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PROBLEMS OF ADMINISTRATIVE PROCEDURES IN STATE STRATEGIC PLANNING

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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) [Sovremennyyi 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 result⁶, 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 strategicheskome 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 reglamenti 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 Barenis 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](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 decision¹⁰, 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. “Utilitarianism’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. Elis-tratov, 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 inter-relations 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 administrativno-go 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 Gruyter 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 (assignments), 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, Oxford University Press, 2010.

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