nam Enterprises v. the People's Committee of Hochiminh City* below is an example illustrating the above strict rule. [2]

Lan Huong and Thanh Nam enterprises were granted licenses to produces cosmetics. However, these enterprises used the legally registered trade mark "Miss" of the Saigon Cosmetics Company for labelling their cosmetics products. On August 11, 2003, the People's Committee of Hochiminh City passed Decision No. 3272 imposing a fine of 150,000,000 VND on the two enterprises on the ground that they committed an administrative wrong in relation to intellectual property. Lan Huong and Thanh Nam enterprises initiated the case at the Administrative Division of the People's Court of Hochiminh City challenging Decision No. 3272 of the People's Committee of Hochiminh City on the ground that the Committee failed to comply with the requirement of time limit.[3] The court of first instance held that as all substantive issues of the administrative decision were totally legal despite its having been made late, the administrative decision was upheld. Thanh Huong and Thanh Nam then appealed the Appeal Division of the Supreme People's Court based on the view that compliance with time limit is required by the law and administrators must strictly follow them held that the impugned decision was invalid.[4]

1 THE ADMINISTRATIVE DIVISION OF THE SUPREME PEOPLE'S COURT [TOA HANH CHINH – TOA AN NHAN DAN TOI CAO], THE MANUAL FOR RESOLVING ADMINISTRATIVE CASES [SO TAY TRAO DOI NGHIEP VU GIAI QUYET AN HANH CHINH] (2001), p. 12 (unpublished material, on file with the author). .

2 See: H. Thanh, Hearing the case in which the People's Council of Hochiminh City is challenged by the two enterprises [Xet xu vu UBND TP HCM bi hai doanh nghiep kien], VNNEXPRESS (July 21, 2005) available at <http://vietbao.vn/An-ninh-Phap-luat/Xet-xu-vu-UBND-TP-HCM-bi-hai-doanh-nghiep-kien/10918862/218/ >.

3 Article 56 of the 2002 Ordinance for Handling Administrative Law Offences of Vietnam sets out the time limit for the making of an administrative decision imposing administrative penalties as "within 10 days or 30 days in cases of complication since the day a report of administrative offence is made, the competent officer has a duty to make an administrative decision imposing administrative penalties on the offender". This Ordinance also states that in cases of need the competent officer may ask for a permission to extend the time to make decision provided that the extended time is not over 30days; the competent officer is not allow to make decisions imposing fines if he or she fails to comply with time limit requirements.

4 See: H.Thanh, *supra* note 2.

Admittedly, the strict compliance with administrative procedures needs to be emphasised and one may argue that the decision of the Supreme People's Court in *Lan Huong and Thanh Nam Enterprises v. the People's Committee of Hochiminh City* is convincing as the law applicable to the case clearly determines the validity of the decision in case of failure to comply with procedural rules. However, a rigid opinion about the validity of administrative decisions (acts) that fail to observe procedural requirements, especially when the law is silent to the validity of such decisions (acts) are fairly debatable.[5] In fact, breaches of administrative procedures vary from case to case; some may be substantial, whereas others may be minor and insubstantial to the quality of an administrative decision (act). For example, one of the procedural requirements the Supreme People's Court of Vietnam construed as an administrative decision must be shown in a legally prescribed written form.[6] However, the question of whether the court should quash a decision of wrongly written form whose substantive contents are legal is arguable. It seems to be somewhat impractical if the Supreme People's Court of Vietnam opined that any breach of procedures in relation to the making of an administrative decision could make the administrative decision in question fatal. This viewpoint is strongly supported by reference to the law and legal practice of some foreign countries like Australia and China.

In Australia, the validity of a judicially challenged administrative decision (behaviour) failing to comply with prescribed procedures is differently treated depending on whether there is a legislative intention that to comply with prescribed administrative procedures is a legal precondition to the exercise of a power. Generally speaking, if the breach of procedural requirements clearly affected the quality of the decision in question, those requirements should be mandatory, and therefore, the impugned decision should be held invalid; where the breach is minor and insubstantial, the validity of the decision in question should not be affected. [7]

China's courts also have the same approach as seen in the case of Australia to the issue of the validity of an administrative decision that does not comply with procedural requirements. Although it has been suggested a "long-term" goal that

5 See: Le Xuan Than, Some viewpoints regarding the organisation and functioning of administrative courts [Mot so y kien ve to chuc va hoat dong cua Toa hanh chinh], STATE & LAW [NHA NUOC VA PHAP LUAT], (July 2002), p. 33; see also Nguyen Thanh Binh, Concept of the People's Courts' Jurisdiction to Resolve Administrative Law Complaints [Khai niem tham quyen cua toa an nhan dan trong giai quyet cac khieu kien hanh chinh cua cong dan], JURISPRUDENCE REVIEW [LUAT HOC], (October 2001), pp. 25-27.

6 See: ADMINISTRATIVE DIVISION – THE SUPREME PEOPLE'S COURT [TOA HANH CHINH-TOA AN NHAN DAN TOI CAO], supra note 1.

7 See: Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; 153 ALR 490 at CLR 390, [93] per McHugh, Gummow, Kirby and Hayne JJ.

courts will treat all administrative decisions that do not comply with legal procedural requirements as invalid ones, the validity of those decisions is assessed by Chinese people's courts based on the nature of procedural errors.[8] Basically, Chinese legal scholars divide administrative procedures into non-legal administrative procedures (or customary administrative procedures) and legal administrative procedures. The former refers to the ones formulated by administrative organs themselves as long as they are not contradictory to general legal principles. Compliance with non-legal administrative procedures is non-compulsory; therefore, the breach of these procedures does not affect the validity of administrative decisions. The latter refers to the ones set out by legislation and compliance with them is compulsory. However, minor breaches of legal administrative procedures, which are usually construed as the ones that do not cause any harm to the substantive rights and interests, are not fatal to the impugned administrative decisions. Administrative decisions which violate compulsory legal procedures otherwise will be held invalid.

2. Challenging the legality of administrative decisions by Vietnamese courts on the ground of failure to comply with rules of 'procedural fairness' ('natural justice')

In developed legal systems, denial of 'procedural fairness' or 'natural justice' is set out as a ground for judicial review of administrative decisions.[9] The term "natural justice" which stemmed from the Romans refers to situations where *audi alteram partem* (the right to be heard) and *nemo judex in parte sua* (no person may judge their own case) apply".[10] The principles of natural justice primarily govern all judicial making processes by judges and then quasi-judicial decision processes by tribunals for guaranteeing that those processes must be just and fair. More recently, the rule of natural justice has extended its scope of application to the administrative decision making process due to the growth of administrative decisions in both quantity and their importance.

In principle, one can establish denial of natural justice as a ground for judicial review of administrative action by demonstrating the breach of either or both of the two fundamental rules: (i) in the making-decision process, the decision-maker must give a hearing to a person whose legitimate rights and interests will be affected by

8 L FENG, ADMINISTRATIVE LAW PROCEDURES AND REMEDIES IN CHINA (1996) p. 190. Feng mainly cited LUO HAO CAI, JUDICCIAL REVIEW SYSTEM IN CHINA [ZHONG GOU SI FA SHEN CA ZHI DU] (1993) for his discussions about procedural errors in relation to the making of administrative decisions.

9 In the US law, the term that is analogous to 'natural justice' or 'procedural fairness' is 'due process'.

10 See: DUHAIME'S ONLINE LEGAL DICTIONARY, *available at* http://www.duhaime.org/dictionary/dict-no.aspx ac.

the decision; (ii) in the course of making the decision, the decision maker must not be or appear to be biased. An administrative decision that fails to comply with the 'natural justice' (or 'procedural fairness') principle will be quashed.

Under the law of Vietnam, what are called rules of 'procedural fairness' or 'natural justice' in the making of administrative decisions have not been comprehensively developed. This practice is easily understandable in the context of a transitional legal system. In the past, in many fields of administration, procedural rules for protection of individuals and organisations whose legitimate rights and interests may be affected by the administrative decision making process such as 'fair hearing', 'right to reasons' or 'information disclosure' were almost all absent in Vietnamese administrative law. For example, although the making of an administrative decision imposing administrative penalties on administrative law offenders directly involves restrictions on the rights, interests, freedom, property, and money of offenders, no rules in relation to procedural fairness were seen in the 2002 Ordinance on handling of administrative law offences of Vietnam (this Ordinance is currently replaced by the 2012 Law on handling of administrative law offences which came into force on July 1st 2013). This means that at that time administrative law offenders almost all did not have opportunities for explanation and rebuttal, or opportunities to know reasons for making administrative decisions imposing penalties on them.

It, however, should be noted that rules of procedural fairness, though limited, are able to be found in some recent laws of Vietnam. Those laws require administrative decision makers to comply with some particular procedural requirements in order to ensure that their decisions will not adversely affect legitimate rights and interests of individuals and institutions. Below are three typical examples:

- To make of decisions reclaiming of land for public interest, before reaching the final decisions, decision makers are required by the 2013 Land Law to inform land users of the reasons for reclaiming, time and plan to execute the decision and their possible compensation; land users are closely consulted about the concerned administrative decisions.[11]

- The 2011 Law on complaints requires that in the course of decision making, decision makers must directly communicate with the respondent and the appellant for clarifying the case and to propose possible resolutions to the case; in other words, "fair hearing" is given to the appellant whose legitimate rights and interests might be adversely affected by the administrative decision dealing with the complaint.[12]

11 See: article 69 of the 2013 Land Law [Luat Dai Dai].

12 See: article 30 of the 2013 Law on Complaints [Luat Khieu nai].

- The 2012 Law on handling of administrative law offences confers on the offender the right to make explanations prior to making administrative decisions imposing penalties on offenders in certain cases prescribed by the Law.[13]

To some extent, those kinds of procedural requirements as mentioned above also express the ideas procedural fairness under Vietnamese administrative law. An administrative decision fails to comply with those requirements can be challenged on the ground of failure to comply with procedural requirements. In other words, when challenging the legality of administrative decisions, Vietnamese courts do not treat 'denial of procedural fairness' as a separate ground for judicial review. However, given the importance of rules for procedural fairness, a serious consideration should be given to the issue in question by Vietnamese lawmakers. On the one hand, rules for procedural fairness need to be fully incorporated in Vietnamese administrative law. On the other hand, if Vietnamese administrative law would adopt a flexible approach to the effects of procedural errors as above suggested, the procedural errors which adversely affect legitimate rights and interests of individuals and institutions (denial of procedural fairness) must be treated as fatal to administrative decisions.

3. The need for a general law of administrative procedures in Vietnam

The 2013 Constitution of Vietnam states that "The Socialist Republic of Vietnam is a socialist rule of law state of the people, by the people and for the people".[14] To pursue this goal, much attention should be paid to the improvement of administrative procedural law. This is because the administrative procedure plays an important role in ensuring the effective and efficient implementation and enforcement of the law in a manner of respecting the rule of law and legitimate rights and interests of individuals and entities. The above analysis of challenging the legality of administrative decisions by Vietnamese courts on the grounds of failure to comply with procedural requirements suggests several ideas of improving Vietnamese administrative law by enacting a general law of administrative procedures.

First, although detailed administrative procedural rules can be found in many special laws, a general law of administrative procedures is of significant importance. This law will be able to offer general provisions based on which detailed administrative procedure rules are consistently made in special laws. As noted above, these general provisions should include:

- Guiding principles of administrative law such as flexibility, simplicity,

13 See: article 61 of the 2011 Law on handling of administrative law offences [Luat xu ly vi pham hanh chinh].

14 See; Article 2 of the 2013 Constitution of Vietnam.

appropriateness, quickness of administrative procedures and impartiality of state officials conducting administrative procedures.

- Fundamental rights of participants in administrative procedures such as right to be heard, right to inspection of files, right to advice and information by public authorities.

- General procedures requirements for state officials conducting administrative procedures and participants in administrative procedures.

Second, for the purpose of reviewing administrative decisions, the general law of administrative procedures can be served as source of law proving general grounds involving procedural requirements. During the course of administrative or judicial review of administrative decisions, reviewers can be able to set up firm grounds for review by referring to both these general procedural requirements and specific procedure requirements set out by special laws.

Third, also for the purpose of reviewing administrative decisions, it is relevant for the general law of administrative procedures to provide general rules for determining the validity of administrative decisions with procedural errors. These rules appear to be very important for courts to decide whether an administrative decision in question must be quashed if relevant procedural errors can be found. However, although statutory law can easily produce such general rules, but finding what is exactly entailed in each rule is not an easy task and usually needs reference to cases in which legal rules in this regard are specifically interpreted and consistently applied. Responding this issue in question, it should be noted that the latest Law on organisation of people's courts of Vietnam (the 2014 Law) has officially introduced the adoption of a case law system in Vietnam. Article 22 of the Law states that "the Council of Judges of the Supreme People's Court (CJSPC) has rights and duties to select cassation decisions of the CJSPC and standard enforced decisions of other courts for developing precedents which will be published for study and application by all courts".

References:

1. *Duhaime's online legal dictionary*, available at : http://www.duhaime.org/dictionary/dict-no.aspx ac (accessed : 13.04.2015).
2. H. Thanh, Hearing the case in which the People's Council of Hochiminh City is challenged by the two enterprises [XÉT XỬ VỤ UBND TP HCM BỊ HAI DOANH NGHIỆP KIẾN]. *VNNEXPRESS* from July 21, 2005, available at : http://vietbao.vn/An-ninh-Phap-luat/Xet-xu-vu-UBND-TP-HCM-bi-hai-doanh-nghiep-kien/10918862/218/ (accessed : 24.04.2015).
3. L. Feng, *Administrative Law Procedures and Remedies in China*, 1996.
4. Le Xuan Than, Some Viewpoints Regarding the Organisation and Functioning of Administrative Courts [MỘT SỐ Ý KIẾN VỀ TỔ CHÚC VÀ HOẠT ĐỒNG CỦA TÒA HÀNH CHÍNH]. *NHA NUOC VA PHAP LUAT – State & Law*, July 2002.
5. Luo Hao Cai, *Judicial Review System in China* [ZHONG GOU SÍ FA SHEN CÀ ZHI DÙ]. 1993.
6. Nguyen Thanh Binh, Concept of the People's Courts' Jurisdiction to Resolve Administrative Law Complaints [KHAI NIỀM THẬM QUYỀN CỦA TÒA ĂN NHÂN DÂN TRONG GIẢI QUYẾT CÁC KHIẾU KIẾN HÀNH CHÍNH CỦA CÔNG DÂN]. *LUẬT HỌC – Jurisprudence Review*, October 2001.
7. The Administrative Division of the Supreme People's Court [TÒA HÀNH CHÍNH – TÒA ĂN NHÂN DÂN TÔI CAO]. *SỔ TAY TRAO ĐỔI NGHIỆP VỤ GIẢI QUYẾT ĂN HÀNH CHÍNH – The Manual for Resolving Administrative Cases*, 2001.

Universal Decimal
Classification 342.9

Sherstoboev O. N.

ADMINISTRATIVE PROCEDURES: SOME ISSUES OF PUBLIC ADMINISTRATION IN THE FIELD OF MIGRATION

Sherstoboev Oleg Nikolaevich,
c.j.s. (PhD in law), Associate professor at the Department of history of state and law, constitutional law of Novosibirsk Law Institute (branch) of the National Research Tomsk State University.

The article deals with the specificity of administrative reform in the immigration field. For a long time the state's task while regulating public administration has been the solving of economic development problems. As a result of this the procedures of legalization of foreign citizens in the Russian territory were simplified, and appeared a category of highly skilled professionals. The problem lies in the underestimation of the supervisory function of the state. It appears that the administrative reform should seek a due balance between the regulatory and protective functions of the state in the field of immigration.

Keywords: administrative law, administrative reform, foreign citizens, public services, administrative supervision, administrative expulsion.

Administrative procedures – this is one of the key categories of administrative law of any country. There are two options for their legal enshrining. The first, they rely on the basic law, single for the most subjects of public administration. The second, for each procedure there is developed an independent normative legal act, which may not always acquire the force of a law. In General, the second model is implemented in Russia, whereby the activity of executive bodies and their officials relies on bylaws – administrative regulations. Their considerable number, the lack of a unified for all of them legal framework shows the fragmentation of administrative-legal regulation of procedures, the potential of which is not used by the state to one hundred percent. As a result, the effectiveness of public administration is reduced and, at the same time, the rights of powerless parties of public legal relations are not ensured in full.

At that, things are not all that bad. Administrative reform of the last decade has revealed a new trend. A number of federal laws clearly designated an official position on the legal provision of interrelation the subjects of public administration with citizens and organizations. These relations develop in three directions: provision of public services, implementation of administrative supervision, exercising of administrative responsibility. Classic administrative procedures manifest in the first two. Administrative and jurisdictional process manifests in the third one. The category of state services seems to be the most problematic of them. This is due to the underdevelopment of the theory, as well as the existing imbalance between the doctrinal statements and the practice of administrative reform. There is a fair comment of L. A. Mitskevich, that "the very theory of public services currently looks more like a concept than as a truly developed theory".[1] In other words, the main ideas are outlined, some of the notions and a number of principles are formulated. At the same time, all this does not represent a slim complete ideology that explains the interrelation of the various elements of legal construction at all the stages of providing services.

There is a dispute about the nature of state services in the Russian science. It is largely reduced to the determination of their list. For example, under the current regulations, the issuance (change) of the passport is a state service provided by the Federal Migration Service of Russia (hereinafter – FMS of Russia). It is widely believed that such activity looks like an "imposed service", non-receipt of which is punishable by an administrative fine. As a result, this activity is denied "the right" to be referred to state services. I believe that this approach has no

1 Mitskevich L. A. Essays on the Theory of Administrative Law: a Comparative Content: Monograph [Ocherki teorii administrativnogo prava: sravnitel'noe napolnenie: monografiya]. Moscow: Prospekt, 2015, p. 165.

practical importance. This interpretation distorts the essence of the legal structure of the state service, leaving behind the boundaries of the discussion its actual purpose, aimed at simplifying the "life" of citizens when applying to the authorities. Main categories, describing the state service and delimiting it from oversight activity, are not the imposition and punishability, but the availability, timeliness, completeness. Consequently, the main emphasis in determining of state services must move to the procedure of their implementation.[2] It is in this case, citizen's rights are ensured in the course of day-to-day management activity. In this case, the category of administrative procedure makes it possible to evaluate the entire range of managerial activity of the subjects of public authority. As a result, the provision of a state service, for example informing, can be incorporated into a supervisory management structure.

The minimum starting conditions in the introduction of the considered structure did not allow the state to cover all of its aspects. Often the attention of reformers was focused on the timing of delivery of state services. The need to reduce it goes in parallel with such concepts as "quality", "effectiveness". There are known cases when the checking of the quality of a provided service was in verification of the time allocated by the regulations for the implementation of legally significant action by the entities of public administration. So, article 14 of the Federal Law "On the Arrangement the Provision of State and Municipal Services"[3] establishes requirements to the standard of provision of state and municipal services. Of the fourteen points that make up this norm, three set chronological parameters. These are the deadline for provision of a state or municipal service; the maximum waiting time in the queue when submitting the request for provision of a state or municipal service and in case of receiving the result of the provision of a public or municipal service; the deadline for registration of the applicant's request on provision of a state or municipal service. These positions are the easiest for verification, but they are more likely exposed to a breach. However, the quality of services is reduced not only to the execution of their timing, which is only one of the conditions for achieving the availability of services. Administrative reform offers two directions designed to reveal the mentioned principle. Firstly, the places of interaction of the entities of administrative legal relations are very different. Services may be provided in the premises of bodies, as well as in

2 So, Mitskevich L. A. notes that "the German administrative law studies not so much the concept of service as the concept of a positive public administration". See: Mitskevich L. A. Op. cit. p. 168.

3 Federal Law No. 210-FL from July 27, 2010 "On the Arrangement the Provision of State and Municipal Services" (ed. from 31.12.2014) [Federal'nyi zakon ot 27 iyulya 2010 № 210-FZ «Ob organizatsii predostavleniya gosudarstvennykh i munitsipal'nykh uslug» (red. ot 31.12.2014)]. SZ RF – Collection of Laws of the RF, 2010, no. 31, article 4179.

multi-functional centers for the organization of provision state and municipal services. Secondly, the technologies for the exchange of information between authorities and citizens (organizations) are being optimized. First of all, it is associated with the electronic document circulation. In this case, there is a federal "Portal of state services" that completely automates the mechanism of interaction between citizens and authorities[4].

It should be noted that today the bodies of the FMS of Russia do not provide completely electronic services. On the portal foreign nationals are offered only two services: 1) the issuance of work permits for foreign citizens arriving in order, requiring a visa; 2) extension of the forced migrant status. In other cases, foreign citizens can apply to the resources of the Portal only for information about the activity of the FMS of Russia, their rights and duties, as well as existing administrative procedures. In addition, through the Portal it is possible to familiarize with forms of documents, fill them in and transfer them to the bodies of the FMS of Russia. This group include the following legally-significant actions: registration and issue of invitations to enter the Russian Federation for foreign nationals and stateless persons; granting to foreign nationals and persons without citizenship the residence permit of the Russian Federation; granting to foreign nationals and stateless persons a temporary residence permit; implementation of the migration registration in the Russian Federation; registration, issue, extension and restoration of visas to foreign nationals and stateless persons. Mainly the Portal is used to inform citizens about the legal regimes of services. Identical information is contained on the official websites of the bodies. They also allow implementation of partial electronic interaction among the participants of administrative procedures. Most often, this refers to making an appointment, obtaining forms of documents, information about working hours of responsible officials, as well as other contact information.

In General, the use of electronic tools in the provision of state services has simplified the life of citizens, as well as has softened the pressure on authorities. The preparatory phase of the provision of state services (issuing of blank documents, other information, counselling) "goes" to On-line, allowing officials to concentrate on implementing authoritative functions. But the introduction of these technologies is faced with a number of non-legal problems. Effective use of the electronic resources requires special culture of citizens and officials. They must

4 Provision on the federal public information system "Unified portal of public and municipal services (functions)" approved by the RF Government Decree No. 861 from October 24, 2011 [Polozhenie o federal'noi gosudarstvennoi informatsionnoi sisteme «Edinyi portal gosudarstvennykh i munitsipal'nykh uslug (funktsii)», utv. Postanovleniem Pravitel'stva Rossiiskoi Federatsii ot 24 oktyabrya 2011 g. № 861]. SZ RF – Collection of Laws of the RF, 2011, no. 44, article 6274.

trust the electronic document management system, like habitual for them paper one with traditional signatures and seals. The formation of such way of thinking requires time and effort on the part of the state. Organizational and technological study of management schemes, which should be easy in use and convenient for the participants of a procedure, is also important. These properties still don't always accompany the current options[5].

There are specific decisions aimed at ensuring accessibility of state services in the migration sphere. At the beginning of the twenty-first century, the state worried about the issues of reduction of queues in the premises of migration bodies, minimization of documents needed for receiving public services, the simplicity of their filling, reducing wait times for an authoritative decision. All of these factors to some extent were reflected in the law on migration registration of foreign citizens and stateless persons.[6] So, now it is possible to get migration registration in post offices of Russia. In fact, we see the embodiment of the idea of "walking distance" rendering of state services. By the way, in May 2012 the President of the Russian Federation assigned a task to increase by 2015 the proportion of citizens with access to the receiving of public services at the place of stay, including multi-functional centers, up to 90%.[7] For temporarily staying foreigners the problem was solved in 2007 (by the entry into force of the law on migration registration). Enshrined algorithm of actions of concerned subjects reduced the time for obtaining a legalizing

5 Interesting data are given in the paper of Chernyavskii A. V., Kuyanova A. V., Yuritsin A. E. devoted to quality evaluation of state services provided by the Department of the Federal Migration Service of Russia for Omsk region. The authors note that "recipients of public services come to the offices of Department of the Federal Migration Service of Russia for the Omsk region often already having sufficient information about state services provided by the migration service. The main sources of its obtaining: preliminary consultations with the employees of the Department of the Federal Migration Service of Russia for Omsk region – 1019 respondents (47.6%), obtaining additional information through the media – 908 people (42.4%), by phone – 981 people (45.8%)". See: Chernyavskii A. V., Kuyanova A. V., Yuritsin A. E. Topical Issues of Quality Evaluation by the Population of the Employees' Work of the Department of the Federal Migration Service of Russia for Omsk region in the Provision of State Services [Aktual'nye voprosy otsenki naseleniem kachestva raboty sotrudnikov UFMS Rossii po Omskoi oblasti pri okazanii gosudarstvennykh uslug]. Zakonodatel'stvo i praktika – Legislation and Practice, 2014, no. 1, p. 81.
In general, the interviewed respondents were satisfied with the quality of work of migration bodies, but there are no electronic resources, the official website of the FMS of Russia and the DFMS of Russia, the portal of public services among the channels of obtaining preliminary information about the services provided. Obviously, many people still prefer a personal contact with staff or contacts by phone than the more convenient interaction via the Internet.

6 Federal Law No. 109-FL from July 18, 2006 "On Migration Registration of Foreign Citizens and Stateless Persons in the Russian Federation" (ed. from 12.22.2014) [Federal'nyi zakon ot 18 iyulya 2006 № 109-FZ «O migratsionnom uchete inostrannykh grazhdan i lits bez grazhdanstva v Rossiiskoi Federatsii» (red. ot 22.12.2014)]. SZ RF – Collection of Laws of the RF, 2006, no. 30, article 3285.

7 Paragraph 1 "b" of the RF Presidential Decree No. 601 from May 7, 2012 "On the Main Directions of Public Administration Improvement" [Ukaz Prezidenta Rossiiskoi Federatsii ot 7 maya 2012 № 601 «Ob osnovnykh napravleniyakh sovershenstvovaniya sistemy gosudarstvennogo upravleniya»]. SZ RF – Collection of Laws of the RF, 2012, no. 19, article 2338.

document. The procedure is as follows: the receiving party fills the notice of arrival, postal worker separates the detachable part of it, affix a stamp on it and sends to the receiving party. This document affirms the right of a foreigner to stay in Russia. Since 2012 it has been also allowed to send the notice of arrival to migration body through a unified multifunctional center.

Despite the superficial effect, the conversion of the legislation has remained partial. For example, it is unclear why the reform has not affected the institute of administrative supervision. After all the simplification of legalization was being carried out against the background of considerable "illegal immigration". According to some estimates, in the first decade of the 21st century in violation of the legislation there were up to 15 million men in the country.[8] Today this figure has apparently declined, but only slightly. Simplification of the procedure of legalization of foreigners has created an opportunity for abuse of the provided right. For example, there are cases of registration of temporary staying foreign nationals with using forged documents, as well as a few dozen people in one residential premise. For example, according to the data of immigration offices (Department of the Federal Migration Service of Russia for Irkutsk region) for the period from January 1, 2009 to November 30, 2009, citizen L. placed on migration registration 680 people at the address of her registration.[9] Indeed, postal workers are not public servants, they do not have necessary knowledge, abilities and skills to identify such situations, and most importantly they do not have powers of authority. They perform the function of a transmission mechanism, and the Russian FMS employees nowadays carry out verification only after receipt and processing of notifications of arrival. Finally, the reform of migration legislation of 2006-2007 did not affect the statuses of temporarily and permanently staying foreign nationals, who still had to visit the premises of immigration bodies, gather and provide packages of documents required to obtain a permission to stay or residence permit. The situation for them has changed somewhat in 2010, with the permission to file documents necessary for legalization via the Internet, including the unified portal of state and municipal services.

An interim conclusion is as follows. The Russian State has significantly simplified the procedures for providing public services in the field of immigration.

8 Thus, the United Nations Department for Economic and Social Affairs in the Human Development Report of 2009 provided the following information on the number of illegal immigrants: "Estimates of the number of illegal migrants in several countries – including the Russian Federation, Thailand, Republic of South Africa – ranges from 25% to 55% of the population". Chapter 2. People in Motion: Who, Where and Why Move [Glava 2 Lyudi v dvizhenii: kto, kuda i pochemu peremeshchaetsya]. Official site of the United Nations Department of Economic and Social Affairs, available at : http://www.un.org/ru/development/hdr/2009/hdr_2009_ch2.pdf (accessed : 04.07.2015).

9 Official site of the FMS of Russia, available at : http://www.fms.gov.ru/press/news/news_detail.php?ID=50859&sphrase_id=1016154 (accessed : 06.01.2012).

At that, it did not take care about the targeting of the reform. The most preferential mode of legalization was set for temporary staying foreigners, by whom the cohort of "illegals" is mainly replenished. Temporarily and permanently residing foreign citizens acquire their status after all sorts of verifications, proving their loyalty to the Russian rule of law. But the procedures for registration, as well as the subsequent interaction with bodies of FMS of Russia remain for them quite burdensome. The peculiarity of administrative reform in the immigration field has become the fact that it affected only the significant categories of foreign nationals, but the attitude of an individual person towards the Russian rule of law, his usefulness to Russia almost was not taken into account. Just a year ago, the state has attempted to enter a point system for foreign nationals and tied the term of ban on entry after deportation to the danger of an expelled foreigner. Ideally, the situation should change. The state is required to build up an individual relationship with each immigrant, depending on his behavior. The greater danger he represents, the more thorough verifications must be. Conversely, with persons, who do not represent danger, the State should build relations, relying on the principle of trust. The mentioned policy has not been adequately implemented into life yet. Administrative procedures should become an institute that brings together all kinds of management activity of public entities. They allow combination of both rendering services and exercising of supervision. For example, through incorporating positive managerial structures (informing, etc.) into supervision proceedings. "Administrative procedures, as noted by N. Yu. Starilov, are an integral and ever-present in modern administrative system of a constitutional state area of administrative-legal regulation, the main goal of which is to establish the principles of administrative procedures, the order for adoption of administrative acts, the ensuring of the rights, freedoms and legal interests of individuals and legal entities, as well as settlement of administrative-legal disputes through appropriate procedural forms"[10].

Partly the imbalance of positive and negative regulation in the immigration field is due to the poor development of the principles, on which all administrative procedures must be based. However, a number of fundamental principles in the first decade of the twenty-first century was being actively put into the practice of public administration. The most famous of these is the principle of proportionality.

10 Starilov Yu. N. About the Two Main Modern Directions of the Development of Russian Administrative and Administrative-procedural Legislation (thesises) [O dvukh glavnykh sovremennykh napravleniyakh razvitiya rossiiskogo administrativnogo i administrativnogo protsessual'nogo zakonodatel'stva (tezisy)]. Vestnik Voronezhskogo gosudarstvennogo universiteta – Bulletin of the Voronezh State University, Ser: Pravo, 2014, no. 3, p. 7.

Perhaps for the first time its practical value was seen in the implementation of coercive measures applied to foreign nationals. Its entering is due to the practice of the European Court of Human Rights and the Constitutional Court of the Russian Federation in cases of expulsion of foreign nationals. For example, there are determinative decisions of the European Court of Human Rights: "Chahal v. the United Kingdom" on November 15, 1996[11]; "Soering v. the United Kingdom" on July 7, 1989[12]. For Russia, this principle was reflected in the case of "Liu and Liu v. the Russian Federation" on December 6, 2007[13]. In General, the Constitutional Court fully accepted the position of the European Court (Ruling No. 55-O from March 2, 2006 "On the complaint of a citizen of Georgia Kakhaber Todua"[14]; Ruling of the Constitutional Court of the RF No. 155-O from May 12, 2006 "On the complaint of a citizen of Ukraine X. against violation of his constitutional rights by paragraph 2 article 11 of the Federal Law "On the Prevention of Spread in the RF of a Disease Caused by the Human Immunodeficiency Virus (HIV)", by paragraph 13 article 7 and paragraph 13 article 9 of the Federal Law "On the Legal Status of Foreign Citizens in the Russian Federation"[15], etc.). These positions have been reflected in the practice of courts of general jurisdiction.

---

11 Resolution of the European Court of Human Rights from November 15, 1996 "Chahal v. the United Kingdom" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 15 noyabrya 1996 «Chakhal (Chahal) protiv Soedinennogo Korolevstva»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

12 Resolution of the European Court of Human Rights from July 7, 1989 "Soering v. the United Kingdom" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 07 iyulya 1989 «Sering (Soering) protiv Soedinennogo Korolevstva»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

13 Resolution of the European Court of Human Rights from December 6, 2007 "Liu and Liu v. the Russian Federation" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 06 dekabrya 2007 «Delo "Lyu i Lyu (Liu and Liu) protiv Rossiiskoi Federatsii»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

14 Ruling of the Constitutional Court of the RF No. 55-O from March 2, 2006 "On the complaint of a citizen of Georgia Kakhaber Todua against violation of his constitutional rights by paragraph 7 article 7 of the Federal Law "On the Legal Status of Foreign Citizens in the Russian Federation" [Opredelenie Konstitutsionnogo Suda RF ot 02 marta 2006 № 55-O «Po zhalobe grazhdanina Gruzii Todua Kakhabera na narushenie ego konstitutsionnykh prav punktom 7 stat'i 7 Federal'nogo zakona «O pravovom polozhenii inostrannykh grazhdan v Rossiiskoi Federatsii»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

15 Ruling of the Constitutional Court of the RF No. 155-O from May 12, 2006 "On the complaint of a citizen of Ukraine X. against violation of his constitutional rights by paragraph 2 article 11 of the Federal Law "On the Prevention of Spread in the RF of a Disease Caused by the Human Immunodeficiency Virus (HIV)", by paragraph 13 article 7 and paragraph 13 article 9 of the Federal Law "On the Legal Status of Foreign Citizens in the Russian Federation" [Opredelenie Konstitutsionnogo Suda RF ot 12 maya 2006 g. № 155-O «Po zhalobe grazhdanina Ukrainy X. na narushenie ego konstitutsionnykh prav punktom 2 stat'i 11 Federal'nogo zakona «O preduprezhdenii rasprostraneniya v Rossiiskoi Federatsii zabolevaniya, vyzyvaemogo virusom immunodefitsita cheloveka (VICh-infektsii)», punktom 13 stat'i 7 i punktom 13 stat'i 9 Federal'nogo zakona «O pravovom polozhenii inostrannykh grazhdan v Rossiiskoi Federatsii»]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

It may be noted that nowadays the courts when deciding on the expulsion of foreigners from Russia weigh the right of the family members of an expelled person to family well-being, as well as health condition. The latter value is indicative. The law is imperative: a HIV-positive foreign national is subject to deportation. The Constitutional Court of the Russian Federation has left in the country a citizen of Ukraine, referring to the fact that his expulsion will affect on his wife and daughter – Russian citizens living in Moscow. The foreigner himself is not dangerous for the Russian legal order, since his lifestyle is not asocial; he performs the prescriptions of doctors. Courts of general jurisdiction have gone even further. For example, one of the courts of Nizhny Novgorod citing humanitarian considerations did not apply deportation to a HIV-infected foreigner. All relatives of the foreign citizen were the residents of Russia, and he had nobody at his homeland. He needed care. If the expulsion took place, the patient would be in much worse conditions than those in which he existed on the Russian territory.

Nevertheless, the principle of proportionality has not become a general principle of public administration activity. First of all, this is due to a lack of common doctrine. Even in cases of expulsion, there are cases of its improper use. Courts often rely on unverified data. For example, a court established the existence of an immigrant's wife – a Russian citizen, according to oral information provided by the foreigner. In the end, he stayed in Russia. In general, the presence of family members, who reside in the territory of Russia, almost always allow foreigners to avoid deportation. In such cases, the balance of individual and public interests is not complied. Not all the elements of proportionality are studied: affordability, reasonableness, equality. As a result, it creates the preconditions for the abuse of right, for example, when entering into sham marriages. The solution is seen in the comprehensive development of this principle, in the adaptation of existing practice to other cases requiring the weighing of interests. Its postulates have to be implemented by public administration authorities already in the consideration of a case. We should not forget about other principles defining the basis of administrative procedures. Exactly the principles, which are properly formulated, understood by law enforcers and implemented in their activity, are designed to remove the dispute about the admissibility of administrative discretion. It is obvious that building of effective governance is impossible without the discretion; the desire to foresee all the managerial incidents in regulations is futile. Therefore, a body must always have a legal tool allowing carrying out its powers in non-standard, not expressly prescribed situations. In such circumstances, the principles are

an important support.[16] Examples of immigration practices show this well.

In conclusion, we should make some conclusions of a general nature. 1. Administrative procedures should receive a permanent "residence" in the domestic administrative law. 2. There is a need for effective doctrine providing adequate legal regime of administrative procedures, suitable for all spheres of public administration. Perhaps, the study of general and specific principles should go first. And the principle of proportionality should become the first of them. 3. After that, it will be possible to realize the idea of a general law (Code) on administrative procedures.

16 Regarding administrative discretion, see: Davydov K. V. Judicial Control over Discretionary Administrative Acts: European Experience [Sudebnyi kontrol' za diskretsionnymi administrativnymi aktami: evropeiskii opyt]. Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law, 2014, no. 5, pp. 9-26.

References:

1. Federal Law No. 109-FL from July 18, 2006 "On Migration Registration of Foreign Citizens and Stateless Persons in the Russian Federation" (ed. from 12.22.2014) [Federal'nyi zakon ot 18 iyulya 2006 № 109-FZ «O migratsionnom uchete inostrannykh grazhdan i lits bez grazhdanstva v Rossiiskoi Federatsii» (red. ot 22.12.2014)]. *SZ RF – Collection of Laws of the RF*, 2006, no. 30, article 3285.

2. Federal Law No. 210-FL from July 27, 2010 "On the Arrangement the Provision of State and Municipal Services" (ed. from 31.12.2014) [Federal'nyi zakon ot 27 iyulya 2010 № 210-FZ «Ob organizatsii predostavleniya gosudarstvennykh i munitsipal'nykh uslug» (red. ot 31.12.2014)]. *SZ RF – Collection of Laws of the RF*, 2010, no. 31, article 4179.

3. RF Presidential Decree No. 601 from May 7, 2012 "On the Main Directions of Public Administration Improvement" [Ukaz Prezidenta Rossiiskoi Federatsii ot 7 maya 2012 № 601 «Ob osnovnykh napravleniyakh sovershenstvovaniya sistemy gosudarstvennogo upravleniya»]. *SZ RF – Collection of Laws of the RF*, 2012, no. 19, article 2338.

4. Chapter 2. People in Motion: Who, Where and Why Move [Glava 2 Lyudi v dvizhenii: kto, kuda i pochemu peremeshchaetsya]. *Official site of the United Nations Department of Economic and Social Affairs*, available at : http://www.un.org/ru/development/hdr/2009/hdr_2009_ch2.pdf (accessed : 04.07.2015).

5. Chernyavskii A. V., Kuyanova A. V., Yuritsin A. E. Topical Issues of Quality Evaluation by the Population of the Employees' Work of the Department of the Federal Migration Service of Russia for Omsk region in the Provision of

State Services [Aktual'nye voprosy otsenki naseleniem kachestva raboty sotrudnikov UFMS Rossii po Omskoi oblasti pri okazanii gosudarstvennykh uslug]. *Zakonodatel'stvo i praktika – Legislation and Practice*, 2014, no. 1.

6. Davydov K. V. Judicial Control over Discretionary Administrative Acts: European Experience [Sudebnyi kontrol' za diskretsionnymi administrativnymi aktami: evropeiskii opyt]. *Aktual'nye voprosy publichnogo prava – The Topical Issues of Public Law*, 2014, no. 5.

7. Mitskevich L. A. *Essays on the Theory of Administrative Law: a Comparative Content: Monograph* [Ocherki teorii administrativnogo prava: sravnitel'noe napolnenie: monografiya]. Moscow: Prospekt, 2015.

8. *Official site of the FMS of Russia*, available at : http://www.fms.gov.ru/press/news/news_detail.php?ID=50859&sphrase_id=1016154 (accessed : 06.01.2012).

9. Provision on the federal public information system "Unified portal of public and municipal services (functions)" approved by the RF Government Decree No. 861 from October 24, 2011 [Polozhenie o federal'noi gosudarstvennoi informatsionnoi sisteme «Edinyi portal gosudarstvennykh i munitsipal'nykh uslug (funktsii)», utv. Postanovleniem Pravitel'stva Rossiiskoi Federatsii ot 24 oktyabrya 2011 g. № 861]. *SZ RF – Collection of Laws of the RF*, 2011, no. 44, article 6274.

10. Resolution of the European Court of Human Rights from July 7, 1989 "Soering v. the United Kingdom" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 07 iyulya 1989 «Sering (Soering) protiv Soedinennogo Korolevstva»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

11. Resolution of the European Court of Human Rights from November 15, 1996 "Chahal v. the United Kingdom" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 15 noyabrya 1996 «Chakhal (Chahal) protiv Soedinennogo Korolevstva»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

12. Resolution of the European Court of Human Rights from December 6, 2007 "Liu and Liu v. the Russian Federation" [Postanovlenie Evropeiskogo suda po pravam cheloveka ot 06 dekabrya 2007 «Delo "Lyu i Lyu (Liu and Liu) protiv Rossiiskoi Federatsii»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

13. Ruling of the Constitutional Court of the RF No. 55-O from March 2, 2006 "On the complaint of a citizen of Georgia Kakhaber Todua against violation

of his constitutional rights by paragraph 7 article 7 of the Federal Law "On the Legal Status of Foreign Citizens in the Russian Federation" [Opredelenie Konstitutsionnogo Suda RF ot 02 marta 2006 № 55-O «Po zhalobe grazhdanina Gruzii Todua Kakhabera na narushenie ego konstitutsionnykh prav punktom 7 stat'i 7 Federal'nogo zakona «O pravovom polozhenii inostrannykh grazhdan v Rossiiskoi Federatsii»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

14. Ruling of the Constitutional Court of the RF No. 155-O from May 12, 2006 "On the complaint of a citizen of Ukraine X. against violation of his constitutional rights by paragraph 2 article 11 of the Federal Law "On the Prevention of Spread in the RF of a Disease Caused by the Human Immunodeficiency Virus (HIV)", by paragraph 13 article 7 and paragraph 13 article 9 of the Federal Law "On the Legal Status of Foreign Citizens in the Russian Federation" [Opredelenie Konstitutsionnogo Suda RF ot 12 maya 2006 g. № 155-O «Po zhalobe grazhdanina Ukrainy X. na narushenie ego konstitutsionnykh prav punktom 2 stat'i 11 Federal'nogo zakona «O preduprezhdenii rasprostraneniya v Rossiiskoi Federatsii zabolevaniya, vyzyvaemogo virusom immunodefitsita cheloveka (VICh-infektsii)», punktom 13 stat'i 7 i punktom 13 stat'i 9 Federal'nogo zakona «O pravovom polozhenii inostrannykh grazhdan v Rossiiskoi Federatsii»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

15. Starilov Yu. N. About the Two Main Modern Directions of the Development of Russian Administrative and Administrative-procedural Legislation (thesises) [O dvukh glavnykh sovremennykh napravleniyakh razvitiya rossiiskogo administrativnogo i administrativnogo protsessual'nogo zakonodatel'stva (tezisy)]. *Vestnik Voronezhskogo gosudarstvennogo universiteta – Bulletin of the Voronezh State University*, Ser: Pravo, 2014, no. 3.

Universal Decimal
Classification 342.9

Shigeru Kodama

REFORM OF ADMINISTRATIVE LAW AND ADMINISTRATIVE REFORM IN JAPAN – ADOPTION OF THE LAW ON ADMINISTRATIVE PROCEDURES

Shigeru Kodama
Doctor of Law, Mie University, Japan.

In Japan, administrative law experts consistently demanded the adoption of the law on administrative procedure (hereinafter – LAP) since the 1950s. However, this task became real only in the 1980s. In the conditions of stagnating economic growth and globalization the post-war type of Japanese administrative system was sharply criticized both from the outside (United States) and by Japanese entrepreneurs. They demanded the adoption of LAP and includ-ed it in the agenda of administrative reform. Japanese administrative bureaucracy recognized the need for transformation of admin-istrative system as a need of the time.

"Trust" in the 1980s, as well as "fairness" and "transparency" in the 1990s were the key concepts in Japanese administrative reform. This influenced on the content of LAP. According to the "theory of generations" of LAP, the development of LAP can

be divided into three generations. Japanese LAP mainly belongs to the first (protection of the rights of citizens) and second (setting rules) generations. However, Japanese LAP provides for not only the procedure for the adoption of acts with external action, but also the internal activity of bureaucracy. Japanese LAP sought to transform the style of internal activity of administrative bureaucracy. In this sense, the adoption of LAP in Japan means self-reform of administrative bureaucracy.

Keywords: administrative procedures, law on administrative procedures, administrative reform, economic growth, administrative bureaucracy.

One of the specialists in comparative public law of the United States, comparing Japanese and Korean law on administrative procedures (hereinafter – LAP), pointed out that the Japanese LAP "rather codifies existing law than represents an institutional innovation" and "preserves the system that serves the interests of the Liberal Democratic Party"[1]. However, the Japanese LAP was adopted in 1993 as one of the key elements of administrative reform, which sought to transform post-war type of administrative system. Adoption of the LAP is recognized as the starting point and prerequisite for further administrative reforms and reform of the administrative law of Japan.

Three waves of administrative procedures in Japan

There were three waves of attempts to adopt LAP in postwar Japan.

The first attempt was made in 1953. A relevant draft law was published, but it did not find the necessary support among scientists because its content did not meet the requirements of administrative procedure. Many provisions of this draft were related to the effective conduct of proceedings within administrative bodies and for citizens. Of the necessary requirements of "administrative procedure" only "hearing" in a very simple form was here.

1 Tom Ginsburg. "Dismantling the Developmental State? Administrative Procedure Reform in Japan and Korea". The American Journal of Comparative Law, 49(2001), pp. 602, 615.

The second attempt was undertaken after about 10 years, in the year 1964. As a result of the activity of "the first provisional council of administrative reform" a meaningful and real draft law of LAP appeared. This meant the increasing in the level of study of administrative procedure. Scholars highly appreciated that. However, unfortunately in reality this document was ignored by the Parliament.

The third attempt, after about 20 years began with the resumption of research on adoption of LAP in the consultative research group of the Chief of administrative management bureau of Administrative Management Agency (1980-1983). It published its research results in the form of a draft law in 1983. Research searches of scholars continued, and in 1989 a new draft law was released in a scientific journal. The publication of these documents contributed to the understanding of administrative procedure, attracted and strengthened attention to the draft of LAP. The results of activities of research teams, finally, were turned into an official draft law by "the third provisional council for promotion of administrative reform". It proposed its draft law in 1991. And in 1993 the law was passed.

If count from the moment when, for the first time, in 1964, the first draft law was drawn up, the adoption of LAP took almost 30 years. Scientists continued to study administrative procedure and hoped to adopt the law, particularly after the year 1976 when Germany adopted its law on administrative procedures.

However, in addition to the development and enrichment of scientific research of administrative procedure, the following three conditions were very important for the implementation of LAP into law enforcement practice:

1) changing of Japanese society and understanding of new tasks related to it (objective and subjective changes);

2) emergence of social movements that promote adoption and understanding of this law (politicians and entrepreneurs);

3) recognition of the need to reform its internal activity and external relations of citizens and public servants (bureaucracy self-reform).

Changing of Japanese society – stagnation of economic growth

Japanese economic growth from 1945 onwards can be divided into 4 stages.

The first period (1945-1959) – phase of post-war recovery.

The second period (1960-1973) – the period of high economic growth. During this period, the Japanese economy grew every year by approximately 10%.

The third period (from mid-1970's up to late 1980's) – the period of stable (but already not so high) economic growth. However, compared with other developed

countries, Japan maintained a high level of economic growth and became recognized as the second economic power worldwide after the United States.

The fourth period started in 1990. The Japanese economy has entered into a phase of prolonged stagnation, continuing up to the present time. For this period, only 2% economic growth is considered high. This period is called "lost decades". The stagnation of economic growth was considered as an institutional fatigue in the post-war type of administrative system, depletion of its potential.

In Japan they believe that a greater role in achieving high economic growth of 1960's, i.e. in the abovementioned "second period", was played by the Government and administrative bodies. One common version arises from the idea that the reason for success was the wise orienting of economic growth, business activity by a number of excellent administrative bodies and officials.

Features of the post-war type of Japanese administrative system

Of course, Japan is a capitalist country, a state with market economy. However, the administrative authorities did not consider that free competition in market economy contributed to the economic growth of Japan and ensured international competitiveness. Therefore, for the promotion of economic growth and international competitiveness, administrative authorities interfered in entrepreneurial activity and market economy.

This role of administrative authorities led to the following features of their activity.

Firstly, the uniformity in application of powers. There are governmental and departmental normative acts for execution or application of laws in Japan. Moreover, their adoption includes establishment of internal norms on these administrative decisions. Discretion of officials within an administrative body is controlled by the adoption of an administrative decision in accordance with such internal normative act. The objective is that, regardless of who performs it, it is equally applied. But here it is necessary to emphasize that such internal normative acts were taken for uniform application of laws by officials. Therefore, these internal acts also have an external action. This is an important aspect, which is not always underlined by researchers, it expresses the internal feature, while the next aspect detects the external feature – the so-called "administrative guidance" denoting the known discretion of the subject of management.

So, the second as if is contrary to the first. On the one hand, administrative bodies not only uniformly applied powers for regulation, but at the same time intervened in entrepreneurial activity and market economy at discretion within

formal powers. On the other hand, administrative bodies, especially municipalities, took their own internal norms when they faced with social conflict, on which they could not find answers in the provisions of laws, therefore, public administration had to perform a coordinating role between interested persons.

If we focus on the first aspect – interference in entrepreneurial activity and market economy, it is possible to say that such interference by the administrative bodies have created unique relations between administrative bodies and firms. Thus, administrative bodies not only regulate entrepreneurial activity, but peculiarly intertwine with entrepreneurs and firms. Here we can talk about the interrelation or interdependence between regulators and regulated persons.

Criticism from inside and outside on the post-war type of administrative system under conditions of low economic growth and globalization

In "the third period", the average annual rate of economic growth remains at the level of 4%. Simultaneously with the end of the high economic growth Japan got into financial difficulties. Administrative reform in early 1980's primarily sought to overcome financial crises through financial reconstruction. Considering the latter as the current task, the council for administrative reform proposed as a long-term task the reform of post-war administrative system of Japan. Privatization of the state railways is one of the results of this administrative reform. At the same time, however, "administrative procedure" and access to information in possession of administrative bodies were considered just as tasks to review and discuss.

But during "the fourth period" the globalization and economic stagnation made public administration in the 90's change the post-war administrative system. We are talking about institutional reforms, reconsideration of the role of the state and the government, represented by "the third provisional council for promotion of administrative reform" in its last report in 1993, in accordance with which there was an attempt to change the following three main directions. Firstly, the reconsideration of the role of the government and municipal formations, in other words, of administrative bodies – "bring the officials closer to the people", secondly, changing relations between the central government and municipal formations – "the state towards the territoriality", finally, "strengthening the leadership of the Prime Minister".

In the context of globalization the criticism of post-war type of administrative system came from the Western countries, especially the United States. The United States criticized the lack of a pure market economy in Japan. According to

the United States, the post-war type of administrative system contained specific unfair relations between administrative bodies and firms, and there were non-economic customs barriers.

In order to understand why the United States criticized the post-war type of administrative system, that is, the Japanese model of market economy, we have to look at the globalization of economy. The latter here can be understood as an increase in foreign direct investment in Japan. Because, since the second half of 1980's there have increased direct foreign investments from Japan to developed Western countries. In this situation, American firms sought to open branches and invest direct investments in Japan. The States tried to implement economic expansion into Japan. But, having found that the Japanese market is closed to foreign firms, began to criticize the latter.

In 1989-1990 certain contacts (Structural Impediments Initiative, SII) between these countries were implemented, where the United States demanded Japan to revise the mutual relations between administrative bodies and firms in terms of "transparency" and "justice". Outer criticism on administrative system contributed to the adoption of LAP, the requirement on the part of the United States was one of the reasons for the adoption of this law.

But criticism of foreign countries can represent only one of the reasons. Inside Japan, due to the worsening of economic stagnation, there appeared an opinion that they needed a new type of administrative system instead of the outdated post-war model. This was about converting the old system to the new "administrative system of the 21st century". The main directions of the last report of "the third provisional council for promotion of administrative reform" reflected such needs. Japanese firms require adoption of LAP as one of the important tasks of administrative reform. Japanese firms not only wished the adoption of the law, but also themselves carried out activities to disseminate understanding of administrative procedure phenomenon.

The abovementioned shows how new factors appeared in the new conditions: low economic growth and globalization made administrative procedure an urgent task of administrative reform.

Administrative procedures as self-reform of administrative bureaucracy

Undoubtedly, the criticism on the part of the United States and the need of Japanese businessmen became an important impetus for the adoption of LAP. They put "administrative procedure" in the agenda of administrative reform. In 1989, "the sub-committee on public regulation of the second provisional council

for the promotion of administrative reform" put forward the issue of "development of the institute of administrative procedure" as a prerequisite for improvement of public regulation. There was a belief that "transparency" and "justice" in the activities of administrative bodies, which were demanded by Japanese entrepreneurs and the United States, ensured "the development of the institute of administrative procedure". "Section on fair and transparent administrative procedure" was founded in the third provisional council for the promotion of administrative reform, to design the draft of LAP. As has already been indicated, officials submitted their draft of LAP in 1991.

It is difficult to deny the fact that criticism of the United States and the needs of Japanese entrepreneurs contributed works on LAP. However, we need to recall that the third wave for adoption of LAP began in 1980, when, as already indicated, there were conducted researches within the framework of administrative management agency, and within the framework of the management and coordination agency. It is necessary to pay attention to the fact that one report of 1982 of the second provisional council of administrative reform listed four main directions in administrative reform: "responding to changes", "ensuring of totality, "simplification and efficiency" and "trust". In this context, administrative procedure related, together with "access to information", to the latter direction ("trust").

Indeed, administrative bodies, officials and employees, in other words, public administration, bureaucracy can count on the gaining of "confidence" by improving "transparency" and "justice" in its activity. Of course, initially the Japanese bureaucracy was not quite ready for these changes. But since the 1980s, strong criticism of scholars, as well as research results in the form of draft laws, gradually instilled relevant ideas to administrative apparatus. After all, in the 1990's, the latter became to understand the importance of adoption of LAP.

The reason that despite the development of researches on administrative procedures the scholars could not exercise adoption of the law till 1990's was that administrative bureaucracy did not understand the meaning and importance of this law. However, the administrative bureaucracy in the 1990's no longer opposed the adoption of LAP, began the preparation of the draft, and started to prepare necessary normative acts for the implementation of this law in their ministries and agencies. In this sense, we may call the self-reform of administrative bureaucracy as an important factor in the success of adoption LAP in Japan. Administrative bureaucracy recognized the need for transformation of administrative system as the need of modern times.

Peculiarities of Japanese LAP and generations of administrative procedures

As has already been mentioned above, in Japan "confidence" in the 1980's, and "justice and "transparency" in the 1990's were the key concepts to justify the movement towards the adoption of LAP. This is reflected in the provisions of LAP.

Article 1 provides for the purpose of the law as follows: "This law establishes procedures for the orders, administrative guidance and notifications, and provides the versatility of questions concerning such actions, seeks to improve the guarantee of fairness and progress towards transparency (that means that there should be clarity in public understanding of the content and processes of administrative decisions; this meaning is also used in article 38) in administrative process, and thus contributes to the protection of the rights and interests of citizens" [2].

One can retrieve two peculiarities of the Japanese LAP From article 1.

1. The subject matter of this law was limited to three types of procedures: for dispositions, administrative guidance and notifications. Procedures for dispositions are divided into two types – "dispositions upon application" and "adverse dispositions".

2. The ultimate objective of this law is to "improve the guarantee of justice and progress in respect of transparency". At that, it is helpful to determine the value of "justice" and "transparency" for administrative procedure, in particular, "transparency".

As for "administrative guidance", here the specifics is contained not in the procedure, but in the "administrative guidance" itself, that is why this issue is not considered here.

Scholars of public law of Japan, especially scholars of administrative law, for many years, since the 1960's, were insisting on the need to adopt LAP and continued its research. With the development of the doctrine the following two types of administrative procedure acquired particular importance.

The first type is the procedure of ensuring "the protection of the rights and interests of citizens" as it is stipulated in LAP. The other is the procedure of ensuring participation in making administrative decisions, the typical example of which is represented by the procedure of participation citizens in the process and taking decision on territorial planning in town planning. The first kind, of course, comes from the idea of the "rule of law" and gives priority to the rights and interests

2 GIZ German Society for International Cooperation. Collection of legislation on administrative procedures [GIZ Germanskoe Obshchestvo po Mezhdunarodnomu Sotrudnichestvu. Sbornik zakonodatel'nykh aktov po administrativnym protseduram]. Tashkent: Abu Matbuot-Konsalt, 2013. The text of the Japanese LAP of 1993 was translated in the collection. It does not reflect addings and amendments made in 2006. You can find the latest version of the text of this law (in English) at the website of "Japanese Law Translation".

of citizens as private individuals. This can be called as "classic task" of LAP. And the second type is based on the principle of democracy and pursues the realization of public interests of participation of citizens as individuals concerned. This can be understood as a more "modern" task.

The adopted LAP did not fully satisfy all the scientists, because the original version of 1993 did not include procedures for possibility of participation in decision-making. In this sense, LAP did not correspond to a more modern task due to its adoption in the framework of administrative reform. Administrative reform demanded by the United States and Japanese firms was actually based on the concept of neo-liberalism. Neo-liberalism gives great importance to the rights and interests of a private individual, while democratic procedures here remain in the background. Therefore the limitation of the subject matter was associated with the view that the ultimate goal of the law was "ensuring the protection of the rights and interests of citizen".

Despite the reasoned criticism of the content of LAP due to its imperfection, scientists almost unanimously recognized the need to adopt LAP. They believed that it was "a step forward" in the progress of Japanese administrative law, which had not yet meant a denial of the value of procedures for the possibility to participate in administrative decision. The formalization of the latter was just seen as a task for the future.

Long-awaited addings and amendments to the LAP of Japan of 1993 were made in 2006, developers added procedures for adoption administrative normative acts (administrative orders) as "public comment procedures". Paragraph 1 of article 38 provides for the main provisions of this procedure, as follows: "Bodies establishing administrative orders, etc., when establishing administrative orders, etc. shall publicly in advance notify about the proposed administrative orders, etc., (that is, a draft showing the content of anticipated administrative orders. The same shall apply hereinafter.) And any materials relating to the proposed administrative orders, etc., and must seek to comments (Including information. The same shall apply hereinafter.) of the public, showing the address at which the comments and the time period for submission must be directed"[3].

Administrative procedure as a transformation of the style of internal activity of administrative bureaucracy

As indicated above, in Japan the limitation of the subject matter of LAP was justified by the fact that the procedures were divided into two types – "classic" and

3 http://www.japaneselawtranslation.go.jp/?re=02

"modern". "Modern" remain a future task.

In this regard, interest is arisen by the theory of three generations of administrative procedure (hereinafter referred to as "the theory of generations") [4]. According to this concept, the purpose and subject matter of each generation turns out as follows.

Table 1

First generation	protect the rights of citizens / apply the law properly protective attitude against the abuse of power and arbitrariness
Second generation	set the rules protective attitude ensuring the participation of interested persons or the task of strengthening of democratic legitimacy
Third generation	perform actions through new modes of governance ensure good governance / greater legitimacy / promoting new regulatory strategies

"Contemporary tasks" in the study of administrative procedure in Japan are not always the same as in the "third generation" of the "theory of generations". It implies more modern conditions – privatization, globalization, good governance and so on. Here it is important that the basis and the content of LAP are being developed and enriched. We notice that the basis and purpose of the "third generation" is not in "protective attitude", but in a more positive – response to the "needs of new ways of governance".

Paragraph 1 and 3 article 5 of chapter 2 "dispositions upon application" and paragraph 1 and 2 article 12 "adverse dispositions" embody the specificity of the Japanese LAP as follows. Article 5: "1. Administrative bodies should accept criteria (here and below we will use "criteria for consideration") needed to resolve the issue of issuance of permit requested in an application under the provisions of relevant legislative acts.

2. Administrative bodies, when establishing criteria for consideration of the application, shall make them as specific as possible on the merits of this permit, etc. that is under consideration.

3. Except of cases of emergency administrative obstacles, administrative bodies should provide accessible to society criteria for consideration of applications in an administrative agency, which, in accordance with legislative acts, is obliged to accept applications or in other suitable way".

4 Javier Barnes. "Towards a Third Generation of Administrative Procedure". Comparative Administrative Law, under edition of Susan Rose-Ackerman & Peter L. Lindseth, Cheltenham, UK, Northampton, MA, USA: Edward Elgar, 2010.

Article 12

"1. Administrative bodies should seek to accept requirements (hereinafter "requirements for taking a decision") needed for consideration under the provisions of relevant legislative acts to determine what adverse dispositions are taken, what kind of adverse act should be adopted, and the bodies should seek to make these requirements available to the public.

2. The administrative bodies when adopting requirements for taking a decision should make them as specific as possible on the merits of this type of adverse disposition".

It's not only about the result of an external action that this procedure brings, but also about the quality of performing internal work that is done within administrative bureaucracy under the requirement of administrative procedure, that is, "transparency". In other words, the Japanese LAP provides for not only the procedure for making a decision with an external action, but also internal appropriate conditions for the achievement of objectives that are set forth by the LAP inside of administrative bureaucracy. From this point of view, one of the goals of the Japanese LAP is the transformation of the style of administrative bureaucracy activity. At the same time, we can say that this LAP is designed to achieve improvement of relations between the administrative bureaucracy and citizens. On the one hand, it is a striving to gain the confidence of citizens in the activity of administrative bureaucracy, on the other hand, the intention to include elements of self-control or self-regulation into the internal activity of administrative bureaucracy.

Strictly speaking, according to the LAP, a body must make or seek to make internal information, i.e. "criteria" or "requirements" for a decision, available only to the party applying or recipient of an adverse disposition. But gradually the norms on access have begun to spread also to the relations that were previously considered internal, left on the free discretion of administrative bodies. In this sense, the LAP enhances internal control in administrative bureaucracy and limits its discretion.

Here we can see the similarity between the LAP and the law "On Access to Information Held by Administrative Bodies". The first law (LAP) just imposes a duty to make "criteria" available to the applicant who has applied to administrative body. In comparison, in the second law citizens have begun to enjoy the right to request access to information held by an administrative body. In Japan since 1970's they have started to discuss about the issue of "the right to free access to information" as the right to demand information from administrative bodies to

ensure an active participation of citizens in policy and management. In the 1990's this problem has started to be considered due to the promotion of administrative reform. "Committee for Administrative Reform", established in 1994, was at work upon the law "On Access to Information Held by Administrative Bodies, which was adopted in 1999. The latter is not due to the concept of "the right to free access to information", but due to the concept of "accountability". This means that the law is based not on the view that "the government must be monitored by citizens with help of constitutional rights", but on the theory that "administrative bodies have a duty to give explanations to citizens about their administrative actions, and to fulfill this duty they should monitor themselves".

The beginning of this article contains the assessment of the Japanese LAP by the specialist in comparative public law of the United States. This assessment is based on the theory of "principal – agency". But this assessment is based on the assumption that the reform of administrative law without the strengthening of external control over administrative bureaucracy is meaningless. In other words, the value of administrative law reform increases as the growth of the role of courts in monitoring over administrative bureaucracy. Of course, external monitoring over administrative bureaucracy is certainly important. But the latter does not automatically ensure the improvement of activity within administrative bureaucracy. In this connection, we can pay attention to the elements of internal control or self-reform for the evaluation of administrative procedure.

List of documents, actions and laws on administrative reform and reforms of administrative law in Japan

Table 2

1953		Outline of State Administrative Operation Act
1962		Administrative Case Litigation Act Administrative Appeal Act
1964		Draft of Administrative Procedure Act and Report on Reform for Administrative Procedure (First Provisional Council of Administrative Reform, 1961-1964)
1983	3	Final Report (Second Provisional Council of Administrative Reform, 1981 -1983)
1983	11	Outline of Administrative Procedure Act (in Report by Consultative Experts Group to the Chief of Administrative Management Bureau of Administrative Management Agency, 1980 - 1983)
1988		Structural Impediments Initiative (US and Japan,-1989)

Continuation of table 2

1989	10	Outline of Administrative Procedure Act (Interim Report by Consultative Experts Group to the Chief of Administrative Management Bureau of Management and Coordination Agency, 1985-1989)
1989	11	Report on Public Regulation (by Subcommittee on Public Regulation of Second Provisional Council for Promotion of Administrative Reform)
1990	4	Final Report (Second Provisional Council for Promotion of Administrative Reform, 1986-1990)
1991	7	Outline of Administrative Procedure Act (by Section on Fair and Transparent Administrative Procedure of Third Provisional Council for Promotion Administrative Reform)
1991	12	Outline of Administrative Procedure Act (in Report on Development of Fair and Transparent Administrative Procedure Legal System by Third Provisional Council for Promotion of Administrative Reform)
1993	10	Final Report (Third Provisional Council for Promotion of Administrative Reform, 1990-1993)
1993	11	Administrative Procedure Act
1995	3	First Deregulation Package (Cabinet Decision)
1995	5	Decentralization Promotion Act
1996	12	Standards for Administrative Involvement (Committee for Administrative Reform, Cabinet Decision)
1996	12	Outline of Information Disclosure Act (Opinion on Establishing Legal System for Information Disclosure, Committee for Administrative Reform)
1997	12	Final Report (Committee for Administrative Reform,1994-1997)
1997	12	Final Report (Administrative Reform Council, 1996-1997)
1997	12	Deregulation Committee (Regulatory Reform Committee) (-2001)
1998	6	Basic Act on Reform of Central Government Ministries and Agencies
1999	7	Act on Access to Information Held by Administrative Organs
1999	7	Act for Establishment of the Cabinet Office
1999	7	Partial Revision of Cabinet Act
1999	7	Act on General Rules for Incorporated Administrative Agencies
1999	9	Partial Revision of National Government Organization Act
1999	11	Comprehensive Decentralization Act (Revision of Local Self-Government Act)
2000	12	Comprehensive Program for Administrative Reform
2001	1	Reorganizing Central Government Ministries and Agencies

2001	4	Council for Regulatory Reform (-2004)
2001	7	Council for Decentralization Reform (-2004)
2004	4	Council for the Promotion of Regulatory Reform (-2007)
2004	6	Partial Revision of Administrative Case Litigation Act
2005	6	Partial Revision of Administrative Procedure Act
2006	12	Act on Promotion of Decentralization Reform
2007	1	Regulatory Reform Council (-2010)
2007	4	Committee for Decentralization Reform (-2010)
2009	11	Local Sovereignty Strategy Council (-2012)
2011	4	Act on the Development of Related Acts for Promoting Reform with the Aim of Increasing the Autonomy and Independence of Local Authorities (08/2011, 02/2012, 05/2014)
2014	6	Full Revision of Administrative Appeal Act
2014	6	Partial Revision of Administrative Procedure Act

Administrative Procedure Act (Act No. 88 of November 12, 1993)

Chapter I General Provisions

Article 1 (Purpose, etc.)

Article 2 (Definitions)

Article 3 (Exclusion from Application)

Article 4 (Exclusion from Application; Dispositions, etc. Rendered to State Organs, etc.)

Chapter II Dispositions upon Applications

Article 5 (Review Standards)

Article 6 (Standard Period of Time for Process)

Article 7 (Review and Response to Applications)

Article 8 (Showing of Grounds)

Article 9 (Provision of Information)

Article 10 (Holding of Public Hearings, etc.)

Article 11 (Dispositions Involving More Than One Administrative Agency)

Chapter III Adverse Dispositions

Section 1 General Rules

Article 12 (Disposition Standards)

Article 13 (Procedures Prerequisite for Adverse Dispositions)

Article 14 (Showing of Grounds for Adverse Dispositions)
Section 2 Hearings
Article 15 (Manner of Notice of Formal Hearings)
Article 16 (Agents)
Article 17 (Intervenors)
Article 18 (Inspection of Records, etc.)
Article 19 (Presidency of the Hearing)
Article 20 (Method of Proceedings on the Date of the Hearing)
Article 28 (Special Provisions concerning Hearings prerequisite for Adverse Dispositions ordering the Dismissal of Officers, etc.)
Section 3 Grant of Opportunity for Explanation
Article 29 (Method of Granting an Opportunity for Explanation)
Article 30 (Method of Notice of Grant of Opportunity for Explanation)
Article 31 (Application Mutatis Mutandis of Procedures pertaining to Hearings)

Chapter IV Administrative Guidance
Article 32 (General Principles of Administrative Guidance)
Article 33 (Administrative Guidance related to Applications)
Article 34 (Administrative Guidance related to Authority over Permissions, etc.)
Article 35 (Method of Administrative Guidance)
Article 36 (Administrative Guidance Directed to More Than One Person)

Chapter V Notifications
Article 37 (Notifications)

Chapter VI Public Comment Procedure, etc.
Article 38 (General Principles relating to Establishment of Administrative Orders, etc.)
Article 39 (Public Comment Procedure)
Article 40 (Special Provisions concerning Public Comment Procedure)
Article 41 (Making Public the Public Comment Procedure)
Article 42 (Consideration of Submitted Comments)
Article 43 (Public Notice of the Results)

Article 44 (Application, Mutatis Mutandis)
Article 45 (Method of Public Notice)

Chapter VII Auxiliary Provisions
Article 46 (Measures by Local Public Entities)

Supplementary Provisions

References:

1. *GIZ German Society for International Cooperation. Collection of legislation on administrative procedures* [GIZ Germanskoe Obshchestvo po Mezhdunarodnomu Sotrudnichestvu. Sbornik zakonodatel'nykh aktov po administrativnym protseduram]. Tashkent: Abu Matbuot-Konsalt, 2013.
2. Javier Barnes. "Towards a Third Generation of Administrative Procedure". *Comparative Administrative Law*, under edition of Susan Rose-Ackerman & Peter L. Lindseth, Cheltenham, UK, Northampton, MA, USA: Edward Elgar, 2010.
3. Tom Ginsburg. "Dismantling the Developmental State? Administrative Procedure Reform in Japan and Korea". *The American Journal of Comparative Law*, 49(2001).
4. *http://www.japaneselawtranslation.go.jp/?re=02* (accessed : 05.04.2015).

Universal Decimal
Classification 351.95

Vasil'eva A. F.

ADMINISTRATIVE PROCEDURES FOR THE EXECUTION OF INDIVIDUAL LEGAL ACTS OF PUBLIC ADMINISTRATION

Vasil'eva Anna Fedotovna,
c.j.s. (PhD in law), Associate professor of the Department of constitutional, administrative and municipal law at Law Institute of Siberian Federal University
afvassilieva@yandex.ru

Using comparative-legal method the author analyses the institute of execution individual legal acts of public administration, which has been little researched in national science of administrative law.

Keywords: individual acts of public administration, enforcement proceedings, administrative act, administrative procedure, comparative-legal method.

Introduction

The issue of execution of individual acts of public administration is almost not studied in the science of domestic administrative law. The main thesis on this issue is that individual acts of public administration are legally binding, and their execution is "ensured by different organizational measures, means of persuasion, and, where necessary, by measures of state coercion"[1]. In the current legislation we will not find a law that would establish single rules for the execution of individual acts of public administration. At the same time, the legislation provides for certain types of administrative acts[2] the opportunity of their enforced execution, and also gives some administrative bodies powers to execute such acts independently.

1 Soviet Administrative Law. Methods and Forms of Public Administration [Sovetskoe administrativnoe pravo. Metody i formy gosudarstvennogo upravleniya]. Moscow: Yuridicheskaya literatura, 1977, pp. 49-50. It should be noted that the institute of execution of administrative acts is not studied in the educational, methodical literature. See, e.g.: Vasil'ev R. F. On Teaching a Special Course "Legal Acts of Representative and Executive Power Bodies" [«O prepodavanii spetsial'nogo kursa «Pravovye akty organov predstavitel'noi I ispolnitel'noi vlasti»]. Vesti. Mosk. un-ta – News of Moscow University, Ser. 11, Law, 2001, no. 5, pp. 58-71.

2 Here and hereinafter, the concepts of "administrative act" and "individual legal act of public administration" are used interchangeably.

Proper execution of an individual act of public administration is a prerequisite for its effectiveness, since its execution allows achieving the purposes for which the act has been issued[3]. Also, the procedure of execution of an administrative act, as rightly pointed out by R. Poscher, represents a form of legal resolution of a conflict in relations "state citizen" in conditions of a constitutional state[4].This highlights the practical significance of research the institute of administrative acts execution.

Lack of the doctrine of the institute for execution administrative acts of public administration in the Russian science of administrative law led to the application of comparative-legal method. For comparison we selected the German institute of administrative acts execution, which is characterized by a long history (since the 19th century), detailed legal regulation and generally high role of administrative bodies in administrative acts execution[5].

1. Legal nature of administrative procedure of administrative acts execution

The German doctrine of administrative law considers execution of administrative acts as a forced implementation of public-law duties of citizens or other subjects of law by administrative bodies within an independent *administrative procedure*[6]. Administrative bodies exercise enforced execution of those requirements, which are formalized by an administrative act and execution of which does not require recourse to the court[7]. Thus, the center of an administrative procedure of execution is an administrative act[8] which by virtue of its titular (right creating) function

3 Bakhrakh D. N. Russian Administrative Law [Administrativnoe pravo Rossii]. Moscow: 2000, p. 293.

4 Poscher R. Administrative Act and Administrative Law in the Enforcement. On the History, Theory and Doctrine of the Administrative Decision Enforcement Law [Verwaltungsakt und Verwaltungsrecht in der Vollstreckung. Zur Geschichte, Theorie und Dormatik des Verwaltungsvollstreckungsrecht]. VerwArch – Administrative Archive, 1998 (89), pp. 113-114.

5 In respect of the applicability of the German experience in the execution of administrative acts, see: Podeiko V. A. Judicial and Administrative Bodies in German Enforcement Proceedings [Sudebnye i administrativnye organy v germanskom ispolnitel'nom proizvodstve]. Zakonodatel'stvo – Legislation, 2015, no. 5, p. 58. Sattarova Z. Z. Enforcement Proceedings in Germany and Russia (comparative-legal analysis) [Ispolnitel'noe proizvodstvo Germanii i Rossii (sravnitel'no-pravovoi analiz)]. Trudy Orenburgskogo instituta (filiala) Moskovskoi gosudarstvennoi yuridicheskoi akademii – Proceedings of Orenburg Institute (branch) of Moscow State Law Academy, 2008, no. 9, pp. 184-193.

6 Wolff, Bachof, Stober, Kluth. Administrative Law I [Verwaltungsrecht I].12th edition by C. H. Beck, Munich: 2007, § 64, note 2.

7 Podeiko V. A. Op. cit. p. 57.

8 This in turn raises the question of correlation between an administrative act, substantive administrative law and administrative executive law, since an administrative act, which is based on the norms of substantive administrative law, is executed within the framework of administrative and executive law. As noted by R. Poscher, such a correlation is manifested in the fact that the requirements for the issuance of an administrative act and the requirements for the execution of an administrative act are strictly delimited, established by different laws. At that, there is a general principle of administrative enforcement proceedings, according to which in the performance of an administrative act the issue of its substantive legality is not affected. Poscher R. Op. cit. p. 111.

in implementing requirements and other obligations in relations like "state-citizen" performs *a role similar to a court decision in civil process*. It should be noted that within the framework of an administrative procedure there is also possible an enforced execution of administrative contracts, if an appropriate condition is provided for in a particular administrative contract[9].

At that, the administration compared to a private creditor is a privileged entity since the administration without recourse to the court creates the ground for execution and independently may exercise enforced execution. Judicial control is exercised only in the following case[10], if a citizen appeals against measures taken within the proceedings on execution of an administrative act.

Thus, execution of an administrative act is connected with the "result" (an administrative act) of administrative procedure and at the same time is an independent administrative procedure, which differs from the administrative procedure for taking an administrative act due to specific objectives that are implemented during the procedure of execution of an administrative act[11].

It should be noted that in the Russian doctrine the enforcement proceedings, within which certain types of administrative acts are executed, is considered both as the institute of administrative law[12] and as a kind of administrative proceedings[13].

2. The genesis of the procedure of administrative acts execution

Formation of the German administrative procedure of administrative acts execution dates back to the early 19th century, which in many respects was borrowed from the civil procedural enforcement proceedings. Although the prototype of the German administrative law was the French administrative law, in Prussia they refused the reproduction of the French model of administrative acts execution, under which enforced execution of an administrative act was possible only after obtaining an appropriate court decision. In accordance with the German model, executive authorities (particularly in the fields of military and financial management) had the powers to execute their own administrative acts[14].

9 Wolff, Bachof, Stober, Kluth. Op. cit. § 64, note 2.

10 Wolff, Bachof, Stober, Kluth. Op. cit. § 64, note 2.

11 Wolff, Bachof, Stober, Kluth. Op. cit. § 64, note 8.

12 Gorbunova Ya. P. Enforcement proceedings as an Institute of Administrative Law: Problems of Organization, Practical Realization and Prospects of Legal Regulation [Ispolnitel'noe proizvodstvo kak institut administrativnogo prava: problemy organizatsii, prakticheskoi realizatsii i perspektivy pravovogo regulirovaniya]. Thesis abstract for the degree of PhD in law, Voronezh: 2007.

13 Sarychev A. N. Enforcement Proceedings as a Form of Administrative Proceedings [Ispolnitel'noe proizvodstvo kak vid administrativnogo proizvodstva]. Thesis abstract for the degree of PhD in law, Saratov: 1998.

14 Wolff, Bachof, Stober, Kluth. Op. cit. § 64, note 3. Poscher R. Op. cit. pp. 114-115.

3. Legal regulation of administrative acts execution

A unified (common) procedure for the execution of administrative acts was established with the adoption in 1953 of the law "On Execution of Administrative Acts" (Verwaltungs-Vollstreckungsgesetz (VwVG)) [15]. However, given the federal structure, the Law on execution of administrative acts operates directly only for the acts of the federal executive authorities. Regulation of the order for execution of administrative acts of lands (hereinafter – the subjects of Federation) refers to their competence. The subjects of Federation, in most cases, adopt their own laws on the procedure of administrative acts execution, when this they partly use blanket rules referring to the Federal law on the order of execution of administrative acts[16].

Special norms on execution of administrative acts contained in the Law on the direct application of coercive measures (Gesetz über den unmittelbaren Zwang (UZwG)), the Law on the direct application of coercive measures and the implementation of special powers by soldiers and civilian guards (Gesetz über die Anwendung unmittelbaren Zwanges und die Ausübung besonderer Befugnisse durch Soldaten der Bundeswehr und zivile Wachpersonen (UZGBw)), the Law on the procedure of collection of taxes, duties (Abgabenordnung), as well as in a number of other laws.

Thus, the structure of the German legislation governing administrative procedure of execution of administrative acts is rather difficult or, as pointed out by German scientists, "hard to foresee"[17]. Firstly, given the federal structure the regulation is exercised both at the federal level and at the level of the subjects of Federation. At that, the Federation is entitled to regulate only the administrative procedure of execution of administrative acts adopted by federal administrative bodies. The order of execution of administrative acts adopted by the administrative bodies of the subjects of Federation is established by the subjects of Federation. Secondly, along with the general rules determining the order of execution of administrative acts, there are special norms for certain types of administrative acts.

In the Russian legal system, the basic law governing the execution of individual legal acts of public administration is the Federal Law No. 229-FL from 02.10.2007

15 Russian text of the law see: Administrative Procedural Law in Germany: the Law on Administrative Court Procedure; the law on Administrative Litigation; the Legislation on the Execution of Administrative Decisions [Administrativno-protsessual'noe pravo Germanii: Zakon ob administrativnom proizvodstve; Zakon ob administrativno-sudebnom protsesse; Zakonodatel'stvo ob ispolnenii administrativnykh reshenii]. Compiler V. Bergmann, Moscow: Volters Kluver, 2007.

16 Wolff, Bachof, Stober, Kluth. Op. cit. § 64, note 6.

17 Enegelhardt, App, Schlatmann. Commentary to the Law on Execution of Administrative Decisions [Verwaltungs-Vollstreckungsgesetz Kommentar]. 10th edition by C. Z. Beck, 2014, note 2.

"On Enforcement Proceedings" (hereinafter – FL on Enforcement Proceedings)[18]. In accordance with article 1 of the FL on Enforcement Proceedings this law regulates not only the order of execution of judicial acts, but also *acts of other bodies and officials*, which in the implementation of powers provided by the federal law are granted the right to impose on individuals (hereinafter – citizens), legal entities, the Russian Federation, the subjects of the Russian Federation, municipal entities (hereinafter – organizations) *obligations to transfer* to other citizens, organizations, or to appropriate budgets *cash and other property* or *to commit certain actions in their favor* or *refrain from certain actions*.

In accordance with article 3 of the FL on Enforcement Proceedings the legislation on enforcement proceedings consists of the FL on Enforcement Proceedings, the Federal law No. 118-FL from 21.07.1997 "On bailiffs" and *other federal laws* governing the conditions and procedures for the enforced execution of judicial acts, acts of other bodies and officials. At that the norms of federal laws *governing the conditions and procedures for the enforced execution* of judicial acts, acts of other bodies and officials must comply with the FL on Enforcement Proceedings. Thus, the norms of the FL on Enforcement Proceedings have priority.

At that the literature indicates that despite the fact that neither article 71 nor article 72 of the Constitution of the Russian Federation assigns legislation on enforcement proceedings to the sole jurisdiction of the RF or to the joint jurisdiction of the RF and the constituent entities of the Russian Federation, enforcement proceedings, like procedural branches of law, should be referred to the jurisdiction of the RF[19].

Thus, at the moment, the order of execution of administrative acts is regulated at the federal level.

4. Types of individual legal acts of public administration that shall be executed

According to the German Act on execution of administrative acts (§§ 1, 6), the following of two types of administrative acts are subject to execution: firstly, the acts which contain the requirements of monetary nature, and secondly, the acts that impose on the recipient an obligation to transfer a thing, to make a certain action, undergo an action or refrain from certain actions. The procedure of execution of administrative acts is dualistic: the law distinguishes the procedure of execution of

18 The initial text of the document published in SZ RF – Collection of Laws of the RF, 2007, no. 41, article 4849.

19 Commentary to the Federal Law "On Enforcement Proceedings" and its Practical Application [Kommentarii k Federal'nomu zakonu «Ob ispolnitel'nom proizvodstve» i praktike ego primeneniya]. Editor-in-cief I. V. Reshetnikova, Moscow: Volters Kluver, 2009, p. 13.

monetary (property) requirements and the procedure of forcing to the commission, refraining or undergoing of certain actions. Such a dual approach entails legal and technical differences of these procedures in part of application coercive measures in the performance of administrative acts[20].

The most common approach of the Russian administrative law is that the law establishes mandatory execution of individual legal acts, without the possibility of enforced execution. At the same time the duty of execution is ensured by the possibility of bringing the addressee of an act to administrative responsibility. For example, in accordance with article 36 of the Federal law No. 135-FL from 26.07.2006 "On Protection of Competition", there is an obligation to exercise decisions and orders of antimonopoly body within a time period established by such decisions and orders. At that, the Code on Administrative Offences of the RF establishes responsibility for the failure to comply with an injunction.

Article 12 of the FL on Enforcement Proceedings lists individual legal acts of public administration that have the status of executive document:

- acts of the Pension Fund of the RF and Social Insurance Fund of the RF[21] *concerning the recovery of money from the debtor-citizen*, who is duly registered as an individual entrepreneur, without the attachment of documents with marks of banks or other lending institutions, if the debtor has the right to exercise entrepreneurial activity without opening a checking and other accounts[22];

20 Wolff, Bachof, Stober, Kluth. Op. cit. § 64, note 12. In addition, there are various procedural forms of administrative acts execution, which differ from each other by a set of stages of enforcement proceedings: elongated proceedings, immediate execution, shortened execution, immediate application. The correlation of these forms in detail is considered by R. Poscher: "Elongated proceedings is a standard, ordinary order of execution of administrative acts in all cases where there is no urgency of execution of an administrative act, the administrative act does not meet the requirements of immediate execution. In contrast to the procedure of immediate execution, within the framework of ordinary execution, it requires a valid administrative act that brings this execution procedure closer with the procedure of court judgment execution. Within the procedure of immediate execution an administrative act, which has not entered into force, is subject to execution. A characteristic feature of the shortened execution is the lack of the stage of notification the debtor about the application of coercive measures in the absence of voluntary execution of an administrative act. The procedure of immediate application is implemented in the absence of an administrative act. Not an administrative act, but directly the norm, on the base of which the administrative act can be issued, is subject to enforced execution. It is believed that the procedure of immediate application was provided for by the legislator for the execution of tacit decisions." Poscher R. Op. cit. p. 120-130.

21 Pension Fund of the RF and Social Insurance Fund of the RF, although not being executive authorities in the institutional sense, but are referred to other government entities created by the state to implement public tasks (are the executive authorities in the functional sense). For more details see: Mitskevich L. A. Essays on the Theory of Administrative Law: Modern Content [Ocherki teorii administrativnogo prava: sovremennoe napolnenie]. Moscow: Prospekt, 2015, pp. 135, 150-152.

22 As follows from the provisions of articles 19 and 20 of the Federal Law No. 212-FL from 24.07.2009 "On the Insurance Premiums to the Pension Fund of the RF, Social Insurance Fund of the RF, Federal Fund of Compulsory Medical Insurance" the Pension Fund and its local bodies are entitled to take authoritative

- acts of bodies exercising control functions[23] *on the recovery of money* with the attachment of documents with marks of banks or other lending institutions, where checking and other accounts of the debtor are open, about the complete or partial non-fulfillment of requirements of these bodies due to the absence on the accounts of the debtor sufficient funds to meet these requirements;

- acts of other bodies and officials on the cases of administrative offences[24];

- acts of other bodies in cases stipulated by the Federal law[25].

It should be noted that there are administrative acts, which are executed not by bailiffs under the FL on enforcement proceedings, but directly by administrative bodies (officials), who has issued them. As an example, we consider the decision of a police officer on the use of physical force, the execution of which is settled in article 19 of the FL "On the Police" [26] (hereinafter – FL "On the Police"). So, in particular, the procedure of use of physical force includes the duty of a police officer

---

decisions in relation to individual entrepreneurs and drive them to enforced execution extrajudicially. Review of judicial practice the Supreme Court of the RF for the first quarter 2013. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

Resolution of a bailiff not to institute enforcement proceedings found to be unlawful because the decision of the state institution – the Office of the Pension Fund of the RF on recovery of money from the debtor-citizen ... is an executive document: Ruling of the Supreme Court of the RF No. 301-KG14-4876 from 01.30.2015, [Opredelenie Verkhovnogo Suda RF ot 30.01.2015 g. № 301-KG14-4876], Decision of the Arbitration Court of the Ural District No. F09-9922/14 from 02.27.2015 [Postanovlenie Arbitrazhnogo suda Ural'skogo okruga ot 27.02.2015 g. № F09-9922/14]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

23 E.g., the decision of a tax authority on the recovery of taxes (fees), fines and tax penalties from the assets of a taxpayer – organizations and individual entrepreneurs (paragraph 7 article 46, paragraph 1 article 47 of the Tax Code of the RF), resolution of the Presidium of the Higher Arbitration Court of the RF No. 8421/07 from 20.11.2007, Commentary to the Federal Law "On Enforcement Proceedings" and its Practical Application [Kommentarii k Federal'nomu zakonu «Ob ispolnitel'nom proizvodstve» i praktike ego primeneniya]. Editor-in-cief I. V. Reshetnikova, Moscow: Volters Kluver, 2009, p. 66.

24 The most studied in administrative law is the procedure of execution of decisions on cases of administrative offences taken by the officials of administrative bodies. See., e.g.: Buznikova N. E. Enforcement Proceedings on Cases of Administrative Offenses [Ispolnitel'noe proizvodstvo po delam ob administrativnykh prav-onarusheniyakh]. Thesis for the degree of PhD in law, Moscow: 2001; Kuprina N. Yu. Enforcement Proceedings on Cases of Administrative Offenses [Ispolnitel'noe proizvodstvo po delam ob administrativnykh prav-onarusheniyakh]. Thesis for the degree of PhD in law, St. Petersburg: 2004; Bakurova N. N. Execution of Decisions on the Imposition of Certain Types of Administrative Punishments: General Characteristics of Enforcement Proceedings [Ispolnenie postanovlenii o naznachenii otdel'nykh vidov administrativnykh nakazanii: obshchaya kharakteristika ispolnitel'nogo proizvodstva]. Vestnik Universiteta imeni O. E. Kutafina – Bulletin of the University named after O. E. Kutafin, 2014, no. 2, pp. 89-94.

25 Higher Arbitration Court of the RF acknowledged the resolution of the Office of the Pension Fund of the RF on recovery of insurance premiums from the property of a payer in the absence of information about its accounts as an independent executive document: Decision of the Presidium of the Higher Arbitration Court of the Russian Federation No. 8545/13 from 05.11.2013, analytical review from 2/25/2014 [Postanovlenie Prezidiuma VAS RF ot 05.11.2013 g. № 8545/13, Analiticheskii obzor ot 25.02.2014 g.]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

26 The initial text of the document is published in SZ RF – Collection of Laws of the RF, 2011, no. 7, article 900.

before using of physical force, special means and firearms to inform persons, in respect of which he assumes to use physical force, special means and firearms, that he is a police officer, to warn them of his intention and give them the opportunity and time to carry out the legitimate demands of the police officer[27].

Conclusion

The procedure of execution of individual acts of public administration requires a thorough scientific investigation, because the legal result, which is expected by the subject of law-enforcement in the adoption of an act, is reached exactly at the stage of execution. At the same time it is still difficult to find works on this subject matter in the domestic literature.

Analysis of domestic legislation and the German experience lets us say that the domestic system of execution of individual legal acts gravitates towards the French model, according to which an enforced execution of an individual legal act requires a court decision. However, in the Russian system we can detect some elements of the German model, since some individual administrative acts are subject to enforced execution without a court decision.

We can state the lack of a unified procedure for execution of individual legal acts of public administration. It seems possible to single out the following administrative procedures for execution of individual legal acts of public administration. Firstly, within the framework of enforcement proceedings under the FL on enforcement proceedings enforced execution may be applied only to those individual acts of public administration that are directly listed in the FL on enforcement proceedings. Secondly, enforced execution is possible under other federal laws establishing the procedure for execution of administrative acts by the bodies (officials) that have adopted them (e.g. coercive measures used by the police).

27 See details: Solovei Yu. P. Legal Regulation of Physical Force Use by Police Officers [Pravovoe regulirovanie primeneniya sotrudnikami politsii fizicheskoi sily]. Administrativnoe pravo i protsess – Administrative Law and pro-cess, 2012, no. 7.

References:

1. *Administrative Procedural Law in Germany: the Law on Administrative Court Procedure; the law on Administrative Litigation; the Legislation on the Execution of Administrative Decisions* [Administrativno-protsessual'noe pravo Germanii: Zakon ob administrativnom proizvodstve; Zakon ob administrativno-sudebnom protsesse; Zakonodatel'stvo ob ispolnenii administrativnykh reshenii]. Compiler V. Bergmann, Moscow: Volters Kluver, 2007.

2. Bakurova N. N. Execution of Decisions on the Imposition of Certain Types of Administrative Punishments: General Characteristics of Enforcement

Proceedings [Ispolnenie postanovlenii o naznachenii otdel'nykh vidov administrativnykh nakazanii: obshchaya kharakteristika ispolnitel'nogo proizvodstva]. *Vestnik Universiteta imeni O. E. Kutafina – Bulletin of the University named after O. E. Kutafin*, 2014, no. 2.

3. Bakhrakh D. N. *Russian Administrative Law* [Administrativnoe pravo Rossii]. Moscow: 2000.

4. Buznikova N. E. *Enforcement Proceedings on Cases of Administrative Offenses* [Ispolnitel'noe proizvodstvo po delam ob administrativnykh pravonarusheniyakh]. Thesis for the degree of PhD in law, Moscow: 2001.

5. Vasil'ev R. F. On Teaching a Special Course "Legal Acts of Representative and Executive Power Bodies" [«O prepodavanii spetsial'nogo kursa «Pravovye akty organov predstavitel›noi i ispolnitel›noi vlasti»]. *Vesti. Mosk. un-ta – News of Moscow University*, Ser. 11, Law, 2001, no. 5.

6. Gorbunova Ya. P. *Enforcement proceedings as an Institute of Administrative Law: Problems of Organization, Practical Realization and Prospects of Legal Regulation* [Ispolnitel'noe proizvodstvo kak institut administrativnogo prava: problemy organizatsii, prakticheskoi realizatsii i perspektivy pravovogo regulirovaniya]. Thesis abstract for the degree of PhD in law, Voronezh: 2007.

7. *Commentary to the Federal Law "On Enforcement Proceedings" and its Practical Application* [Kommentarii k Federal'nomu zakonu «Ob ispolnitel'nom proizvodstve» i praktike ego primeneniya]. Editor-in-cief I. V. Reshetnikova, Moscow: Volters Kluver, 2009.

8. Kuprina N. Yu. *Enforcement Proceedings on Cases of Administrative Offenses* [Ispolnitel'noe proizvodstvo po delam ob administrativnykh pravonarusheniyakh]. Thesis for the degree of PhD in law, St. Petersburg: 2004.

9. Mitskevich L. A. *Essays on the Theory of Administrative Law: Modern Content* [Ocherki teorii administrativnogo prava: sovremennoe napolnenie]. Moscow: Prospekt, 2015.

10. Ruling of the Supreme Court of the RF No. 301-KG14-4876 from 01.30.2015, [Opredelenie Verkhovnogo Suda RF ot 30.01.2015 g. № 301-KG14-4876]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

11. Podeiko V. A. Judicial and Administrative Bodies in German Enforcement Proceedings [Sudebnye i administrativnye organy v germanskom ispolnitel'nom proizvodstve]. *Zakonodatel'stvo – Legislation*, 2015, no. 5.

12. Decision of the Presidium of the Higher Arbitration Court of the Russian Federation No. 8545/13 from 05.11.2013, analytical review from 2/25/2014 [Postanovlenie Prezidiuma VAS RF ot 05.11.2013 g. № 8545/13, Analiticheskii

obzor ot 25.02.2014 g.]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

13. Decision of the Arbitration Court of the Ural District No. F09-9922/14 from 02.27.2015 [Postanovlenie Arbitrazhnogo suda Ural'skogo okruga ot 27.02.2015 g. № F09-9922/14]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

14. Sarychev A. N. *Enforcement Proceedings as a Form of Administrative Proceedings* [Ispolnitel'noe proizvodstvo kak vid administrativnogo proizvodstva]. Thesis abstract for the degree of PhD in law, Saratov: 1998.

15. Sattarova Z. Z. Enforcement Proceedings in Germany and Russia (comparative-legal analysis) [Ispolnitel'noe proizvodstvo Germanii i Rossii (sravnitel'no-pravovoi analiz)]. *Trudy Orenburgskogo instituta (filiala) Moskovskoi gosudarstvennoi yuridicheskoi akademii – Proceedings of Orenburg Institute (branch) of Moscow State Law Academy*, 2008, no. 9.

16. *SZ RF – Collection of Laws of the RF*, 2007, no. 41, article 4849.

17. *SZ RF – Collection of Laws of the RF*, 2011, no. 7, article 900.

18. *Soviet Administrative Law. Methods and Forms of Public Administration* [Sovetskoe administrativnoe pravo. Metody i formy gosudarstvennogo upravleniya]. Moscow: Yuridicheskaya literatura, 1977.

19. Solovei Yu. P. Legal Regulation of Physical Force Use by Police Officers [Pravovoe regulirovanie primeneniya sotrudnikami politsii fizicheskoi sily]. *Administrativnoe pravo i protsess – Administrative Law and process*, 2012, no. 7.

20. Federal Law No. 212-FL from 24.07.2009 "On the Insurance Premiums to the Pension Fund, Social Insurance Fund of the Russian Federation, Federal Compulsory Medical Insurance Fund" [Federal'nyi zakon ot 24.07.2009 g. № 212-FZ «O strakhovykh vznosakh v Pensionnyi fond RF, Fond sotsial'nogo strakhovaniya RF, Federal'nyi fond obyazatel'nogo meditsinskogo strakhovaniya»]. *Konsul'tant Plus. Professional version* [Electronic resource], Moscow: 2015.

21. Enegelhardt, App, Schlatmann. *Commentary to the Law on Execution of Administrative Decisions* [Verwaltungs-Vollstreckungsgesetz Kommentar]. 10th edition by C. Z. Beck, 2014.

22. Poscher R. Administrative Act and Administrative Law in the Enforcement. On the History, Theory and Doctrine of the Administrative Decision Enforcement Law [Verwaltungsakt und Verwaltungsrecht in der Vollstreckung. Zur Geschichte, Theorie und Dormatik des Verwaltungsvollstreckungsrecht]. *VerwArch – Administrative Archive*, 1998 (89).

23. Wolff, Bachof, Stober, Kluth. *Administrative Law I* [Verwaltungsrecht I].12th edition by C. H. Beck, Munich: 2007.