Universal Decimal
Classification 342.92

Podoprigora R. A.

ADMINISTRATIVE PROCEDURES: EXPERIENCE OF KAZAKHSTAN

Podoprigora Roman Anatol'evich,
Doctor of Law, Professor of Caspian University, Almaty, Kazakhstan.

The article is dedicated to the issues of the current state and development prospects of administrative procedures in Kazakhstan. The author also considers difficulties, which can arise in the preparation of the draft Law On Administrative Procedures.

Keywords: administrative law, administrative procedures.

The main administrative-legal problem in Kazakhstan in recent years is concentrated on three issues: administrative procedures, administrative justice and administrative offenses. The vast majority of conferences, round tables, discussions, one way or another, are linked to these issues.

And it is interesting that many local lawyers, professional legal communities and government agencies give priority to administrative offences. Much less attention is given to various other administrative-legal institutes.

It should be recognized that in large part thanks to our foreign colleagues, various projects with varying success working in Kazakhstan, the most important issues of administrative law (administrative procedures and administrative justice) are put on the agenda, transformed into draft laws, constantly included in the program of legal reforms.

This approach is very demonstrative. For many of Kazakhstani lawyers, with different professional levels, administrative law has remained the law for public administration, a kind of knobstick for the impact on citizens and organizations. Another purpose of administrative law: the containment of public administration, protection of the rights of citizens in public sphere remains in the shadows.

That is why such a seemingly complex, from the point of view of legal technique, Act as the Code on Administrative Offences is developed and adopted in less than one year[1], and the issues related to administrative procedures and administrative justice have been being discussed with varying degrees of intensity, for years, but still have not found their adequate resolution.

Although if you look formally at the Kazakh legislation, things are not so bad. Fifteen years ago, a law on administrative procedures[2] was adopted. But, despite the promising title, administrative procedures are given very little space therein. The Law to date has just 29 articles which are also referred to public authorities, their competence, functions, legal acts, and to consideration of citizens' applications. It is clear that each of these issues deserves one or several acts with dozens or hundreds of articles.

The main value of the law on administrative procedures is that it is the only one in the whole Kazakhstan legislation, despite shortness, but says about individual (administrative) acts of state bodies.

1 July 5, 2014 the New Code of Administrative Offences was Adopted in Kazakhstan [5 iyulya 2014 g. v Kazakhstane byl prinyat novyi Kodeks ob administrativnykh pravonarusheniyakh]. Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan, 2015, no. 18-II, art. 92.

2 Law of the Republic of Kazakhstan from November 27, 2000 "On Administrative Procedures" [Zakon Respubliki Kazakhstan ot 27 noyabrya 2000 g. «Ob administrativnykh protsedurakh»]. Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan, 2000, no. 20, art. 379.

Many other issues of administrative procedures (participants, stages, types, entry into force of acts, performance of acts, etc.), that are specific to the laws on administrative procedures in different countries, do not take place.

But since the procedural activity of the state administration, in principle, cannot remain without normative regulation, such activity has become governed by the laws and bylaws affecting various aspects of public administration: registration, licensing, monitoring and supervision, consideration of appeals and so on.[3]

At that, the corresponding normative legal acts are traditionally focused on explaining of procedural actions of the state administration; the rights and freedoms of citizens, maybe except for the right to appeal, have no place in such procedures. Lack of necessary procedures in the general Law on administrative procedures, unfortunately, is not compensated for in other laws and bylaws.

A vivid example of the neglect of administrative procedures is the situation of loss of nationality. The Law of the Republic of Kazakhstan "On Citizenship"[4] from December 20, 1991 does not determine when citizenship is considered to be lost and consequently terminated. Bylaws contain an indication that a) citizenship of the Republic of Kazakhstan shall be terminated on the day of registration of its loss; b) registration of the loss of citizenship of the Republic of Kazakhstan shall be exercised only after the notification of the person about the reasons and grounds for the decision to loss his citizenship of the Republic of Kazakhstan; c) the registration is exercised through drawing up a pronouncement on the loss of citizenship of the Republic of Kazakhstan, approved by the head of a foreign establishment.[5] However, bylaws do not state that a person, in respect of whom was taken a decision on the loss of citizenship, should be informed about this, as

3 See: Law of the Republic of Kazakhstan from January 12, 2007. "On the Order of Consideration of Applications by Physical and Legal Entities" [Zakon Respubliki Kazakhstan ot 12 yanvarya 2007 g. «O poryadke rassmotreniya obrashchenii fizicheskikh i yuridicheskikh lits»]. Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan, 2007, no. 2, art. 17; Law of the Republic of Kazakhstan from January 6, 2011 "On State Control and Supervision" [Zakon Respubliki Kazakhstan ot 6 yanvarya 2011 g. «O gosudarstvennom kontrole i nadzore»]. Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan, 2011. no. 1, art. 1; Law of the Republic of Kazakhstan from May 16, 2014 "On Permissions and Notifications" [Zakon Respubliki Kazakhstan ot 16 maya 2014 g. «O razresheniyakh i uvedomleniyakh]. Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan, 2014, no. 9, art. 51.

4 Gazette of the Supreme Council of the Republic of Kazakhstan [Vedomosti Verkhovnogo Soveta Respubliki Kazakhstan]. 1991, no. 52, art. 636.

5 See: Order of the Secretary of State – Minister of Foreign Affairs of the Republic of Kazakhstan from January 19, 2011 "On Approval the Rules for Foreign Establishments of the Republic of Kazakhstan concerning Registration of Documents on the Issues of Citizenship of the Republic of Kazakhstan" [Prikaz Gosudarstvennogo sekretarya – Ministra inostrannykh del Respubliki Kazakhstan ot 19 yanvarya 2011 g. «Ob utverzhdenii Instruktsii po oformleniyu zagranuchrezhdeniyami Respubliki Kazakhstan dokumentov po voprosam grazhdanstva Respubliki Kazakhstan»]. Informational system "Paragraf", accessed : March 31, 2015.

well as, not set a time-frame for such notices, the opportunity to appeal an act on the loss of citizenship.

The emergence of the institute of state services became a very important step in the development of administrative procedures when at the political level there had been taken a decision to move public administration toward so called model of corporate governance. Moreover, it should be noted that the impetus to the development of this institute became the businessmen's and especially investors' discontent of excessive bureaucracy of the State apparatus. At a certain stage, especially the economic development of the country was faced with unwieldy state apparatus, ossified forms of work, numerous manifestations of corruption, including due to the lack of transparency of administrative activity, excessive licensing functions and the traditional bureaucratic red tape.

In connection with the new administrative-legal institute, there were started the development of standards and regulations, registers of state services, systems of quality assessment and monitoring of these services. At the same time, there was no any serious discussion of what is meant by state services; whether they different from state functions, and how they differ; by whom and in respect of whom it may be exercised.

At one time, general provisions on state services were in the Law on Administrative Procedures, thereby affirming that administrative procedures should include procedures for the provision of state services. But in 2013 a separate Law on State Services[6], which brought state services from under the law on Administrative Procedures, was passed.

To date the register of state services includes 709 items, 232 of which are available only in paper form, 39 only in electronic form, and 438 both in paper and in electronic.[7] The register is very bitty, and includes both completely understandable actions: issuance of certificates, licenses, permits, and those that cause questions: provision of dormitory to students, subsidized interest rates on loans, training of entrepreneurs, appointment to a doctor.

For most of the services there are accepted standards and regulations of state services (approved by a Government Decision), which contain numerous

6 Law of the Republic of Kazakhstan from April 15, 2013 "On State Services" [Zakon Respubliki Kazakhstan ot 15 aprelya 2013 g. «O gosudarstvennykh uslugakh»]. Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan, 2013, no. 5-6, art. 29.

7 Resolution of the Government of the Republic of Kazakhstan from September 18, 2013 "On Approval the Register of State Services" [Postanovlenie Pravitel'stva Respubliki Kazakhstan ot 18 sentyabrya 2013 g. «Ob utverzhdenii reestra gosudarstvennykh uslug»]. Sobranie aktov Prezidenta Respubliki Kazakhstan i Pravitel'stva Respubliki Kazakhstan – Collection of Acts of the President of the Republic of Kazakhstan and the Government of the Republic of Kazakhstan, 2013, no. 55, art.769.

administrative procedures. In addition to standards and regulations, there are still various departmental rules that also contain administrative procedures, sometimes contrary to the standards and regulations. Sectoral legislation (tax, customs, anti-monopoly), in its turn, establishes its procedural rules.

Thus, there is an obvious spontaneous process of norm-setting, both at the level of laws and at the level of bylaws concerning the issues of administrative procedures. The general trend is that any external activity of public administration falls under the regime of state services.

In addition to all the above the e-government project, which assumes contacts between state administration and citizens solely in electronic form, is gaining momentum. The project is very good: today, registration of a commercial legal entity in Kazakhstan can be done one hour, without leaving your apartment. Kazakhstan notaries are already afraid that soon will be unemployed due to the development of electronic technologies. But legal support for these processes lags behind the technologies.

Today Kazakhstan has again raised the issue of preparation of the Law on Administrative Procedures. Model Law on Administrative Procedures[8] and the Concept of the draft Law of the Republic of Kazakhstan "On Administrative Procedures"[9] have been proposed for discussion.

But the process of preparation of the law, however, as well as any other possible development of the institute of administrative procedures, will be accompanied by some difficulties, which, in our opinion, are:

1. *Nonsystem and, in some cases, sporadic development of the Kazakhstan legislation*. There are projects of new acts that do not fit into the already existing system of legislation and unpredictable in the future. For example, there is a very rapid, even somewhere painful, discussion of the project of Entrepreneurial Code[10] in Kazakhstan, which, incidentally, also contains administrative procedures (whole chapters are devoted to authorizations and notifications, control and oversight activity). The majority of Kazakhstan civil law scholars fight to the bitter end: they say that they do not need such a code and that there is enough of Civil Code and related laws. Nothing but confusion it will bring.

But in response (from those who take decisions) there are explanations why Entrepreneurial Code is so essential. Given the powerful onslaught of civil law scholars, the emphasis in the Code is planned to be put on public-law issues of

8 Model Law on Administrative Procedures [Model'nyi zakon ob administrativnykh protsedurakh]. GIZ. The program "Promotion of Rule of Law in Central Asia Countries", Bishkek: 2015.

9 Available at : http://online.zakon.kz/Document/?doc_id=30931540 (accessed : 30.04.2015).

10 Available at : http://online.zakon.kz/Document/?doc_id=31014546 (accessed : 31.03.2015).

entrepreneurial activity: according to one of the drafts Code, commodity-money and others based on the equality of entrepreneurs property relations, as well as non-property relations related to property relations are governed by the civil legislation of the Republic of Kazakhstan.

But also from the standpoint of administrative law (the main public sector involved in this case) the adoption of the law will lead to another round of confusion in acts relating to public administration.

Or another law, forthcoming in Kazakhstan: On Legal Acts. Its aim is to regulate the issues of both normative and individual acts. While individual acts are contained just in three articles. And the current law on administrative procedures, due to the law on legal acts, is expected to become invalid or undergo significant changes.

2. *Excessive conservatism in respect of administrative-legal institutes even among jurists*. Institutes of administrative law that have long become traditional are still perceived inadequately. A striking example is administrative treaties that are also covered by administrative procedures. Despite their real presence in law-enforcement practice, the mere existence of such treaties is contested or their scope is greatly narrowed, especially by representatives of private-law sectors.[11]

3. T*he technologization of relations between the state and citizens*. Of course, new technologies are very convenient. But they are designed for standard situations. If you go beyond the standard the technologies stuck. Where a machine becomes the main actor, everyone shrugs his shoulders: the program is written so, we cannot do anything. As an option of response: some laws have begun to include the provisions exempting citizens from responsibility if software fails.

The interaction between citizens and state administration is increasingly going out in the electronic environment. Of course, such a situation where, as said by the Head of the State Duma Committee on information policy, information technology and communications, the primary user of the network will be "an elderly woman with a tablet PC"[12] is still far. But the tendency is obvious, and we also must be prepared for the new-tech format of relations between the state administration and citizens. If in 2004 year, the number of Internet users in Kazakhstan was estimated to be about 3-4% of the population, then in 2014 – 70%.[13]

11 This approach is characteristic, in principle, with respect to other public-law treaties. See: Suleimenov M. K. Method of Legal Regulation as a Criterion Distinguishing Civil and Tax Law [Metod pravovogo regulirovaniya kak kriterii razgranicheniya grazhdanskogo i nalogovogo prava]. Yurist – Lawyer, 2013, no. 12.

12 Available at : http://www.aif.ru/dontknows/actual/1452269 (accessed : 31.03.2015).

13 Available at : http://inform.kz/rus/article/2698302 (accessed : 31.03 2015).

Automation of procedures eliminates the possibility of participation of a citizen interested in an act or action. Of course, "contactless relations" drastically reduce the propensity for corruption, but also dramatically increase the risks of incorrect or premature decisions when the possibility to hear citizen or get and check additional information is excluded.

In this regard, we dare to assume that the approaches established in administrative procedures in the last century, with all the permanence of fundamental principles must be audited or adjusted with taking into account completely different informational and technological infrastructure in the modern public administration.

This leads to a proposal for simplification of procedures (the right of challenging, the right to be heard, presence at proceedings, familiarization with case materials), but with the maintaining the guarantees of rights and interests of citizens. The very guarantees shall be ensured in the implementation of procedures both in conventional and electronic forms.

Certainly, we can expect problems here: efficiency and producibility according to the principle are trying to avoid procedural barriers.

4. *Judicial practice.*

Respect for administrative procedures could be raised by the courts. But, most regrettably, the courts still do not consider procedural violations significant, especially in the case of violations perpetrated by the state administration. Procedural shortcomings are often interpreted in favor of state bodies. The courts do not try to protect the weak party (a citizen or a non-government organization). It is clearly manifested in cases where fiscal interests are at stake.

The example may be not very good for the theme of the article, but very indicative. The new Administrative Code excludes the right of a judge to send a protocol on administrative offense for correction. Judges shrug their shoulders: they cannot impose punishment without a properly drawn up protocol.[14] That is the mere fact that procedural violations can serve as a basis for exemption from administrative responsibility badly fits in the head. And the way to fix the problem, which is not based on the law, has already appeared: to correct a protocol "as work proceeds".[15]

Another acute issue associated both with the administrative procedures and administrative justice, on which we do not agree, in particular, with our German colleagues, is an obligatory nature of preliminary appeal of administrative acts to a higher authority prior to recourse to the courts. We are told that the preliminary

14 Isabaeva A. Within the Framework of the New Legislation [V ramkakh novogo zakonodatel'stva]. Yuridicheskaya gazeta – Legal Newspaper, March 12, 2015.

15 En'shina I. Exclude Procedural Infringements [Isklyuchit' protsessual'nye narusheniya]. Yuridicheskaya gazeta – Legal Newspaper, April 3, 2015.

appeal will raise the percentage of corrected mistakes and unload the courts. We say – not in our political-legal and bureaucratic culture. The interests of protection esprit de corps, perceptions of self-worth are much higher than the interests of restoration of the rule of law. Plus, there is a shabby fight against corruption that has lost any rational basis when an official, seeing obvious violations of the law, is afraid to correct them because of the questions from, for example, procuratorial bodies. Therefore a simple introduction of the institute of mandatory preliminary appeal will not filter illegal acts and unload judiciary, and only will delay the process of consideration of public-law disputes. As an option there is a possible and compromise solution – creation of quasi-judicial structures in state administration bodies with the involvement of representatives of civil society, scientists and experts.

5. *The issues of lawfulness and legal culture, in particular when it comes to public servants*. They (public servants) as before, are oriented to the interests of the state and of a superior, but not to the interests of citizens and the laws (despite the very good declarative regulations, in particular, on the principles of public service, principles for establishing administrative procedures). In practice, this leads to situations when in the dilemma to help a citizen to receive a requested act or strictly comply with the procedure and deny the citizen, the refusal will take place.

6. *Administrative procedures and the integration formations*.

In connection with the establishment of the Eurasian Economic Union, for sure, there will be reasons to talk about administrative procedures for the activity of the bodies of this integration formation, which will have an impact on the internal administrative procedures of the States-participants to the EEU. Of course, it is an issue of the future, but already now it makes sense to think about the common parameters, principles of administrative procedures, possible conflicts of external and internal procedures.

The EEU is often compared to the European Union. In this regard, it should be noted that the researchers of administrative law in many European countries speak about the impact of European Administrative Law (Administrative Law of the EU) on national administrative-legal institutes. Moreover, some scientists say about administrative law in Europe as a legal formation and include in it:

- national administrative law – a mix of laws, judicial decisions and a doctrine used by public authorities in a particular European country;
- administrative law, established by the Council of Europe, which is for the most part contained in numerous recommendations of the Council of Ministers, as well as in the practice of the European Court of Human Rights;

- public law of European nations (Ius Publicum Europeaum) – works of legal scholars gleaned from the constitutional history and comparative studies of vague content and in indefinite frameworks, that, nevertheless, have a high conceptual value;

- administrative law of the European Union – a law created by the integration bodies of the Union in order to guarantee the effective application of legal norms on the territory of the EU;

- International administrative law, the sources of which are international treaties of a public-law nature.[16]

It can be expected that the development of integration processes on the post-Soviet space will also cause a lot of issues of correlation between the internal and "integration" administrative law.

7. *Intellectual resources*. It is fair to say that there few people able to conceptualize the issues of administrative procedures in Kazakhstan. The reasons are both very global shortage of legal scholars, and the consequences of reforms in legal education. We with some envy look at the number of theses on administrative procedures defended in Russia. In Kazakhstan just one master's thesis[17] on administrative procedures was defended (whereas dozens of works were devoted to the status of the President or the Government).

Summing up, I want to note that in Kazakhstan we are to face a difficult path for the creation of a modern legal institute of administrative procedures, on which there will be obstacles that are named above and assistants, among which are: progressive technologies, foreign experience and works of scientists – legal scholars of different countries.

16 Administrative Law in Europe: Between Common Principals and National Traditions / Ed. Matthias Ruffert. - European Administrative Law Series (7), 2013. p. 3.

17 Shishimbaeva S. S. Administrative Procedures (theoretical and legal aspects). Thesis abstract of dissertation for the degree of candidate of legal sciences [Administrativnye protsedury (teoretiko-pravovye aspekty)]. Almaty: 2009.

References:

1. Law of the Republic of Kazakhstan from November 27, 2000 "On Administrative Procedures" [Zakon Respubliki Kazakhstan ot 27 noyabrya 2000 g. «Ob administrativnykh protsedurakh»]. *Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan*, 2000, no. 20, art. 379.

2. Law of the Republic of Kazakhstan from January 12, 2007. "On the Order of Consideration of Applications by Physical and Legal Entities" [Zakon Respubliki Kazakhstan ot 12 yanvarya 2007 g. «O poryadke rassmotreniya obrashchenii fizicheskikh i yuridicheskikh lits»]. *Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan*, 2007, no. 2, art. 17.

3. Law of the Republic of Kazakhstan from January 6, 2011 "On State Control and Supervision" [Zakon Respubliki Kazakhstan ot 6 yanvarya 2011 g. «O gosudarstvennom kontrole i nadzore»]. *Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan*, 2011. no. 1, art. 1.

4. Law of the Republic of Kazakhstan from April 15, 2013 "On State Services" [Zakon Respubliki Kazakhstan ot 15 aprelya 2013 g. «O gosudarstvennykh uslugakh»]. *Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan*, 2013, no. 5-6, art. 29.

5. Law of the Republic of Kazakhstan from May 16, 2014 "On Permissions and Notifications" [Zakon Respubliki Kazakhstan ot 16 maya 2014 g. «O razresheniyakh i uvedomleniyakh]. *Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan*, 2014, no. 9, art. 51.

6. Resolution of the Government of the Republic of Kazakhstan from September 18, 2013 "On Approval the Register of State Services" [Postanovlenie Pravitel'stva Respubliki Kazakhstan ot 18 sentyabrya 2013 g. «Ob utverzhdenii reestra gosudarstvennykh uslug»]. *Sobranie aktov Prezidenta Respubliki Kazakhstan i Pravitel'stva Respubliki Kazakhstan – Collection of Acts of the President of the Republic of Kazakhstan and the Government of the Republic of Kazakhstan*, 2013, no. 55, art.769.

7. Order of the Secretary of State – Minister of Foreign Affairs of the Republic of Kazakhstan from January 19, 2011 "On Approval the Rules for Foreign Establishments of the Republic of Kazakhstan concerning Registration of Documents on the Issues of Citizenship of the Republic of Kazakhstan" [Prikaz Gosudarstvennogo sekretarya – Ministra inostrannykh del Respubliki Kazakhstan ot 19 yanvarya 2011 g. «Ob utverzhdenii Instruktsii po oformleniyu

zagranuchrezhdeniyami Respubliki Kazakhstan dokumentov po voprosam grazhdanstva Respubliki Kazakhstan»]. *Informational system "Paragraf"*, accessed : March 31, 2015.

8. *Administrative Law in Europe: Between Common Principals and National Traditions*. Under edition of Matthias Ruffert. – European Administrative Law Series (7), 2013.

9. En'shina I. Exclude Procedural Infringements [Isklyuchit' protsessual'nye narusheniya]. *Yuridicheskaya gazeta – Legal Newspaper*, April 3, 2015.

10. *Gazette of the Supreme Council of the Republic of Kazakhstan* [Vedomosti Verkhovnogo Soveta Respubliki Kazakhstan]. 1991, no. 52, art. 636.

11. Isabaeva A. Within the Framework of the New Legislation [V ramkakh novogo zakonodatel'stva]. *Yuridicheskaya gazeta – Legal Newspaper*, March 12, 2015.

12. July 5, 2014 the New Code of Administrative Offences was Adopted in Kazakhstan [5 iyulya 2014 g. v Kazakhstane byl prinyat novyi Kodeks ob administrativnykh pravonarusheniyakh]. *Vedomosti Parlamenta Respubliki Kazakhstan – Gazette of the Parliament of the Republic of Kazakhstan*, 2015, no. 18-II, art.92.

13. Model Law on Administrative Procedures [Model'nyi zakon ob administrativnykh protsedurakh]. *GIZ. The program "Promotion of Rule of Law in Central Asia Countries"*, Bishkek: 2015.

14. Shishimbaeva S. S. *Administrative Procedures (theoretical and legal aspects).* Thesis abstract of dissertation for the degree of candidate of legal sciences [Administrativnye protsedury (teoretiko-pravovye aspekty)]. Almaty: 2009.

15. Suleimenov M. K. Method of Legal Regulation as a Criterion Distinguishing Civil and Tax Law [Metod pravovogo regulirovaniya kak kriterii razgranicheniya grazhdanskogo i nalogovogo prava]. *Yurist – Lawyer*, 2013, no. 12.

16. Available at : *http://online.zakon.kz/Document/?doc_id=30931540* (accessed : 30.04.2015).

17. Available at : *http://online.zakon.kz/Document/?doc_id=31014546* (accessed : 31.03.2015).

18. Available at : *http://www.aif.ru/dontknows/actual/1452269* (accessed : 31.03.2015).

19. Available at : *http.//inform.kz/rus/article/2698302* (accessed : 31.03 2015).