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THE RULE OF LAW AND ADMINISTRATIVE JURISDICTION IN AUSTRIA

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The article focuses on practical aspects of the rule of law with regard to remedies against administrative decisions. Explores the problems of the system of judicial protection against administrative orders.

Keywords: administrative court procedure in Austria, administrative orders, judicial protection.

A. Introduction

Administrative Procedures are forming the relationship between the state and its citizens. In the meantime many European countries have established legal codifications of administrative procedural rules in order to enhance the uniformity and foreseeability of the actions of the state administration on the way to render an administrative decision.[1]

In Austria the General Administrative Procedure Act[2] entered into force in 1925 and was the first Administrative Procedure Act worldwide. This piece of legislation with the purpose of simplifying and improving the Austrian administration in favour of the Rule of Law gained[3] international recognition as a pioneering work and was a model for many Procedure Acts in many other countries.[4]

It is not necessary to explain that a legal codification of administrative procedure encourages that the state complies with the requirements of the principle of the Rule of Law.[5] The Rule of Law[6] as the *imperium legum* or more literally "the empire of laws and not of men"[7] is starting point for almost every fundamental analysis of administrative procedures and administrative jurisdiction. The Rule

1 For example Poland and Czechoslovakia introduced an Administrative Procedure Act in 1928 and Yugoslavia in 1930. In Switzerland the Law of Administrative Procedure was established in 1968, in the Federal Republic of Germany the Administrative Procedure Act (VwVfG) [...]in 1976, in Finland an Adminstrative Procedure Act in 1982, in Denmark in 1984, in Italy in 1990 and in the Netherlands in 1992; see for details *Hermann Pünder* in *Hans-Uwe Erichson/Dirk Ehlers* (eds.), Allgemeines Verwaltungsrecht, 13th Edition (2006), p. 390 et seq.

2 Österreichisches Bundesgesetz über das allgemeine Verwaltungsverfahren (AVG), Federal Law Gazette No. 172/1925.

3 See *Wolfgang Fasching/Walter Schwartz*, Verwaltungsverfahrensrecht, 4th Edition (2009), p. 26; *Johannes Hengstschläger*, Verwaltungsverfahrensrecht, 4th Edition (2009), p. 44; *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan L. Frank*, Österreichisches Staatsrecht IV (2010), Rz 62.001.

4 Especially the legislation in those countries which had formerly been united with Austria based on the Austrian model; see *Michael Stolleis*, A History of Public Law in Germany, 1914-1945 (2004), p. 241; *Heinz Schäffer,* Administrative Procedure in Austria, in European Review of Public Law, vol. 17 (2005), No. 2, p. 871. The high legislative quality of the Austrian General Administrative Procedure Act is demonstrated by the fact that the legislative text remained for the most part unchanged until now and was just subject to insignificant amendments.

5 For the Russian legal science see for example *Jurij Nikolaevič Starilov*, Verwaltungsjustiz in Russland. Probleme der modernen Theorie und Entwicklungsperspektiven, in Osteuroparecht, Heft 3-4 (1998), p. 217.; see further more for example *Heinz Ahrens* in *Fritz Morstein Marx* (ed.), Verwaltung (1965), p. 251 („A legally regulated procedure is a guarantor of the Rule of Law"); *Christian Quabeck*, Dienende Funktion des Verwaltungsverfahrens und Prozeduralisierung (2010), p. 256.

6 The books about the Rule of Law could certainly fill whole libraries: See for example *Mauro Cappelletti* (ed.), Access to Justice and the Welfare State (1981); *Pietro Costa/Danilo Zolo* (eds.), The Rule of Law. History, Theory and Criticism (2007); *Ferdinand Feldbrugge* (ed.), Russia, Europe and The Rule of Law (2007); *Matthew H. Kramer*, Objectivity and the Rule of Law (2007); *Rudolf Machacek*, Austrian Contributions to the Rule of Law (1994).

7 See *Mortimer Sellers*, What Is the Rule of Law and Why Is It So Important?, in *Silkenat/Hickey/Barenboim* (eds.), The Legal Doctrines of The Rule of Law and Legal State (2014), p. 4.

of Law principle is commonly understood as a synonym for the *legal state*, although it differs in its content in certain details.[8]

In the following I want to start with some significant aspects usually qualified as basic elements of the Rule of Law as well as key elements of the legal state concept. Afterwards I want to focus on the system of legal protection in administrative matters and its efficency and effectivity which are in the understanding of the Austrian Constitutional Court also guaranteed by the Rule of Law and even by the European Convention on Human Rights. I want to concentrate on the practical consequences of the Rule of Law in regard of remedies against administrative decisions. What impedes the functioning of the Rule of Law in this area? What are the gaps and obstacles concerning the system of judicial protection against administrative orders?

B. The Primacy and the Supremacy of the Law

The Rule of Law or rather some of its elements are more or less explicitly embedded in the Constitutions of almost all modern democracies.[9] The so-called *Supremacy* of the law which is one of the core elements of the Rule of Law and characteristical for every modern law-based state is, for example, guaranteed by Art. 15 Par. 2 of the Constitution of the Russian Federation (*"The bodies of state authority, the bodies of local self-government, officials, private citizens and their associations shall be obliged to observe the Constitution of the Russian Federation and laws."*) as well as by Art. 20 III of the German Constitution (*"The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."*).[10] Also Art. 18 of the Austrian Constitution ensures the same principle: *"The entire public administration can be exercised only on the basis of the laws."* These cited phrases express in the end that the state has to act in accordance with the law.

In the Austrian doctrine it is common sense that Art. 18 of the Austrian Constitution establishes – as a first pillar – the supremacy of the law in the way that all

8 *Gadis A. Gadzhiev*, The Russian Judicial Doctrine of the Rule of Law: Twenty Years After, in *Silkenat/Hickey/Barenboim* (eds.), The Legal Doctrines of The Rule of Law and Legal State (2014), p. 209. Russian scholars qualify as main elements of the Rule of Law inter alia the existence of human rights, the separation of powers and democracy as the rule by the people; see *Ilja Skrylnikow*, Legal State: the Rule of Law in Russia, http://wikis.fu-berlin.de/display/SBprojectrol/Russia (download on Feb. 2nd, 2015). There are schollars adding more than 140 sub-principles to the Rule of Law (see *Katharina Sobota*, Das Prinzip Rechtsstaat [1997], 471 et seq.).

9 In Austria the Rule of Law is even interpreted as a super-constitutional law ranking higher than the "ordinary" constitutional law; see for example *Theo Öhlinger/Harald Eberhard*, Verfassungsrecht 10th edition (2014), Rz 74.

10 See for example *Ernst Forsthoff*, Lehrbuch des allgemeinen Verwaltungsrechts I (1973), p. 81; *Georg Ress* in *Heinz-Christoph Link/Georg Ress/Jörn Ipsen/Dietrich Murswiek/Bernhard Schlink* (eds.), Staatszwecke im Verfassungsdienst - nach 40 Jahren Grundgesetz, VVDStRL 48 (1990), p. 84.

administrative and judicial acts have to comply with the law.[11] As a second pillar the entire administration (and the courts as well) may only take action on the basis of an explicit legal authorization (Primacy of the law).[12]

In the last decades Art. 18 of the Austrian Constitution was the starting point for the Austrian Constitutional Court to derive various obligations for the legislation and the administration. For example the Constitutional Court considers since 1923 that the concept of the Rule of Law established in Art. 18 of the Austrian Constitution requires that legal provisions have to be "sufficiently clear and detailed" otherwise these provisions infringe the Constitution.[13] Legal provisions which can be understood only by using "subtle constitutional knowledge, qualified legal qualifications and experience and downright archival diligence", do not meet the requirements of the Rule of Law.[14] This jurisdiction has to be seen in the light that the "normal" citizen should be able to foresee the acts of the administration which is not possible when the sense of the law is hardly to understand and can't be recognized even by the use of all methods of judicial interpretation.[15] Therefore a legal provision breaches the constitution when its content and its entry into force is formulated in a way that only those persons are able to benefit from the advantages granted by this provision, who knew the content of the provision before the entry into force.[16]

In one of the first judgements of this kind the Constitutional Court ruled out that a legal provision violates the Constitution when the assessment of a provision "demands a certain diligence in archive research or a faible for solving puzzles".[17]

C. System of legal protection

Another important aspect accompanying the Supremacy of the Law is the judicial control of administrative decisions: The functioning of the executive power in compliance with the law can only be guaranteed by a *judicial control*. This is a

11 In Austrian literature this principle is also named "principle of legality"; see for example *Christoph Grabenwarter/Michael Holoubek*, Verfassungsrecht - Allgemeines Verwaltungsrecht (2009), p. 304 et seq.; *Robert Walter/Heinz Mayer/Gabriele Kucsko-Stadlmayer*, Grundriss des österreichischen Bundesverfassungsrechts (2007), 10th edition, p. 82; *Arno Kahl/Karl Weber*, Allgemeines Verwaltungsrecht 2nd edition (2008), p. 101 et seq.

12 *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan L. Frank*, Österreichisches Staatsrecht II, 2nd edition (2013), Rz 27.041.

13 VfSlg. (Official Compilation of the Constitutional Court's rulings and decisions) 176/1923.

14 VfSlg. 3130/1956.

15 See for example *Ludwig Adamovich/Bernd-Christian Funk/Gerhart Holzinger/Stefan L. Frank*, Österreichisches Staatsrecht I, 2nd edition (2011), Rz 14.014.

16 VfSlg. 13.329/1993.

17 VfSlg. 12.420/1990; see also VfSlg. 13.740/1994, 16.381/2001, 17173/2004. This jurisdiction is humorously called the "brain-teaser jurisdiction".

requirement of a legal state although it is not self-evident that decisions of a state body can be subject of an appeal by a "normal" citizen. But the Rule of law has only an effect when there is a certain control which ensures the compliance with the law. In the meanwhile this is also a principle in many constitutions.

In Austria the Constitutional Court derived from the Rule of Law that there has to be "a system of institutions for legal protection to ensure that all acts of state bodies comply with the law". It also has to be considered that it is not just a question of the conformity of acts with the law, but the rights or even human rights of individuals which have to be guaranteed. One can say: For every right there must be a remedy![18] Therefore the legislator is - from the perspective of the Constitutional Court - obliged by the constitution to assure that in case of legal prescriptions providing (significant) interferences in a person's right by actions of the administration there must be granted an administrative order which may be challenged before the courts by the affected person.

This notion finds a parallel in Art. 13 of the European Convention on Human Rights which requires that "everyone whose rights and freedoms" are violated shall have a remedy before a national authority. Art. 13 of the Convention does not demand, however, a judicial protection and is further more limited to the rights and freedoms as set forth in this Convention whereas the jurisdiction of the Austrian Constitutional Court does not distinguish on the basis of the legal framework the effected rights are derived.[19]

Although the necessity of a comprehensive system of judicial protection is evident, if you take a closer look the legal system is not perfect: You will find everywhere "gaps" in the system:

An illustrating example for the jurisdiction of the Austrian Constitutional Court in this regard may be the judgement concerning the Austrian Act on extradition and judicial assistance which was the legal background of the extradition of an American citizen who was sentenced in absentia by an American District Court to 845 years' imprisonment for committing an insurance fraud with a damage of $ 350 Million.[20] Mr. Weiss fled before the pronouncement of the judgement.

18 Gadis A. Gadzhiev, The Russian Judicial Doctrine of the Rule of Law: Twenty Years After, in *Silkenat/Hickey/Barenboim* (Editors), The Legal Doctrines of The Rule of Law and Legal State (2014), p. 209 (211).

19 The Austrian Constitutional Court abolished in the beginning of the 1990's a paragraph in the Austrian Calibration Law which provided that the calibration authority does not issue an order when the measuring device does not comply with the law (VfSlg. 13.223/1992). The applicant of the concrete proceeding was a taxi driver who applied for the permission of his taximeter.

20 It was believed to be the largest insurance failure in history at the time: See Extradited fugitive asks for bond hearing, Herald Tribune, 11.6.2002.

Surprisingly he appeared after a while in Austria, and the authorities of the United States of America requested his extradition.[21] After an extradition proceeding in which an Austrian court approved the extradition, the extradition of Mr. Weiss to the United States could immediately be carried out because the Austrian Act on extradition only provided a remedy for the public prosecutor (to ensure a lawful decision) but not for the person affected by the extradition request. Mr. Weiss tried to prevent his immediate extradition desperately and unsuccessfully with several complaints with many institutions in Austria, which did not have any effect for the extradition matter, even a complaint with the Constitutional Court which indeed abolished the legal provision of the Austrian Act on extradition which excluded a remedy for the person to be extradited because it violated the constitutional principle of the Rule of Law.[22] The consequence of this judgement was a comprehensive amendment to the Austrian Act on extradition establishing new stages of appeal[23], but Mr. Weiss who was at this time after his immediate deportation already in prison in the United States could not benefit from proceedings he initiated in Austria. His stay in prison in the United States remained unchanged.

Another example of the jurisdiction in this context was the legal protection in the framework of the public procurement law: In the 1990's in Austria a private tenderer who took part in a proceeding for the purchase by a public sector body had no possibility to file a remedy against the decision when a competitor' s offer was chosen for the contract even when this decision was not consistent with significant legal provisions. This restriction concerned all public purchases up to a certain amount of the contract value which was defined by the EU thresholds. In other words only purchases of a very high contract value covered by EU directives could be subject of a judicial review.[24] The Austrian Constitutional Court abolished this restriction with reference to the Rule of Law and pointed out that a minor value of a contract may justify legal restrictions in favour of procedural simplifications or the loss of time-consuming and elaborate appeals procedures but not the total abandonment of any legal protection.[25]

21 See Fugitive Arrested in Austria After a Year on the Run, New York Times, 26.10.2000.

22 VfSlg. 16.772/2003. The United Nations Human Rights Committee seised by the American citizen retradicted to the United States stated a violation of Art. 2 and Art. 14 of the second UN Covenant on Human Rights (HRC 8.5.2003, No. 1086/2002).

23 See the amendment in Federal Law Gazette No. 15/2004.

24 Reason for this restriction was the fact that in Austria a judicial control concerning the award of contracts was not implemented before entering the European Union and only the obligations of the European law forced the Austrian legislation to establish a public procurement review at least for contracts exceeding the EU thresholds.

25 VfSlg. 15.106/1998, 15.204/1998, 16.027/2000. For further details and references see for example

Even in the more recent past the Austrian legislation contained certain "gaps" in the system of judicial review: For example the Austrian Financial Market Authority was allowed to inform the public by publication on the Internet or in any other newspaper with nationwide circulation, that a particular person is not entitled to carry out certain investment services to prevent possible disadvantages for private investors. This warning notice was not the result of a comprehensive administrative procedure and even not content of an administrative decision which could have been subject of a remedy or file or whatever. In case of a wrong or unlawful warning by the Financial Market Authority the person falsely accused in public to carry out services illegally had no instrument to activate a judicial review to quash this warning notice (and especially to restore confidence). The Austrian Constitutional Court abolished also the legal provision authorising the Financial Market Authority to this warning notice and ruled out that the massive interference in the integrity of such a person in the light of an irrevocable loss of reputation at the market of financial services requires a certain kind of judicial protection to revise such a warning notice and to recover the reputation of that person.[26]

A similar deficit of judicial control was to find in the Austrian Alien's legislation concerning the immigration restrictions for family reunification: To receive a settlement permit the family member of a foreigner already settled down in Austria had to apply for a "quota place" which was determined by the Government every year only in a small number with the result that many applications were added on a waiting list without any administrative order. As a consequence applicants had to wait for many years without any information about their position in the waiting list and when their request would be the next in the line. The Constitutional Court criticised that there was no exact regulation of the waiting list and the applicants did not have any right to lodge a complaint against the default.[27]

An important issue in this context is the constitutional jurisdiction in regard to the occupation of major or higher positions in public office, for example for headmasters of schools: The Constitutional Court ruled out that no applicant has a legal right to a special workplace but a candidate who was selected onto the shortlist of the nomination proposal is allowed to lodge a complaint against the decision in favour of the successful candidate.[28] Of course the appointing authority has wide

Peter Chvosta, Die verfassungsgerichtliche Judikatur in Vergabesachen, in *Gunther Gruber/Thomas Gruber/Michael Sachs* (eds.), Jahrbuch Vergaberecht 2008 (2008), p. 95.

26 VfSlg. 18.747/2009.

27 VfSlg. 17.013/2003.

28 VfSlg. 9923/1984, 12.102/1989, 12.476/1990, 18.095/2007, 19.670/2012.

discretion when selecting the most appropriate applicant, but that discretion must always be exercised according to the general principle of objectivity. A selection on the basis of a party membership card system or a decision without coherent and comprehensible reasons will be quashed by the Administrative Courts.

D. The efficiency of legal protection

Jurij Nikolaevič Starilov wrote in an essay published a few years ago, the most important feature of a modern legal state would be an administrative court proceeding which is designed to ensure the rights of the citizens and legal entities.[29] I agree with that and want to underline that it is not only the existence of a procedure but the configuration of the proceeding, the quality and capability to achieve the objectives which only can be the safeguarding of the rights of individuals and the compliance of state acts. It is a political question how easy shall be made the access to the court or to the appellation body, if a citizen shall be able to lodge a complaint without the support of a lawyer or not, if a complainant has to pay fees for his remedy or not.

But in the end it is also a question how effective is the system of legal protection: In Austria the Constitutional Court ruled out that the Rule of Law does not only demand a system of judicial control, the system of legal protection has also to be *effective* and the legislation has to comply with that.[30] A regulation for remedies which does not guarantee a certain minimum of *de facto efficiency* for a complainant does not comply with the Rule of Law.

This notion is in some extent not only very similar to Art. 13 of the European Human Rights Convention which demands an *effective* remedy. Also Art. 6 of the Human Rights Convention which protects the right to a fair trial in criminal law cases and cases to determine civil rights. The European Court of Human Rights ruled out that the right of access to a court guaranteed by Art. 6 shall not be "*theoretical* or *illusory*" but "practical and effective".[31] Also the European Union law contains the principle of *effective judicial protection* which requires that the Member States of the European Union establish a system of legal remedies and procedures

29 *Jurij Nikolaevič Starilov*, Verwaltungsjustiz in Russland. Probleme der modernen Theorie und Entwicklungsperspektiven, in Osteuroparecht, Heft 3-4 (1998), p. 217.

30 See comprehensively Martin Hiesel, Die Rechtsstaatsjudikatur des Verfassungsgerichtshofes, ÖJZ 1999, p. 522; Martin Hiesel, Die Entfaltung der Rechtsstaatsjudikatur des Verfassungsgerichtshofes, ÖJZ 2009/12.

31 Judgement of 26.2.2002, Del Sol v. France, 46800/99; judgement of 13.2.2003, Bertuzzi v. France, 36378/97; judgement of 13.7.1995, Tolstoy Miloslavsky v. the United Kingdom, Series A no. 316-B; judgement of 9.10. 1979, Airey v. Ireland, 6289/73; judgement of 22.3.2007, Staroszczyk v. Poland, 59519/00.

safeguarding the rights derived from Union law.[32] According to the Court of Justice of the European Union the procedural rules governing actions for safeguarding an individual's rights under Union law must not render practically impossible or excessively difficult the exercise of rights conferred by Union law. If a person was forced to be subject to administrative or criminal proceedings and to any penalties that may result as the sole form of legal remedy for disputing the compatibility of the national provision at issue with Union law, would not be sufficient to secure for it such effective judicial protection.[33] The "right to an effective judicial protection" can also be qualified as an essential element of the Rule of Law within the European Union.[34]

One of the most significant aspects of the effectivity of legal protection in the context of the Austrian Constitutional jurisdiction is the suspensive effect of a remedy. An appeal against the administrative decision which imposes the demolition of a house because of various violations of the Construction Ordinance will not be effective without the suspensive effect of the remedy because the applicant won't be satisfied by the successful appeal after the demolition is already realized. The Constitutional Court ruled out that a regulation generally straining the citizen with the negative consequences of a potentially unlawful decision by administrative authorities violates the Rule of Law principle. The general exclusion of a suspensive effect for remedies will be acceptable only when the immediate enforcement of a decision does not have irrevocable impacts, for example when the decision causes only financial consequences which can be reversed, or (vice versa) when the suspensive effect leads to circumstances which make the final decision about the remedy pointless.[35]

The Asylum Law was very often subject to amended legislations with the goal to avoid proceedings of long durations.[36] One attempt was to reduce the time

32 See the settled case law of the jurisdiction of the Court of Justice of the European Union, for example Judgement of 15.05.1986, Johnston, 222/84; Judgement of 20.03.1997, Rheinland Pfalz v. Alcan, C-24/95; Judgement of 27.11.2001, Commission v. Austria*, C-424/99;* Judgement of 25.7.2002, Unión de Pequeños Agricultores v. Council, C-50/00*;* Judgement of 19.06.2003, Eribrand*,* C-467/01; Judgement of 28.07.2011, Diouf, C-69/10.

33 Judgement of 13.03.2007, Unibet, C-432/05.

34 See for example *Koen Lenaerts*, Effective judicial protection in the EU, p. 1 (http://ec.europa.eu/justice/events/assises-justice-2013/files/interventions/koenlenarts.pdf.), with regard to Art. 47 of the Charter of Fundamental Rights of the European Union.

35 See for example *Johannes Hengstschläger/David Leeb*, Kommentar zum Allgemeinen Verwaltungsverfahrensgesetz III (2007), § 64 Rz 31 et. seq.

36 According to the Geneva Convention for Refugees an asylum seeker usually may not be deported to his home country as long as the decision regarding his asylum application has not been made, i.e. asylum seekers are granted ex lege protection from deportation for the whole asylum procedure (at least in the first instance).

limit for lodging a complaint with the result that asylum seekers had only two days time to analyse a negative decision and to lodge the appeal containing all necessary reasons for appeal. The Constitutional Court did not accept the argument of the Government defending the legal provision with the reference to the simplicity of the subject of the administrative procedure and the low probability of wrong decisions. In order to achieve a de facto efficient legal protection system for lodging a complaint should usually take at least one week as the Constitutional Court pointed out.[37] Also a legal provision which bans the presentation of new facts and evidence by the complainant against a decision of the determining authority can violate the maxim of an effective remedy when the administrative procedure at first instance is formed as a summary trial where the complainant didn't have enough time and opportunity to present his facts and evidence. In this sense the Austrian Constitutional Court abolished a specific legal provision which prohibited any new fact or evidence against an asylum decision by the asylum seeker although the asylum procedure did not allow an extensive examination of the presented reasons for asylum.[38]

The procedural costs can also affect the efficiency of the legal protection in a massive form: The Austrian public procurement code provided that complainants had to pay procedural fees in case of a remedy against a decision of a public purchaser. The fee was formed as a very high flat-rate fee but the tenderer had to pay not only once for his complaint but also for further applications in the same procedure, in particular for an interim injunction which often had to be extended with a special application again increasing the fees. In total the sum of the fees for one procedure could exceed the financial interest of the applicant in the concrete public contract which is usually his potential profit in the contract. The flat-rate fee had the effect of an artificial obstacle to effective access to justice.[39] Also the European Court of Human Rights emphasised in his jurisdiction regarding Art. 6 of the European Human Rights Convention that legal restrictions placed on access to a court, especially in form of the requirement to pay fees, will not be compatible with Art. 6 "unless it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the legitimate aim sought to be achieved".[40] For example in the case Kreuz v. Poland a Polish applicant suing a Municipality for damages had to pay procedure fees which were equal to an average

37 VfSlg. 15.218/1998.

38 VfSlg. 17.340/2004.

39 VfSlg. 17.783 - 17.970/2006, 18.034/2006, 18.248/2006.

40 See for example Judgement of 10.07.1998, Tinnelly & Sons Ltd and Others and McElduff and Others v. the United Kingdom, Reports 1998-IV, p. 1660.

annual salary in Poland. Bearing in mind that the applicant could not pay the fee and had to desist from his claim the European Court of Human Rights concluded that excessive court fees impaired the very essence of the right to access to a court and were a breach of Art. 6 of the Convention.[41]

A long duration of proceedings can also interfere the efficiency of legal protection. This aspect can be seen in the light of Art. 6 of the European Human Rights Convention which guarantees the right to a hearing *within a reasonable* time and in the light of the Rule of Law as well. For example in Austria a legal provision in the Tax Code extended the usual period within the state authorities are obliged to decide on requests from 6 months up to 24 months. There was no significant reason for such a long period of time within the applicant had to wait for a decision and was not allowed to submit a request for the transfer of competence to the higher authority. The Austrian Constitutional Court considered that such a general extension violates the Rule of Law and the maxim of an effective system of legal protection.[42]

The efficiency of legal protection was even one of the reasons for the legislator in Austria to reform the whole Austrian system of judicial protection in administrative matters: The "one-stage-system" with a limited review by only one Administrative Court after various stages of appeal within the administration existed since 1875 and was for a long time sufficient to guarantee the legal acting by the administrative bodies. After more than 100 years of practice this system could not manage the challenges of the presence anymore and the Supreme Administrative Court was permanently congested with thousands of pending complaints with the result that proceedings took many years until the final decision by the Supreme Administrative Court was delivered.[43] In 2012 the Austrian legislator decided to eliminate the stages of appeal within the administration and to establish a two-stage system of administrative jurisdiction with 11 Administrative Courts as first instance and the Supreme Administrative Court as second instance only deciding when the ruling depends on solving a legal issue which is of fundamental importance. The main effect should that the citizens can lodge a complaint against an administrative decision with a court immediately after its issue and is not forced anymore to have a "long march through the stages of appeal" before he is allowed to defend his rights

41 Judgement of 19.06.2001, Kreuz v. Poland, 28249/95.

42 VfSlg. 16.751/2002.

43 The average duration for the proceedings rose since the 1990's till 2011 up to 23 months (see Activity Report of the Supreme Administrative Court 2011, p. 9). The Republic of Austria was also condemned by the European Court of Human Rights several times solely because of the long duration of the proceedings in administrative matters as a violation of Art. 6 of the European Human Rights Convention (when the proceedings affected civil rights or criminal law cases in the sense of Art. 6).

before a court.[44] The fact that the Administrative Courts decide mostly within six months shall ensure that a final judgement in a concrete administrative matter can be granted within a short period of time. After one and a half year it can be said that this objective of the reform could be achieved.[45]

E. Conclusion:

These examples and aspects should demonstrate that the Rule of Law and the judicial protection can face various obstacles impairing the functioning of the system of judicial control in administrative matters. In my opinion it is obvious that the Rule of Law concept is an ideal which will never be achieved completely! It is a goal you can only come closer to step by step. I hope this conference contributes to taking the next step in our countries!

44 For more details see for example *Peter Chvosta*, Aktuelle Reform der Verwaltungsgerichtsbarkeit in Österreich, Deutsche Gesellschaft für Internationale Zusammenarbeit (Ed.), Jahrbuch des öffentlichen Rechts 2014, p. 186.

45 See Verwaltungsgerichtshof hat Entscheidungsdauer halbiert, Salzburger Nachrichten, 15.2.2015.

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PLANNING APPROVAL OF PUBLIC INFRASTRUCTURE PROJECTS IN GERMAN ADMINISTRATIVE PROCEDURE LAW

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The author examines the sequence of administrative procedures in course of implementation the planning approval of public infrastructure projects in Germany.

Keywords: planning approval, administrative procedural law of Germany, administrative procedures of Germany.

I. Introduction

Public Infrastructures are vital for a modern society. The dependable and sustainable provision of the services which these infrastructures convey is a fundamental precondition for a country's economic development, society's well-being and political stability. Thus, the public authorities are responsible for providing the public with adequate infrastructures such as roads, railways, power nets, waterways, airports, etc.[1] Planning approval is the administrative key tool to ensure the fulfillment of that responsibility.[2] Public infrastructure projects will almost always have spatial impacts and numerous other effects. Especially environmental effects and effects on the property of institutions and individuals are connected with almost any sectoral planning decision. The purpose of sectoral planning is therefore to determine whether a particular infrastructure is to be permitted to proceed despite its various effects. The procedure provides a reliable basis for ensuring that the affected public and private interests are sufficiently taken into account. However, this does not mean that the decision to realize a project needs the approval of those affected by the project. On the contrary the planning approval is the only permission in German administrative law which allows – unlike the building permission or the permission to erect an industrial plant – to overcome the legal position of third parties. With the words of the Federal Administrative Court of Germany the ´planning approval authority is vested by law with the authority to bring private and public interests into balance and overcome the interests if necessary in order to realize a specific project that serves the public good.[3]

Planning approval includes all of the other required decisions by public authorities (e.g., licences, permits, concessions, consent) and regulates all public-law relationships between the developer and those affected by the project. The outcome of planning approval procedure is a legally binding decision, called planning approval. In the following overview of the procedure from the beginning of the planning process to the final, legally binding decision is given. A short description of judicial review of planning approval decisions will complete the report.

II. Statutory regulations

Planning approval procedure is applicable only in cases where sectoral planning is specifically provided by law. For most public infrastructure projects the planning approval procedure is governed by specific federal or state laws

1 http://www.bmi.bund.de/SharedDocs/Bilder/EN/Themen/07-Bevoelkerungsschutz/Kritis.html
2 Steinberg/ Wickel/Müller, Fachplanung, 4th ed. 2012, p.27;
3 D. f. 11.4.1986 - 4 C 51.83 - BVerwGE 74 p.124, 133.

e.g. the Federal Highway Act or the Federal Railway Act in connection with the general principles of planning approval procedure which have been defined in the Federal Administrative Procedure Act of 1976.[4] In fact the Federal Administrative Procedure Act can be characterized as the basic pattern of all approval procedures. But the federal level does not have sole authority to pass legislation on administrative procedures. As far as the German states enforce state laws, they also have authority to pass legislation on administrative procedures. However, federal and state laws on administrative procedures are largely the same, so this report deals only with the federal level and the principles laid down in the (Federal) Administrative Procedure Act.

In sec. 9 of the General regulations of the Federal Administrative Procedure Act administrative procedure is defined as the activity of authorities having an external effect and directed to the examination of basic requirements, the preparation and adoption of an administrative act or to the conclusion of an administrative agreement under public law; it shall include the adoption of the administrative act or the conclusion of the agreement under public law. Unlike the general procedure, which is not tied to specific forms (sec. 10), the planning approval procedure in part V sec. 72 to 78 is subject to detailed rules concerning especially the hearing procedure (sec. 73, 74).

In addition to sec. 72 to 78 and the specific sectoral planning laws planning procedure in Germany is subject to a variety of environmental regulations based on EU law. A central role plays the Council Directive 85/337 on the assessment of the effects of certain public and private projects on the environment[5] and the Council Directive 92/43/EC on the conservation of natural habitats and of wild fauna and flora[6] and the Directive 2009/147/EC on the conservation of wild birds.[7] The environmental impact assessment represents an integral part of procedures applied by authorities when deciding upon the approval of projects. Environmental impact assessment comprises identification, description and assessment of a project's effects on human beings, animals and plants, soil, water, air, climate and landscape, including the individual interaction that may occur, cultural goods and other material assets.

4 In the following paragraphs without stating a law are those of the Administrative Procedure Act.

5 OJ L 175, 27.6.1985, replaced by Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment which replaces the Directive 85/338/EC, amended by Directive 2014/52/EU of 16.4.2014, OJ L 124/1, 25.4.2014.

6 OJ L 206, 22.7.1992, p.7-50.

7 OJ L 20/7, 26.1.2010

III. Planning approval procedure

1. Developing of the plan and hearing procedure

According to sec. 73 para.1 planning procedure starts with the submission of the plan to the hearing authority by the project developer. The plan shall comprise the drawings and explanations to clarify the project, the reasons behind it and the land and structures affected. The documents must satisfy the informatory purpose and be sufficiently specific; the hearing authority has to review the plan with regard to completeness. The fact, that a complete plan has to be submitted from the project developer indicates clearly that the legally regulated procedures in the Federal Administrative Procedure Act cover only the final stage of planning activity. Before submitting the plan to the hearing authority the project developer shall regard all regard requirements and planning limits. For this purpose he has to obtain all necessary information. To accomplish the requirements of the legal binding norms of the environmental law in virtually all cases an expert assessment is necessary. In addition the developer has to consider and evaluate previous planning decisions like spatial development plans and all reasonable alternatives and – finally – has to weigh the public and private rights and interests affected by the planning decision.

This raises the currently much discussed question[8] what impact the subsequent participation and hearing procedure may still have. The question gains even more importance since not only the plan is already completed when it is submitted to the hearing authority to start the formal approval procedure but in practice numerous discussions and meetings between the hearing authority and the project developer are held before the plan is formally handed in. However informal procedures in the pre-application phase are not prohibited as long as there are no binding agreements or commitments of the authorities involved.

2. Hearing procedure

a) Disclosing of the plan

If the plan submitted fulfills all the requirements hearing procedure starts. The hearing procedure aims at disclosing the plan with the objective to involve the parties concerned, to obtain the opinions of the responsible bodies of public concerns and to clarify matters in terms of environmental law. In this context parties concerned have the possibility to raise objections against the plan.[9] Objections in

8 Ziekow, in Ziekow, Handbuch des Fachplanungsrechts, 2ed 2014, p. 17; Steinberg/Wickel/Müller, Fachplanung, 4th ed 2012, p 139; Schink, Öffentlichkeitsbeteiligung – Beschleunigung – Akzeptanz, DVBl. 2011, 1377; Böhm, Bürgerbeteiligung nach Stuttgart 21: Änderungsbedarf und Perspektiven, NuR 2011, 614.

9 http://www.stadtentwicklung.berlin.de/verkehr/politik_planung/planfeststellungen/index_en.shtml

the planning approval procedure have to be objective counter-arguments, which aim at the prevention or modification of the project applied for whereas a mere "no", a non-specified protest and the simple information that no objections will be raised without giving a specified explanation within the objection period, are not considered as objections.[10] The objection must at least generally determine the object of legal protection, and explain the fear of interference with personal interests.[11]

aa) Public authorities

Within one month after receiving the complete plan the hearing authorities are to gather the opinions of those public authorities whose spheres of competence are affected by the project (sec.73 para 2). These authorities shall report their opinions within a period to be stipulated by the hearing authority, and is not to exceed three months. Comments made after the date set for discussion shall be disregarded, unless the matters raised are already or should already have been known to the planning approval authority or have a bearing on the legality of the decision (sec. 73 para 3a).

bb) Citizen´s participation

The second key element of the hearing procedure is citizens' participation. The participation of the public in the planning of infrastructure projects is of high priority in our society and plays an important role in the approval procedure. It starts with the disclosing of the plan in those communities (municipalities) on which the project is likely to have an impact. The communities shall make the plan available for inspection for a period of one month. This procedure may be omitted where those affected are known and are given the opportunity to examine the plan during a reasonable period (sec. 73 para 2, 3). Any person whose interests are affected by the project may lodge objections against the plan in writing or in a manner to be recorded with the hearing authority or with the community (sec. 73 para 4 sen. 1).

cc) Environmental organizations

The participation of recognized envrionmental organizations has been provided in the German nature conservation law for some time. The aim is to mobilize the expertise of these organizations. The position of the organizations in the planning procedure had not been clearly defined in the past until they were treated by the Administrative Procedure Act as part of the public. Thus, they are subject to the same rules as citizens.

10 Federal Administrative Court (BVerwG) D.f. 3.3.2011 - 9 A 8.10 - BVerwGE 139, 150 note 25.

11 http://www.stadtentwicklung.berlin.de/verkehr/politik_planung/planfeststellungen/index_en.shtml

dd) Preclusion

Objections shall be lodged to the hearing authority within two weeks after the end of the inspection period. Following the closing date for lodging objections, no objection shall be allowed except those which rest on specific titles enforceable under private law (sec. 73 para 4 sen. 3).

This preclusion-rule is based on the assumption that to ensure the competitiveness of the business location Germany it was necessary to streamline administrative procedures for approval of infrastructure projects.[12] It is of great practical importance since it does not only limit the extent of scrutiny of the planning approval authority, but also limits the scope and intensity of judicial review by the courts. Because of the far reaching consequences the preclusion only applies if is noted in the announcement of the inspection period or in the announcement of the closing date for lodging objections (sec. 73 para 4 sen. 3).

Preclusion is problematic with regard to the requirement of effective legal protection as guaranteed in Art. 19 para. 4 of our Constitution (see V). However, the Federal Constitutional Court confirmed preclusion as constitutional: Public interest to obtain legal certainty as to the existence of a permit within a reasonable period of time on the one hand and the strengthening of the legal position of the objectors by the hearing procedure justifies the preclusion.[13] Recently the preclusion in § 73 para 4 has been questioned by the European Commission. The Commission doubts that the preclusion is in line with European law as far as members of the public are concerned. The Commission is of the opinion that Art. 11 of Environmental Impact Assessment Directive (Directive 2011/92 EU)[14] requires Member States to ensure a full review of the decisions without limiting the reasons that are to be submitted to the court. Therefore, an infringement procedure against Germany is currently pending at the European Court of Justice.[15]

b) Hearing

Following the closing date for lodging objections, the hearing authority shall discuss the objections made to the plan in good time as well as the opinions of the authorities with regard to the plan with the project developer, the authorities, the people affected by the plan and those who have lodged objections to it. The date

12 See Ziekow, Fachplanungsrecht, 2nd ed. 2014, p. 65; Steinberg/Wickel/Müller, Fachplanung, 4th ed, 2014, p. 173-175.

13 Federal Constitutional Court (BVerfG), D. f. 8.7.1982 - 2 BvR 1187/80, BVerfGE 62 p. 83, 114; Federal Administrative Court (BVerwG) D.f. 14.7. 2011 9 A 12.10, BVerwGE 140, 140 note19-26.

14 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment which replaces the Directive 85/338/EC, see also footnote 5.

15 EU-Infringement procedure No. 2007/4267.

of the meeting for discussion must be announced at least one week beforehand according to local practice (sec. 73 para 6). The public hearing and specially the discussion are seen as the central and core element of hearing procedure. Its aim is to ensure transparency, to increase acceptance of the project and to avoid litigation. In particular to achieve the latter objective, it is essential to exchange arguments and to discuss the pros and cons of various solutions without inappropriate time pressure.[16] This raises the question as to whether it is possible or likely to solve conflicts between the parties concerned via a meeting and discussion at that late stage of the project. The assumption that the developer will not be very willing to change the plan is not far-fetched and in quite some constellations the project developer will not be able to do so without jeopardizing the whole project. These questions were discussed intensely in the aftermath of partially violent protests against the conversion of the main train station in the city of Stuttgart a few years ago.[17] Meanwhile the legislature has responded with the introduction of an early public participation prior to submission of the plan to the hearing authority in Sec. 25 para 3. But this early participation of the public is not compulsory so it is up to the developer whether he makes use of it. In addition to an early citizen participation referendums and mediation procedures are discussed. These instruments raise a number of questions that cannot be discussed here. In Stuttgart, eventually, both took place, a legally not intended and non-binding mediation as well as a referendum provided for in the State Constitution.[18]

c) Alteration of a plan

Since the purpose of the consultation process is to obtain additional information about the project and its impacts, it is obvious that the public hearing can lead to changes in the plan. Procedural law must therefore give an answer on how to deal with such modifications.[19] If the modification affects the project as a whole or in a fundamental way the answer can only be an entirely new procedure. In other cases if the modification concerns only a certain part of the plan such an obligation would be counterproductive. The incentive to incorporate newly gained better knowledge into the plan would be small.[20] Sec. 78 para 8 gives the answer to this dilemma: If a plan already open for inspection is to be altered, and if this means

16 See Wickel, in Ehlers, Ehlers/Fehling/Pünder, Besonderes Verwaltungsrecht, 3 ed. 2013, Vol. 2 § 39 Note 39.

17 The total cost of the project Stuttgart 21 are now estimated at 6 billion euro; the planning approval decision from 2005 was challenged only by a few opponents

18 In the statewide referendum 58.9% voted against the withdrawal from the project financing and 48, 2% for it. The voter participation was rather high at 48, 3 %.

19 Wickel, (footnote 16) § 39 note 42

20 Wickel, (footnote 16) § 39 note 42.

that the sphere of competence of an authority or the interests of third parties are affected for the first time or more greatly than hitherto, they shall be informed of the changes and given the opportunity to lodge objections or state their points of view within a period of two weeks. If the change affects the territory of another community, the altered plan shall be made available for inspection in that community.

d) Statement of the hearing authority

The last step of hearing procedure is made by the hearing authority. It shall issue a statement concerning the result of the hearing and shall send this together with the plan and the opinions of the authorities as well as those objections which have not been resolved to the planning approval authority, sec, 73 para 9. The final report of the hearing authority shall as notification of the result of the hearing procdure enable the planning authority to make a decision on the project.

IV. Decisions on planning approval

After the plan and the statement concerning the result of the hearing is submitted to the planning approval authority, this authority has to consider and decide on the plan (sec. 74 para 1). The deciding procedure is not defined in detail in the Administrative Procedure Act. But it is clear that solely the project of the developer, as it was submitted to the hearing authority and with alterations made during the hearing procedure, is subject to the review of the planning authority. By no means the planning approval authority has the right to modify or supplement the project and the plan. If the plan does not fit the legal requirements, the planning approval authority may ask the project developer to submit in good time any documents still missing or required to decide upon the plan.

In a first step the planning authority shall consider whether the legal requirements of the spatial planning law and other compulsory legal norms such as environmental law are fulfilled. In a second step the planning approval authority has to check whether the weighing (consideration) of both the interests of the developer and the public or private interests which might be affected by the project was sufficient. However, it is not for the planning authority to substitute their choice as to how the planning discretion ought to have been exercised. The planning authority only has to retrace the consideration of the project developer. In the course of this, the planning authority has to decide whether the plan meets the compulsory legal requirements and whether consideration has been sufficient.

The planning approval decision shall contain the decision of the planning approval authority concerning the objections on which no agreement was reached during discussion before the hearing authority. It shall impose upon the project developer the obligation to take measures or to erect and maintain structures or

facilities necessary for the general good or to avoid detrimental effects on the rights of others. Where such measures or facilities are impracticable or irreconcilable with the project, the person affected may claim reasonable monetary compensation (sec. 74 para 2).

The planning approval authority shall deliver the plan approval decision as well as advice on legal remedies to the project developer, to people known to be affected by the project and to those people whose objections have been dealt with. The decision will be made publicly available after notification (sec. 74 para 4). If more than 50 notifications have to be delivered to private objectors, the delivery can be substituted by a public notice.

A copy of the plan approval decision including advice on legal remedies and a copy of the approved plan has to be made publicly available for examination within the communities for a period of two weeks. Place and time of the public notice have to be announced to the public according to local practice. With the end of the inspection period, the other parties affected shall be regarded as having been notified, which fact shall be made known in the announcement.

V. Judicial Review of planning approval decisions

1. Access

In Germany federal and state laws on judicial review before a court of law play a key role in ensuring effective administration and the rule of law. Fundamental principles governing the judicial review are the constitutional guarantee of effective judicial protection and the Administrative Court Act. Art. 19 para 4 sentence 1 of the German Constitution (Basic Law) guarantees that if any person´s rights are violated by public authority, there has to be a recourse to the courts.[21] The guarantee is comprehensive and covers all acts of the executive. The Administrative Procedure Code states in a General Clause that ´the rescission of an administrative act (rescissiory action), as well as sentencing to issue a rejected or omitted administrative act (enforcement action) can be requested by means of an action (sec. 42 para 1). Thus, the access to administrative court review in Germany does not depend on the existence of an explicit provision in the law relevant to the specific case. But only an administrative act that produces discernible effects in someone´s legally defined rights or the refusal or omission of an administrative act will be reviewed by the courts. No action is admissible against mere preparatory acts or intermediate decisions and against the infringement of interests which are not legally protected. An exception to this principle applies to recognized environmental organizations.

21 Oster, The Scope of Judicial Review in German and U.S. Administrative Legal System, German Law Journal, Vol. 09 No. 10 (2008) p. 1267, 1274

They may for instance challenge the substantive or procedural legality of an infrastructure project independently of whether their inherent rights are violated or not. Their standing only presupposes that the interest of nature or any other environmental interest is affected and the organization has taken part in the administrative procedure.[22] These special regulations have come into effect only a few years ago. They result from obligations under European law, in particular from the implementation of the Directive on the Assessment of the effects of certain public and private project on environments.[23]

2. Scope and intensity of judicial review

In line with the constitutional provisions, most legal norms in German administrative law are conditionally structured. They consist of prerequisites on the one side and the legal consequences of the other side ("if . . . then"). This structure allows and obliges the courts to fully review the administrative decision concerning questions of fact and of law. Most of the environmental norms and the norms of the various Pollutions Control Acts are conditionally structured. However, if the legislative grants discretion the state authorities courts may only control whether the administrative decision includes discretion mistakes.[24] Courts may not substitute administrative discretion with their own preferences.

The planning approval authority has to comply with conditional and final structured legal norms. Final clauses set only a purpose and a limited number of decision making criteria for the public authority. Planning rules are typically final structured. They require only procedures of balancing and weighing between different public and private interests and concede planning discretion to the plan developer and the planning authority. Thus, it is not for the courts to substitute the planning decision. On the other hand it is clear the there shall be some judicial control of the planning discretion. To solve that predicament the Federal Administrative Court has developed a test which takes into account planning discretion while ensuring effective judicial protection: Courts may review whether there was disuse of consideration, consideration deficit or consideration disproportionality. This test is similar to the judicial review of discretion.[25]

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22 see Eckertz/Höfer, 2010, The judicial review of Administrative Decisions in Germany http://www.bverwg.de/medien/pdf/rede_20100302_australian_national_conference.pdf

23 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment which replaces the Directive 85/338/EC.

24 Sec. 40 of the German Administrative Procedure Act states: „Where an authority is empowered to act at its discretion, it shall do so in accordance with the purpose of such empowerment and shall respect the legal limits to such discretionary power".

25 Oster (21) Note p. 1270, 1271.

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CONTEST FOR A VACANT POSITION AS AN ELEMENT OF PROMOTION

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The article deals with the contest order of filling vacant positions in public civil service. The authors offer a number of organizational and legal measures on elimination of problems arising when organizing of competitive procedures.

Keywords: public civil service, principle of equal access to public service, contest for vacancy, personnel reserve, appointment to office, performance assessment.

Contest, as a personnel technology is a way of solving the issue of staffing in an organization, mechanism of binding professional possibilities of a person with the conditions and means for their implementation [8, 18].

Legal grounds for holding contest are: article 22 of the Federal Law No. 79-FL "On the Public Civil Service of the Russian Federation" [1], Decree of the President of the Russian Federation No. 112 from February 1, 2005 "On the Contest for Vacancy of the Public Civil Service of the Russian Federation" [2], Decree of the Governor of the Omsk region No. 15 from February 7, 2006 (as amended on February 25, 2014) "On Approval a Provision on Personnel Reserve of the Public Civil Service of the Omsk Region" [5], Order of the Ministry of Education of Omsk region No. 8 from June 21, 2007 "On the Competitive Commission of the Ministry of Education

of Omsk Region" (along with "the rules of procedure of the competitive Commission of the Ministry of Education of Omsk region and methodology for holding in the Ministry of Education of the Omsk region of the contest vacancy of the public civil service of Omsk region and inclusion in the personnel reserve of the Ministry of Education of the Omsk region to fill a vacant position of the public civil service of Omsk region") [6].

Contest for filling a vacant position (hereinafter referred to as the competition) is provided by the constitutional right of citizens of the Russian Federation to equal access to public service, as well as the right to promotion at work on a competitive basis.

The right to participate in the contest is given to citizens of the Russian Federation who have reached the age of 18, speaks the state language of the Russian Federation and corresponds to the established by the legislation of the Russian Federation on public civil service qualification requirements of a vacant civil service post. Employees of the Ministry of Education of Omsk region have the right to participate in the contest on a general basis regardless of what position they occupy for the period of the contest.

The contest is announced by the order of the Ministry of Education of Omsk region, in the presence of a vacant post of the public civil service, the filing of which, in accordance with article 22 of the Federal Law No. 79-FL, can be done on a competitive basis and on the basis of Ministry's needs in the personnel reserve.

The procedure for entry on the public civil service of the Omsk region duplicates the norm of part 2 article 22 of the Federal Law No. 79-FL on that the contest is not conducted in the following cases:

a) in appointment to civil service posts relating to junior civil service posts;

b) in case of conclusion of a fixed-term appointment;

c) in appointment to positions of the civil service of the Russian Federation in categories "heads" and "assistants (advisers)" filled for a specified term;

d) in the appointment of a civil servant to another post of the civil service in the cases provided by part 2 article 28, parts 1, 2 and 3 article 31 of the Federal Law No. 79-FL;

e) in the appointment to the post of the civil service of a civil servant (citizen), who is in personnel reserve formed on a competitive basis.

The contest may be omitted in appointment to certain civil service posts, the performance of the duties on which involves using information constituting a state secret, according to the list of posts approved by the Decree of the President of the Russian Federation.

The contest is held in two stages: preliminary (or preparatory) and main.

The preparatory stage includes the determination of organizational units, rules and procedures for holding, the forming of professional, legal and logistical base. Duration of the stage is from the moment of taking decision on the contest until the announcement of the final list of participants (contenders).

The organization and holding of the contest at the Ministry of Education of Omsk Region is responsibility of the department of personnel management and organizational and documentation support.

For each post the Secretary of the competition commission makes an announcement on holding the contest, which is published in periodic publications, particularly in the newspaper "Omskii vestnik", as well as on the Portal of the Government of Omsk region "Omskaya Guberniya" http: //www.omskportal.ru in information and telecommunication network of public use on the first day of the contest determined by the order of the Ministry.

The published announcement on the admission of documents for participation in the contest shall contain:

a) vacancy name, qualification requirements for applicants on the filling of post, and what duties he has to be able to perform in the course of civil service;

b) general requirements to contestants;

c) list of documents required to be submitted to the Ministry:

- personal application;

- copy of passport or alternate document (the document shall be presented personally by arrival at the contest);

- copy of work record card certified notarially or by personnel services at the place of work (service);

- copies of documents certifying vocational education and, at the wish of the citizen, additional professional education, on academic degrees, academic rank certified notarially or by personnel services at the place of work (service);

- single-handedly completed and signed application form [3], with an attached color photography 3x4 sm.;

- document on absence of diseases preventing entry to the civil service (certificate of a medical establishment by form No. 001-GS/u [4]);

- certificate of income, property and property liabilities of a citizen, wife (husband) and minor children, in the case of the contest for the post included in the list of posts of the public civil service of Omsk region in the Ministry of Education of the Omsk region, the appointment to which and the filling of which requires public civil servants of the Omsk region to submit information about their income,

property and property liabilities, as well as information on income, property and property liabilities of wife (husband) and minor children [7];

d) dates, place and time of submitting the documents and telephone number of an employee of the Ministry, which gives explanations about the announced contest;

e) expected date of carrying out of the contest.

Current normative documents of different levels do not specify personal presence of a citizen at submission of application and documents for the contest. Citizen may send the documents by registered mail, using the services of "Russian Post". In 2013, the Ministry of Labor and Social Protection of the Russian Federation developed a pilot project on the introduction in some federal public authorities a procedure for admission in the electronic form of documents for participation in the contest for vacancy of the public civil service of the Russian Federation and the carrying out of primary qualification for selection of candidates in remote format with the personal identification of a citizen (through automated access to the subsystem "My Account"), who has submitted documents and fulfilled qualification test. 12 Federal state bodies have become participants in this project.

Documents for participation in the contest shall be submitted to the Ministry of Education of the Omsk region within 21 days from the date of the placement of announcement on the site.

Secretary of the competition commission conducts the registration and recording of persons, who submit documents for participation in the contest. Not later than 15 days before the start of the main stage of the contest he shall notify in writing the citizens admitted to participate in the contest about the date, time and place of the contest.

The reliability of any presented information is subject to verification. A contender is not allowed to participate in the contest due to his inconsistency with the qualification requirements for the vacant post of civil service, as well as due to the restrictions on admission to the civil service and its passage established by the legislation of the Russian Federation. In this case, he is informed in writing about the reasons for refusal. A contender for the vacant post of the civil service, who is not admitted to participate in the contest, has the right to appeal against this decision in accordance with the legislation of the Russian Federation.

The main stage directly includes the competitive procedure. It continues from the start of organization of the competitive procedure up to the publication of results in information and telecommunication network of public use.

In the course of the contest the candidates are guaranteed equal rights under the Constitution of the Russian federation and federal laws.

The contest consists in the direct evaluating by the competitive commission of the professional level of candidates, their consistency with the qualification requirements for a vacant post. The holding of the contest is recorded in a protocol that states the time, place, vacant position and methods of assessing the professional and personal qualities of the candidates.

The competitive commission, whose composition is approved by the Ministry of Education of Omsk region, evaluates candidates on the basis of the documents submitted by the candidates and competitive procedures: 1) a written test on the knowledge of the RF Constitution, the legislation on public civil service, legislation in the field of education lasting from 10 to 30 minutes; 2) personal interview on the issues related to the implementation of official duties of the vacant position.

The competition commission session is held with the presence of at least two candidates for the vacant post, it shall be considered eligible if attended by at least two-thirds of the total number of its members. Decision of the competitive commission on the results of the contest is taken by simple majority of votes of its members. In case of equality of votes the Chairman of the competition commission shall have the deciding vote.

The competition commission decision is taken in the absence of the candidate and is a reason for his appointment to the vacant post of civil service or refusal of such appointment.

Based on the results of the contest the competitive commission makes the following decisions:

- on the recognition of one of the participants as the winner of the right to fill the vacancy of the public civil service of the Omsk region in the Ministry or to be included in the personnel reserve of the Ministry;
- on the recognition of the contests invalid;
- on the recognition of all applicants not corresponding to requirements of the vacancy of the public civil service of the Omsk region in the Ministry, the post for inclusion in the personnel reserve of the Ministry.

In 2013 there was introduced a new norm that allows the competition commission on the results of the held contest to decide on the inclusion of one of the participants of the contest in the personnel reserve for this post.

Also the competition commission decides on the failure of contests in the following cases:

1) lack of the applications of candidates to take part in contests;

2) revocation of all the applications of candidates during the contests.

The members of the competition commission, which have not agreed with

the decision of the competition commission, are entitled to express in writing their dissenting opinion (attached to the decision of the competition commission and is its integral part).

If as a result of the contest there have not been determined candidates, who meet the qualification requirements for the vacant post of civil service, the Minister of education of the Omsk region may decide to hold a repeated contest.

Voting results shall be enshrined in a decision, which is signed by the Chairman, Vice-Chairman, Secretary and members of the commission attending the session.

Candidates participating in the contest are informed on its results in writing. The message shall be sent within 7 days from the date of taking the decision by the competition commission. Information on the results of the contest is published on the portal of the Government of Omsk region "Omskaya Guberniya" http://www.omskportal.ru.

The appointment of an employee to a position is carried out by the order of the Ministry, on the basis of which a service contract is concluded with him. In the order and service contract the parties may provide a test in order to verify the conformity to the filled post. Probation period is established for a period of 3 to 12 months.

With the consent of a citizen of the Russian Federation (or an employee of the Ministry) the procedure of his admission to the information constituting state secret and other secret protected by the law is performed, if the performance of duties is associated with the use of such information.

Despite the fact that strategically the interests of society, the state and an individual in providing a favorable environment for career development of public servants are the same, nevertheless, in real life on the way of career advancement of many public servants there are a lot of legal and organizational barriers greatly hindering the career growth, reducing interest in achieving the best results of their work. Civil servants has a right to promotion based on qualifications and abilities, diligent performance of his duties, and so on., but there is no legal basis to interpret this right as a subjective right of a public servant, that is, he has no right to demand the promotion because the appointment is within the competence of a state body or official.

In March, 2015 we conducted a straw poll of a hundred public civil servants on the topic: "The right of a public servant to promotion" and:

More than 50 percent of the respondents think that currently it is quite difficult to make a successful career in public service, 25 percent think that is almost impossible.

A large part of officials (67 percent) noted that over the past 2-3 years they had not received a higher or more prestigious post, and there was not any promotion.

The prospect of career growth at the occupied post by more 50 percent of the respondents is rated as virtually impossible.

To the question "What do you do to get a higher or more prestigious position?" 51% of officials responded that they were raising their qualification, visited courses and attended training; 33% of respondents believed that it was enough to work hard; 8% – were getting higher education, another 8% – did not take any steps.

Answers to the question "What are you ready to sacrifice to get a higher or prestigious position?" were as follows:

- 50 percent are ready to spend some time to study;
- 25 percent are ready to relocate;
- 8 percent can donate time, personal life, family.

Thus, the established practice for the selection, evaluation and promotion, imperfect personnel techniques hamper the growth of efficiency of public service.

It should be noted that there are significant shortcomings in the current procedure for competitive selection.

The open method of voting and the presence of the casting vote of the Chairman of the competition commission may affect the objectivity of taken decisions: the Chairman may have an impact on the members of the commission, because he takes a key post with respect to its all or individual members. Therefore, in our view, it is necessary to enshrine an anonymous way of voting and cancel the casting vote of the Chairman of the competition commission. In accordance with the principles of equality, the Chairman should have an ordinary voice as any other member of the commission.

Mechanism for formation of the competition commission is imperfect. Its composition is completely determined by the head of the state body that has the right of appointment to the corresponding post. Typically, the Chairman of the competition commission is an official, who occupies a head position in this body, his vote is crucial. In this scenario, it is difficult to ensure the objectivity of the decision of the competition commission.

To ensure the independence and objectivity of competitive commissions it is necessary: establish secret voting, independent election of their Chairman; limit the possibility of the heads of those bodies or structural units, where the contest takes place, to occupy the position of the Chairman.

All these measures will reduce the influence of subjective factors and make the procedure of personnel selection the most objective and transparent.

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ADMINISTRATIVE PROCEDURE FOR PUTTING A JUVENILE IN TEMPORARY DETENTION CENTRE FOR JUVENILE OFFENDERS (TDCJO): LEGAL REGULATION IMPROVEMENT ISSUES

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The article deals with topical issues related to normative legal regulation and procedure of putting juvenile offenders in temporary detention center for juvenile offenders, substantiates proposals on improvement of legislation regulating the procedure of putting juvenile offenders in TDCJO.

Keywords: rights and freedoms of minors, forced isolation, state coercion, legal responsibility, special institutions, preventive work, custodial control, neglect, offences, administrative court procedure.

Issues of restriction on the rights and freedoms of juvenile offenders in carrying out forced isolation have always been important for both minors and law enforcers. Despite the fact that *minor non tenetur respondere durante minori aetati* (a minor is not considered responsible during his minority) there is a possibility in the Russian legislation of using coercive measures for restricting freedom of minors, provided that they have committed a socially dangerous or socially harmful deed. However, the application of such measures requires, in our view, a more thorough legal regulation, because it affects the rights and freedoms of persons with special legal status, does not have clear procedure and is ambiguously interpreted by law enforcers.

Status of minors in the Russian Federation predetermines special legal approach to them. This is due to the fact that because of the failure to reach the age of 18 minors are not fully delictual and cannot be responsible for their actions, be liable under the Russian legislation for committing illegal acts. If a minor "makes a false step", makes a mistake it is necessary to apply measure of state coercion that are different from the ordinary measures for a general entity.

Minor age always assumed a differentiated approach to different categories of persons in relation to resolving the issue of their responsibility. Analysis of the legislation of foreign countries has demonstrated different approaches to the determination of the lower age limits of responsibility. Even in ancient Rome there was known infantiae aetas proxima – age that is the closest to infanthood (from 7 to 10.5 years). A child could not be applied a penalty for an offencea the birth until the end of this period. Before the 20th century delictual dispositive capacity came in Italy and Spain – from the age of 9; in Austria, Bulgaria, the Netherlands, Denmark, Russia – 10; in Germany, Hungary, Serbia, and Switzerland – 12; in Turkey – 13; in Norway – 16 years old [6, 7].

Now the age of delictual dispositive capacity abroad also implies differentiation. So, in England criminal responsibility comes from the age of 10, in France – 13, in Germany – 14 years. In Asia: in Philippines –9, in India – 12 and in some cases –7. Middle East: in Syria, Jordan – 7; in Israel – 9 [8, 172].

According to Islamic law a minor in the age group from 7 to 15 years old, just as a younger child, is not criminally responsible. Such a child may be sentenced to ta'azir, which is considered not as a punishment, but as a means of education and correcting bad behavior [10, 105]. Decision on the form ta'azir can be taken by an Imam and Qadi (judge). As noted by researchers, these forms can be a verbal reprimand or whip beat (in an appropriate quantity and quality measure) [9]. In addition, by decision of a judge such a minor can be transferred to a tutor, represented

both by his father and another trustee, or be put in an appropriate correctional facility or school.

Russian legislation, taking into account the age of a minor in the commission of acts containing signs of a criminal or administrative offence, stipulates, if need be, its putting in a special institution – temporary detention center for juvenile offenders under internal affairs bodies (hereinafter referred to as TDCJO). The essence of their activities is the protection of life and health of minors, as well as prevention of committing by them repeated socially dangerous acts and other offences. Educational aspect, designed to ensure correction of minors, goes to the fore here.

TDCJO is a specialized secure setting, which involves: isolation of adolescents, the presence of police officers in the role of tutors, regular individual preventive work, and strict regime of detention with a view to preventing the commission by them of repeated crimes or other offences. Operation of TDCJOs is currently regulated by the Federal Law "About the Basis of Prevention of Child Neglect and Juvenile Delinquency", as well as by departmental acts [2; 4].

According to federal statistical data for 2012-2014, it is possible to state that, despite a slight decrease in total number of crimes, committed by minors in the specified period, the number of administrative of offenses committed by the specified category of persons and the number of minors placed in TDCJOs has increased. So, on the territory of the Russian Federation in 2012 minors committed 64,245 crimes 872,500 administrative offences, 13.6 thousand teenagers were placed in TDCJO; in 2013, minors committed 67,200 crimes, 876,300 administrative offences, 13.8 thousand teenagers were placed in TDCJO; in 2014 – 59,200 crimes, 879, 400 administrative offences, 14 thousand teenagers were placed in TDCJO [7]. Regional statistics confirms the general tendency [5]. Thus, in the Russian Federation annually about 14 thousand minors are placed in such centres.

The minimum age for minors placed in TDCJO is not legislatively enshrined. However, the analysis of the order of the Russian Ministry of Internal Affairs No. 839 shows the presence of the following age groups placed in a TDCJO: 1) 7-11 years, 2) 12-13 years, 3) 14-15 years, 4) 16 years and older. Practice shows that minors aged 11 and older are mainly put in these centers.

The main problem of adjudication on the placement of a minor in TDCJO is a gap in the legislation. The bottom line is that none of the codified normative procedural act enshrines procedure for placing in TDCJO. Despite the fact that the reason of putting a minor in TSVSNP is the commission by him of a crime or administrative offense, neither the Criminal Procedure Code, nor the Code on Administrative

Offences of the RF (hereinafter – CAO RF) contains provisions governing this procedure. It should be noted that even in the near future this problem will not find its solution. Thus, the Code of Administrative Court Procedure of the Russian Federation, entering into effect from September15, 2015 [1], adopted to regulate the order of exercising administrative procedures that were previously scattered in different normative legal acts and had not a clear order of implementation, does not contain provisions concerning judicial review of issues of putting minors in TDCJO. It should be noted that the legislator has included in the Code of Administrative Court Procedure of the Russian Federation twelve procedures for proceedings on certain categories of cases, among which we can find proceedings on administrative cases relating to the placement of a foreign citizen, who is subject to deportation or readmission, in a special institution or extending the stay of a foreign citizen, who is subject to deportation or readmission, in a special institution (Chapter 28); proceedings on administrative cases relating to involuntary hospitalization a citizen in medical organization providing psychiatric care in stationary conditions, extending the period of involuntary hospitalization of a citizen or involuntary psychiatric examination of a citizen (Chapter 30); proceedings on administrative cases relating to involuntary hospitalization of a citizen in medical antituberculosis organization (chapter 31). Thus, in our view, the position of the legislator is not entirely logical, as the placing of a juvenile in TDCJO is of public, administrative nature and is exercised compulsorily in the same way as any other mentioned above procedures, but the issue remains open and the problem is unresolved.

Currently there is the position of the Constitutional Court of the Russian Federation on the placement of minors in TDCJO, which is set out in the ruling from May 14, 2013, which prescribes the resolution of the issue on temporary confinement of persons in TDCJO through civil court procedure [3]. However, this position is in doubt among specialists and law enforcer. As a rule, the placement of a minor in TDCJO is regarded as a combination of actions based on borrowing from various procedures that have only a distant resemblance to the civil process in its classic understanding.

Analysis of judicial practice shows that court itself considering a petition to place a minor in TDCJO, does not operate with the concepts "in accordance with the criminal law" or "under civil-law relations" and, in making a decision on such a petition, does not refer its jurisdiction to this or that branch of law.

Attention should be drawn to constant deficiencies both in the activity of internal affairs bodies in the sphere of work with minors on the issues of placing them in TDCJO them and in consideration of these issues by judges, who are also

not immune from possible mistakes. For example, by the decision of a judge, minor N. born in 1995 was placed in TDCJO. Taking this decision, the judge judged from the fact of commission of offense under paragraph "d" part 2, article 158 of the Criminal Code of the RF and probability of re-offending. However, the judge did not fully take into account the data that characterized the identity of the girl, who, according to the character rating, was hard-working, actively participated in social life of the class and school, and also that earlier N. had not been registered in the division of internal affairs, after carrying out preventive work with her she did not commit any other offenses. The judge's ruling was overturned by the Chairman of the superior court.

Often high workload of a judge dealing with civil cases does not allow to understand the submitted by internal affairs authorities materials in respect of minors, and to make a legitimate and fair decision based on an objective, comprehensive and impartial study of the case materials.

Should be remembered that part 2 article 118 of the RF Constitution, which provides for a symbiosis of form and content, allocates administrative court procedure as an independent form. The procedure for placing minors in specialized centers is, in fact, a separate kind of administrative court procedure, since it involves a court decision on the issue of forced isolation of a teenager, restriction of his freedom, application of administrative coercive measures in compliance with a procedural form, which allows complete respect of his rights and legitimate interests.

The placement of a minor in TDCJO is currently regulated at the legislative by three articles of the FL "About the Basis of Prevention of Child Neglect and Juvenile Delinquency". In our view, this is not enough because:

Firstly, when implementing this procedure the rights and freedoms of a minor are directly affected and the norms of the considered Law do not contain the necessary provisions, which would guarantee the rights of a minor involved in process;

Secondly, the Law specifies that the term for appeal is 10 days, while the Code of Administrative Court Procedure of the Russian Federation as a general term for filing an appeal provides for a 30-day period, which allows appropriate ensuring of the legitimate procedural rights and freedoms of a person.

Thus, given the content, legal form, as well as the need to normatively consolidate the detailed procedure for placing a juvenile offender in TDCJO, it is necessary to include it as a separate kind of proceedings on administrative cases in the Code of Administrative Court Procedure of the Russian Federation.

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ADMINISTRATIVE PROCEDURES AS A TYPE OF MANAGEMENT PROCEDURES

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The article deals with the issue of administrative process not through a traditional legal aspect, using mainly formally dogmatic approach, but through managerial aspect, in terms of substantial activity and, primarily, through the analysis of the managerial nature of process.

Keywords: management procedures, administrative procedures, administrative procedural forms of activity of executive authorities, public management.

Improvement of the administrative and procedural forms of activity of executive authorities is designated as one of the main ways of increasing the efficiency of public administration in the Russian Federation. In reforms to improve public administration in other countries, one of the central points was the changing of legal management in order to optimize procedural forms (administrative procedures). This is due to the fact that administrative procedures are the main element of procedural enshrining the interrelations of executive authorities and citizens, and, ultimately, indication of the degree of readiness of executive authorities to exercise and protect the rights and legitimate interests of citizens. Therein lies the socio-legal value of legal procedures of management process and, therefore, hence the importance of their legal regulation. It appears that legal regulation should be based not

only on a correct formation of legal constructions, but also on an understanding of the managerial nature of procedures, that will allow a correct determination of the correlation between the formal (legal) and informal procedures.

Basic concepts of administrative-legal science in varying degrees always reflect the dual nature of public management – content of management and legal form that mediates it. In its development the Russian science of administrative law faced alternately dominant influence of both legal structures and managerial realities. Pre-revolutionary administrative law was influenced by German and French administrative law, which had strong traditions of formal dogmatic approach[1], during the Soviet period, much attention was paid to the study of management theory[2]. In modern conditions both trends take place alternately: there is formation of legal categories, brought to life by the reform of public management[3], as well as there is a strengthening of legal "component" in the work of executive authorities, which is largely due to administrative and procedural regulation[4].

In this respect, it seems very interesting to consider the problems of administrative process not through the traditional legal aspect, using mostly formal dogmatic approach, but through administrative aspects, in terms of substantial activity, i.e., first of all, through the analysis of the managerial nature of process. These two aspects together form the administrative process, because management process, being settled by the norms of administrative law, turns into administrative process, but the content inside this legal form remains managerial. Without analyzing the discussion in the administrative-legal literature on the issue of correlation between the concepts of "process", "procedure" and "proceedings" [5], to describe

1 See: Elistratov A. I. Basic Principles of Administrative Law [Osnovnyya nachala administrativnago prava]. Moscow: 1917.

2 See: Kurashvili B. P. Essay on the Theory of Public Administration [Ocherk teorii gosudarstvennogo upravleniya]. Moscow: 1987.

3 Federal Law No. 210-FL from July 27, 2010 (as amended on 18.07.2011) "On the Arranging of Rendering State and Municipal Services" [Federal'nyi zakon ot 27 iyulya 2010 g. № 210-FZ (v red. ot 18.07.2011) «Ob organizatsii predostavleniya gosudarstvennykh i munitsipal'nykh uslug»]. SZ RF – Collection of Laws of the RF, 02.08.2010, no. 31, art. 4179; Resolution of the Russian Federation Government No. 373 from May 16, 2011 (as amended on 19.08.2011) "On the Development and Approval of Administrative Regulations for Performing State Functions and Administrative Regulations for Rendering State Services" [Postanovlenie Pravitel'stva RF ot 16 maya 2011 g. № 373 (v red. ot 19.08.2011) «O razrabotke i utverzhdenii administrativnykh reglamentov ispolneniya gosudarstvennykh funktsii i administrativnykh reglamentov predostavleniya gosudarstvennykh uslug»]. SZ RF – Collection of Laws of the RF, 30.05.2011, no. 22, art. 3169.

4 Code of Administrative Court Procedure of the Russian Federation [Kodeks administrativnogo sudoproizvodstva RF]. Rossiiskaya gazeta – Russian Newspaper, 2015, no. 49.

5 See: Bakhrakh D. N. Administrative Law in Russia: Textbook for Higher Schools [Administrativnoe pravo Rossii: Uchebnik dlya vuzov]. Moscow: 2000, p. 302; Sorokin V. D. Administrative Process and Administrative Procedural Law [Administrativnyi protsess i administrativno-protsessual'noe pravo]. St. Petersburg: 2002, pp. 186-190; Starilov Yu. N. From Administrative Justice to Administrative Court Procedure. Series "Anniversary, Conferences, Forums" [Ot administrativnoi yustitsii k administrativnomu

the organizational content we may offer to use concepts applicable in the management literature – *process* (sequence or cyclicity of certain stages (phases) and *procedure* (set or sequence of actions (operations) with the help of which a management process is exercised) [6].

In accordance with the separation of management content and the legal form, we can distinguish two types of managerial procedures – formal or legal *(administrative-legal)* procedures regulated by the rule of law and other *managerial (informal) procedures* that are not enshrined in the law norms, exist as a common practice, as an organizational custom, forming a non-legal part of managerial activity of executive authorities. As you can see, this classification is closely linked to the types of forms of public administration, traditionally distinguished in the science of administrative law[7]. Depending on the legal properties, forms are divided into legal (entailing legal consequences) and non-legal (not entailing legal consequences)[8]. Legal activity directly entails legal consequences, is based on the rule of law and requires a certain legal formulation. Non-legal forms include institutional actions and logistical operations not entailing legal consequences. They are holding of meetings, discussions, checks, dissemination of best practices, development of forecasts, methodical recommendations, organization of press conferences, exercising of statistical records, etc.[9] Logistical actions (operations) traditionally include clerical operations, actual actions for the transfer of funds or property, statistic, information and reference (preparation of reports, briefs, and so on), auxiliary technical operations (procurement of equipment)[10], in modern conditions occur such actions as the supply of an authority with modern technical means, computers and other office equipment, office furniture, repair of offices, buildings and so on[11].

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sudoproizvodstvu. Seriya «Yubilei, konferentsii, forumy»].Voronezh: 2003, no. 1, p. 41; Stakhov A. I., Nesterenko I. A. Administrative Procedure in the Russian Federation: Concept, Essence, Structure and Scope [Administrativnaya protsedura v Rossiiskoi Federatsii: ponyatie, sushchnost', struktura, sfera primeneniya]. Administrativnoe pravo i protsess – Administrative Law and Process, 2012, no. 4, pp. 37-42.

6 See: Atamanchuk G. V. Theory of Public Administration [Teoriya gosudarstvennogo upravleniya]. Moscow: 2004, pp. 252-256.

7 Staros'tsyak E. Legal Forms of Administrative Activity [Pravovye formy administrativnoi deyatel'nosti]. Moscow: 1960, p. 16; Scientific Foundations of Public Administration in the USSR [Nauchnye osnovy gosudarstvennogo upravleniya v SSSR]. Moscow: 1968, pp. 349-351.

8 Administrative Law of Russia: Textbook [Administrativnoe pravo Rossii: uchebnik]. Editor-in-chief N. Yu. Khamaneva, Moscow: 2010, pp. 124-125; Administrative Law: Textbook [Administrativnoe pravo: Uchebnik]. Under edition of L. L. Popov, M. S. Studenikina, Moscow: 2008, pp. 235-237.

9 Bakhrakh D. N. Russian Administrative Law [Administrativnoe pravo Rossii]. Moscow: 2001, p. 269.

10 Scientific Foundations of Public Administration in the USSR [Nauchnye osnovy gosudarstvennogo upravleniya v SSSR]. Moscow: 1968, pp. 364-365.

11 Administrative Law of Russia: Textbook [Administrativnoe pravo Rossii: uchebnik]. Editor-in-chief N. Yu. Khamaneva, Moscow: 2010, p. 128.

It appears that there is a special (so to say, "genetic") link between traditionally distinguished forms of public administration and their processual mediation. Not accidentally a number of authors[12], in addition to the traditional forms of management activity, allocates (as forms of) procedural forms of public administration, but this approach has not found significant response in literature However, it is clear that the activities of executive authorities aimed at commencement of legal effects (adoption of regulations, the publication of individual acts, etc.), is carried out according to a certain procedure, governed by the rule of law. However, it is clear that the activity of executive authorities aimed at emergence of legal effects (adoption of normative acts, issuance of individual acts, etc.) is carried out according to *a certain procedure, governed by the rule of law*. The activity of the authorities in non-legal forms (institutional actions and logistical operations) not involving legal consequences is not regulated by the rule of law, but is exercised also through a certain *management procedure*. This procedure forms a kind of "custom of management practice", is used at the discretion of employees and in accordance with established practice, the recommendations of the theory of management, directives of heads. Although the management activity of entities in non-legal forms is exercised in the absence of legal regulation of a procedure, but it should be carried out within legal frameworks. As mentioned in this regard in German literature, freedom of actions of bodies in non-legal forms means freedom from the requirements of the law, but not "freedom from law" [13]. Consequently, the orientation of actions of management entities to obtaining a legal result determines a strict procedural form, i.e., requires administrative-legal procedures for these actions, the absence of the legal result implies the absence of regulated legal procedures.

Thus, one of the criteria for the study of administrative procedures as a kind of management procedures is a focus on the emergence of *legal consequences*, and the *types* of these legal consequences (e.g., normative or individual acts), that determines the presence or absence of legal regulation of process.

As you know, when describing administrative process, scientists highlight positive and negative types of procedures (proceedings). In scientific debates on the issues of administrative process there have been formed proposal of scientists on division into administrative-procedural and administrative-jurisdictional kinds of process[14]. The criterion in such cases is *the nature of the relationship between subject*

12 The Forms of Public Administration [Formy gosudarstvennogo upravleniya]. Editor-in-chief B. M. Lazarev, Moscow: 1983.

13 Maurer H. Allgemeines Verwaltungsrecht. München. 2010. S. 423.

14 Administrative Law: Textbook [Administrativnoe pravo: uchebnik]. Under edition of Yu. M. Kozlov and L. L. Popov, Moscow: 2000, p. 384.

and object of management, and accordingly, *methods of exposure* and nature of consequences for the powerless party. So, by the methods of exposure of the subject of management on the object, they distinguish *positive and negative* kinds of administrative process, what is also reflected in the terminology: for example, administrative *procedures* of rendering services and disciplinary proceedings or *proceedings* on cases of administrative offenses[15]. Thus, though the Russian literature does not usually distinguish positive and negative public administration as the main types (unlike foreign administrative law, where it is generally accepted to divide public administration into positive, providing benefits to citizens, and negative, burdening citizens[16]), however, the phenomenon that is "not noticed" by the domestic science of administrative law is manifested in positive and negative forms of process.

The described criteria characterize the legal aspect of the study of administrative process; these criteria are *the presence or absence of legal consequences, their types, and their positive or negative nature for the recipient*. If we take as a basis of the study the content of management process, it allows you to look at administrative procedures from a different angle.

Such *management criterion as the functions* of executive authorities (or in other words, types of activities) creates the grounds for division into law establishing, law-enforcement and law enforcement types of process[17]. Such types of proceedings distinguished in the literature, as a monitoring and oversight proceedings, permissive, licensing, registration and etc. types of proceedings are also based on the implementation of those or other functions of bodies.

So, in the literature, when the referring to administrative-procedural norms, it is proposed to focus on a kind, nature, consistency, duration, as well as the order for documenting the actions of executive authorities and their officials associated with the execution of functions such as the provision of state services, monitoring and supervision within the assigned area of activity, administrative prosecution of persons who have committed administrative offences, pre-trial resolution of administrative disputes, etc.[18]

15 Administrative Law: Textbook [Administrativnoe pravo: uchebnik]. Under edition of Yu. M. Kozlov and L. L. Popov, Moscow: 2000, p. 384; Administrative Law of Russia: Lectures [Administrativnoe pravo Rossii: kurs lektsii]. Under edition of N. Yu. Khamaneva, Moscow: 2007, pp. 505-506.

16 See: Vasil'eva A. F. State of Services: Administrative-legal Research of the Provision of Public Services in Germany and Russia [Servisnoe gosudarstvo: administrativno-pravovoe issledovanie okazaniya publichnykh uslug v Germanii i Rossii]. Moscow: 2012, p. 45-58; Mitskevich L. A. Fundamentals of Administrative Law in Germany [Osnovy administrativnogo prava Germanii]. Krasnoyarsk: 2008, p. 20.

17 Administrative Law: Textbook [Administrativnoe pravo: uchebnik]. Under edition of Yu. M. Kozlov and L. L. Popov, Moscow: 2000, p. 384.

18 Stakhov A. I. Federal Administrative Procedural Legislation: Concept, some Features of Structure and Content [Federal'noe administrativno-protsessual'noe zakonodatel'stvo: ponyatie, nekotorye

At the same time, to distinguish between managerial and judicial meaning of functions we should note that these functions began to appear in legal science in the form of legal concepts only with their enshrining in normative legal acts in the course of administrative reform[19]. As you know, up to this moment the functions were considered as the least legal concept of administrative law[20]. Thus, "non-legal" purely managerial concept turned into a legal one, but at that substantively remained related to administrative process. It is very interesting to consider the impact of the subjective factor in the legal registration of this "metamorphosis", since the equal in its managerial essence functions have gained completely different legal regulation, including (or even primarily), administrative-procedural one. As has been repeatedly noted in the literature[21], the ideology of administrative reform in the Russian Federation was oriented to the experience of countries of Anglo-Saxon system, so the main direction of development of the legislation was the development and adoption of administrative regulations. As a result there were formed two different segments of the domestic legislation, on the one hand, traditional laws and bylaws, on the other hand, numerous administrative regulations. The norms of these acts are in the internal conflict, while the traditional correlation of general and special legal regulation is not applicable here, as there is the conflict of not different acts, *but of different legal systems*. As a result administrative procedures in carrying out the functions of providing services became regulated differently than all other functions of the bodies, including the consideration of citizen's applications[22]. At the same time exercising of other functions of the bodies, primarily the functions of monitoring and oversight, is regulated by the traditional way (by federal law), and the complaints procedure

osobennosti struktury i soderzhaniya]. Administrativnoe pravo i protsess – Administrative Law and Process, 2013, no. 2, pp. 13-16.

19 On the System and Structure of Federal Bodies of Executive Power: Decree of the President of the Russian Federation No. 314 from 09.03.2004 [O sisteme i strukture federal'nykh organov ispolnitel'noi vlasti: Ukaz Prezidenta Rossiiskoi Federatsii ot 09.03.2004 № 314]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015].

20 Bachilo I. L. Functions of Control Bodies: Legal Problems of Formulation and Implementation [Funktsii organov upravleniya: pravovye problemy oformleniya i realizatsii]. Moscow: 1976, pp. 23-44.

21 Mitskevich L. A. Supranational Tendencies in the Russian Administrative Law [Nadnatsional'nye tendentsii v rossiiskom administrativnom prave]. Porivnyal'ne pravoznavstvo: suchasnii stan i perspektivi rozvitku: zbirnik naukovikh prats' – Comparative Law: Current State and Prospects of Development: Collection of Scientific Papers, under edition of S. Shemshuchenko and others, Lviv: 2012, pp. 434-437; Mitskevich L. A. Legal Value of Not-legal Forms of Public Administration [Yuridicheskoe znachenie nepravovykh form gosudarstvennogo upravleniya]. Rossiiskoe pravo v internete – Russian Law on the Internet, 2012, no.1.

22 See: Ponkin I. V. Simplification of Legislation as a Tool of the "New" Model of Public Management [Uproshchenie zakonodatel'stva kak instrument «novoi» modeli publichnogo upravleniya]. Administrativnoe pravo i protsess – Administrative Law and Process, 2014, no. 4, pp. 8-12.

is implemented on the basis of the Federal Law on appeals of citizens. It is quite natural that the judicial practice on such disputes is controversial; in some cases courts indicate precedence of the norms of the FL on services, rather than of the FL on appeals of citizens[23].

Thus, the one order functions (in terms of the management process) appeared resolved by completely different administrative-procedural norms and turned into different kinds of administrative procedures (proceedings).

Another reason for the study the impact of management content on legal regulation could be *stages nature of managerial cycle*. It is known that management process, as a complex of continuous, interconnected and sequentially carried out actions, is cyclic, consists of several stages, at each of which the subject of management and other actors make a series of certain, successive actions. The distinguishing of the following stages is considered to be universal: collection and processing of information, adoption of a managerial decision, implementation of a managerial decision, monitoring of its execution[24]. It is believed that management stages are somewhat uneven, for example, the development and taking of managerial decisions –are the main, most crucial stages, as well as the procedure that form them. Other stages, such as the collection and processing of information, are of security nature.

In administrative procedures these stages are reflected differently depending on the consequences for a citizen. Jurisdictional proceedings in detail regulate the actions of the subject of management at each stage, including at the stage of data collection and analysis, due to the need to gather and process evidence. Positive procedures regulate in greater details the stages of adoption and implementation of decisions and the stages of data collection and processing are described in general terms. For example, article 10 of the FL "On the Procedure of Consideration of Citizens' Appeals" indicates that a body or official provides an objective, comprehensive and timely consideration of an application, requests the necessary materials, gives a written reply on the merits of issues set out in the application. These provisions can be described more as the tasks of an authority, the procedure, i.e., the sequence of actions in the stage of collecting and processing information, as well as the order of actions when it takes a managerial decision and prepares the response, is determined by the authority (official)

23 The decision of the Supreme Court of the RF No. AKPI14-730 from August 20, 2014 [Reshenie Verkhovnogo Suda RF ot 20 avgusta 2014 № AKPI14-730]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

24 See: Atamanchuk G. V. Theory of Public Administration [Teoriya gosudarstvennogo upravleniya]. Moscow: 2004, pp. 252-256.

itself. These actions can be attributed to managerial procedures; they are carried out in accordance with the customs of organizational practice. Thus, managerial (non-legal) procedures at certain stages take place in the positive administrative procedures.

In the rule-making process the regulation of a procedure can also be considered in terms of the correlation of administrative-legal and managerial procedures at individual stages of process. The legislation enshrines in detail the procedure of elaboration of a draft act, harmonization and adoption of a sub-legislative normative legal act, its registration and publication. The stage of collecting and processing information on the necessity and feasibility of such an act, about the possible consequences of its adoption has received legal regulation only recently, and it is not a subject to strict and detailed regulation. For example, the Resolution of the Government of the RF from 13.08.1997 "On Approval the Rules of Preparation of Normative Legal Acts of the Federal Executive Authorities and their State Registration" [25] states that in the process of drafting a normative legal act there should be a study of the legislation of the Russian Federation related to the draft's theme, the treaties on the delimitation of powers between the public authorities of the Russian Federation and authorities of the subjects of the Russian Federation, the practice of application of relevant normative legal acts, scientific literature and materials of periodical press on the considered issue, as well as data of sociological and other studies, if such have been carried out. Thus, the responsibility of bodies has been established, but the procedure for performing this duty of the bodies is determined by themselves in accordance with the common practice. About the same nature is typical for the provisions on mandatory preliminary discussion of draft normative legal acts at meetings of public councils under the federal bodies of executive power (in the presence of these councils).

Thus, the analysis of positive administrative procedures allows detect the fact that the correlation of informal (non-legal) managerial procedures and formal procedures depends on the role of those stages of management process in which they are carried out when making a management decision.

Conclusion. Management process, being settled by the norms of administrative law, turns into administrative process, what allows you to analyze both legal form and management content.

As criteria for the description of procedures we can take both legal factors (the presence or absence of *legal consequences, their types*, as well as *the nature for the recipient*) and managerial (management *functions, stages* of management process),

25 Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

to a large extent, these factors influence on the presence or absence of legal regulation of procedures. Along with the formal administrative procedures there are informal managerial procedures, the role and significance of which, as it seems, have not yet been adequately reflected in researches.

The role of procedural forms is to ensure not only legality, but also rationality of public management, since any procedural form is not an end in itself, but a means of achieving management efficiency. To achieve these objectives, the legal regulation of procedures should not be overly formalized, including creating the illusion of anti-corruption measures, but in fact, hindering creative and rational foundations of management activity. Administrative-legal procedures must be in correct proportion with non-legal, informal management procedures providing for the possibility of administrative discretion.

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ADMINISTRATIVE PROCEDURES: EXPERIENCE OF KAZAKHSTAN

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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.

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ADMINISTRATIVE PROCEDURES IN THE REPUBLIC OF BELARUS

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The author notes the key role in the legal system of the Republic of Belarus of the Law of the Republic of Belarus "On the Fundamentals of Administrative Procedures" from October 28, 2008, in terms of legal regulation of submission and consideration of application from a concerned person, the order of taking an administrative decision, as well as the appeal mechanism and execution of the taken decision. The shortcomings and problematic issues of the Law are explored in the article.

Keywords: administrative procedures, administrative procedures in the Republic of Belarus, de-bureaucratization of state apparatus.

After the collapse of the USSR Belarus started the formation of legal system of an independent state, based on the new value system and corresponding to the changed social relations. Reforms have been undertaken primarily in the fields of constitutional legislation and legislation on economic activity. As for administrative legislation, this field has preserved the old model of regulation, which we inherited from Soviet times.

It was characterized by the focus on the interests of the state, rather than on human rights, providing convenient conditions for the work of state bodies, and not for the visitors, regulation of procedures of interrelation authorities and a person primarily at the level of departmental acts, opacity of decision-making.

As a consequence, the absence or lack of information, limited time of reception of visitors, large queues, lack of conditions for visitor services, necessity to visit a wide range of different government agencies to collect documents and approvals, often became typical characteristics of work with population.

The increase of dissatisfaction with the work of state institutions, the desire to eliminate negative phenomena in the field of interrelations of a man and authorities have led to an understanding of the need to reform the relevant legislation. As a result, since the mid-2000s an active work on de-bureaucratization of the state apparatus has started.

De-bureaucratization of the state apparatus becomes a priority of public policy. Its key ideas are reflected in the special political and legal act – Directive of the President of the Republic of Belarus No. 2 from December 27, 2006 "On Measures for Further De-bureaucratization of the State Apparatus and Improving the Quality of Life Support of the Population", which for years has defined the direction of development of legislation in this area.

One of the most important directions of de-bureaucratization of the state apparatus is the improvement of the legislation on administrative procedures. At present Belarus has a significant legislative array in the field of administrative procedures.

In general terms, the structure of domestic legislation on administrative procedures consists of:

- the Law of the Republic of Belarus "On the Fundamentals of Administrative Procedures" from October 28, 2008;
- list of administrative procedures;
- normative legal acts regulating the implementation of specific procedures.

The key role in this system is given to the Law of the Republic of Belarus "On the Fundamentals of Administrative Procedures" from October 28, 2008, which lays

down general requirements for submission and consideration of an application by a interested person, the order of taking administrative decision, and also defines a mechanism for appeal and exercising of a taken decision.

The law enshrines the requirements to the level of regulation of administrative procedures. The names of administrative procedures, bodies that implement them, lists of documents to be submitted, the timing of administrative procedures, validity of the document issued in the implementation of administrative procedures, fees for the implementation of administrative procedures can be established only by laws, decrees and edicts of the President of the Republic of Belarus, decisions of the Government of the Republic of Belarus. This allowed bringing out of the regulation the order of implementation administrative procedures from the scope of departmental rulemaking, and providing a strong legislative foundation for the regulation of relevant issues.

Attention should be paid to strengthening in the Law of a very specific principle applicable in administrative procedures – the priority of interests of interested parties. In case of ambiguity or fuzziness of legal act prescriptions, administrative decisions should be taken by competent authorities on the basis of the best meeting the interests of such persons. This principle is intended to some extent rationalize the use of available discretionary powers by authorized bodies.

Another important provision of the Law is the prohibition to reclaim from an interested person any documents that may be requested by an authorized body itself, aimed at creating conditions for the implementation of the one stop-shop principle. In order to implement this principle there is an approval of lists of documents to be submitted by interested persons, and those that must be requested by authorized bodies themselves.

The Law regulates in detail the procedure for appeal against an administratively taken decision, consolidating the traditional for domestic law approach on the possibility of sending a complaint to a superior organization. This method remains a priority way of appealing against administrative decisions, due to its simplicity and accessibility, the absence of need to bear procedural costs. Often, even with the possibility of judicial appeal, interested persons prefer to repeatedly complain to superior organizations.

In 2014, courts of general jurisdiction received 1512 complaints against decisions, actions (inactions) of state bodies and officials. 556 complaints were satisfied[1].

1 Brief statistics on the activity of courts of general jurisdiction in the administration of justice for 2014 [Kratkie statisticheskie dannye o deyatel'nosti sudov obshchei yurisdiktsii po osushchestvleniyu pravosudiya za 2014 god]. Available at : http://court.by/justice/press_office/fca8015f7fc6586c.html (accessed : 22.05.2015).

The number of complaints lodged in administrative order against administrative decisions many times exceeds this figure[2]. So, in 2014, the Ministry of Housing and Communal Services of the Republic of Belarus, only on the issue of privatization of dwellings, received 694 complaints, the majority of which related to disagreement with decisions taken on privatization.

In turn, appeals against administrative decisions in the courts are regulated by the Civil Procedure Code and Economic Procedure Code. Under the general rule, a prerequisite for a citizen's complaint to the court is a preliminary appeal against the decision in administrative procedure. However, in some cases, legislative acts may provide for possibility to complain directly to the court.

A specific feature of the Belarusian legislation is the existence of lists of administrative procedures – comprehensive normative legal acts that contain information about where you should apply for the implementation of an administrative procedure, lists of documents to be submitted, the timing of administrative procedures, validity of the document issued in the implementation of administrative procedures, as well as fees for the implementation of administrative procedures.

The lists represent an example of doubling the normative material, providing information that is usually enshrined in other normative legal acts in an accessible and standardized form, what greatly facilitates its search. Furthermore, such lists fill up the missing elements of administrative procedure, if in a normative legal act regulating this procedure they are not defined (for example, there is no information on the validity of document, the amount of fees).

At present there are two lists of administrative procedures approved in Belarus:

- list of administrative procedures carried out by state bodies and other organizations towards citizens, approved by the Decree of the President of the Republic of Belarus No. 200 from April 26, 2010. This list contains about 600 procedures divided by respective areas. At the same time, in order to prevent unjustified emergence of new administrative procedures there was established a ban on exercising procedures that are not included in this list;
- unified list of administrative procedures carried out by state bodies and other organizations in relation to legal entities and individual entrepreneurs, approved by the decision of the Council of Ministers of the Republic of Belarus № 156 from February 17, 2012 (contains about 800 administrative procedures).

These lists, despite the complexity of keeping them up-to-date (for example, only in the year 2014, the unified list of administrative procedures carried out by

2 Unfortunately, the majority of authorized bodies do not do separate accounting of administrative complaints. Often these complaints are registered together with the complaints filed under the legislation on appeals of citizens and legal entities.

state bodies and other organizations in relation to legal entities and individual entrepreneurs was updated 53 times), are a very convenient way to streamline legislation and in demand among population and practitioners.

Another component of the legislation on administrative procedures is acts governing the order of exercising of specific administrative procedures. Examples include the Law of the Republic of Belarus from July 22, 2002 "On State Registration of Real Estate, Rights on it and Transactions with it", Decree of the President of the Republic of Belarus No. 450 from September 1, 2010 "On Licensing of Certain Kinds of Activity", Decree of the President of the Republic of Belarus No. 41 from January 19, 2012 "On State Targeted Social Assistance".

In some cases such acts contain only some provisions of an administrative procedure, and in others, provide for a very detailed procedural regulation. In both cases, the content of the said acts must conform to the Law of the Republic of Belarus "On the Fundamentals of Administrative Procedures".

Along with the establishment of the necessary legal framework, in Belarus we can see a large-scale work on the introduction into practice of a new mechanism of interaction of authorities and citizens in exercising of administrative procedures on the basis of one stop-shop principle.

Local authorities obtain special units – "one-stop shop" services, which provide the possibility of filing in one place of applications for the exercising administrative procedures in various areas.

A unified portal of electronic services has been created and is developing.

There is a fully functioning single reference number for administrative procedures (142), where you can get information on how to exercise procedures in a particular locality.

Monitoring of the order of exercising administrative procedures is conducted on an ongoing basis.

Establishment of responsibility for violation of the legislation on administrative procedures is designed to promote the ensuring of its practical implementation. In particular, the Code of the Republic of Belarus on Administrative Offences is supplemented by a special article, which provides for administrative responsibility for violation of the legislation on administrative procedures (discovery of documents, which must be requested by a public authority or another organization itself, unlawful charging, delays in implementation of procedures, etc.).

However, a significant number of outstanding issues remains in the sphere of exercising administrative procedures, both in part of legal regulation and in part of practical implementation of regulatory prescriptions.

We would like to stay on the problematic issues of the Law of the Republic of Belarus "On the Fundamentals of Administrative Procedures". Its adoption raised great expectations regarding the establishment of unified standards of exercising administrative procedures, strengthening guarantees of interested persons in the course of exercising administrative procedures.

Unfortunately, these expectations were not fully realized. This is partly due to too broad description of the order for filing applications and taking administrative decision, the existence of a significant number of blanket rules.

A significant drawback is a very narrow subject of regulation. The definition of administrative procedure is limited to the adoption of administrative decisions on the basis of application of a person concerned, that excludes from the scope of the Law all decisions taken by own initiative of administrative bodies.

In addition, administrative decision covers only those decisions that establish, change or terminate the rights or obligations of persons.

As a result, the Law does not cover a significant number of applications relating to the scope of the Law of the Republic of Belarus "On Appeals of Citizens and Legal Entities". Parallel action of the legislation on administrative procedures and legislation on appeals of citizens and legal entities, which regulate very similar issues, complicates enforcement, each time requiring identification of the institutional affiliation of a submitted application.

In such a situation, the Law, despite its fairly common name, does not establish a universal administrative procedures and is more similar in governed matters to the legislation on public (administrative) services of the Russian Federation, Kazakhstan and Ukraine.

Another disadvantage of the current Law is inadequate regulation of a number of issues that are important for the implementation of administrative procedures.

So, the range of participants in administrative procedures does not include such an important entity as the third parties, whose rights or duties may be affected by a taken administrative decision. Such persons are forced to undertake protection of their rights within the framework of the legislation on appeals of citizens and legal entities.

The rights of interested parties do not include an already traditional for foreign administrative-procedural legislation "right to be heard" in the event of an unfavorable decision to the applicant. Attempts to enshrine this right stumble on the objections of practical nature (lack of suitable premises, increased load on the management bodies, possibility to slow procedures, etc.).

The issue of the invalidity of an administrative decision, the order of its cancellation and recognition invalid, also remains unresolved.

All this reduces the role of Law as a pivotal piece of legislation in the sphere of exercising administrative procedures. Not coincidentally, among practitioners, the Law rarely stays among the acts governing day-to-day work on the implementation of administrative procedures, and even rarer they are able to call its procedural provisions. References to the general Law are practically not included in judicial decisions when considering complaints related to the implementation of administrative procedures.

As a consequence, currently the main "driving force" of the legislation on administrative procedures becomes not the Law, but acts governing the order of implementation of certain procedures, within which there can be created its own procedural regulation, as well as the existing lists of administrative procedures.

The effective functioning of the institute of administrative procedures is hindered also by a certain "gap" between the standard of administrative procedure at the legislative level and its practical implementation by state bodies and organizations.

In some cases, there are such negative phenomena as collection by interested parties of documents that must be requested by the authorized bodies, violation of the terms of administrative procedures, non-compliance to the work regime, long waiting lines, etc. Along with objective reasons, such shortcomings are caused by the attitude of certain categories of employees of public bodies and organizations towards the procedural rules as to somewhat secondary, compliance with which can be ignored in certain situations.

At that, there is a very interesting phenomenon. Many citizens do not consider procedural violations made by state bodies and organizations as violations of their rights. This is largely explained by the Soviet pattern of interrelations "official-citizen", in which the position of the representative of a public authority was regarded as "derivative" rights, which should not be doubted, as well as the conviction that a dispute with such an authority will not contribute to a positive solution of the applicant's issue.

All this shows that unlike traditional criminal or civil processes, understanding of the importance of respecting procedural forms in the sphere of public administration have not yet been fully established.

In the current situation there is a need for the adoption of measures for the further improvement of the legislation on administrative procedures, as well as the practice of its application.

Priority issues requiring resolution at the legislative level, include:

- extension of the scope of the Law;

- elimination of overlapping between the legislation on administrative procedures and legislation on appeals of citizens and legal entities, the creation of a unified procedural order of consideration of applications and complaints in public authorities;

- search for a balance between the norms of the general Law on administrative procedures and norms of the sectoral legislation, regulating the order of implementation of specific procedures;

- filling gaps in the current Law.

Currently, according to the plan of preparation of draft laws for 2015, approved by the Decree of the President of the Republic of Belarus No. 55 from 13.02.2015, there is an elaboration of amendments and additions to the Law of the Republic of Belarus "On the Fundamentals of Administrative Procedures", within which, we hope, certain mentioned issues will be resolved. In particular, clarification of the range of participants in administrative procedure and regulation for the order of validity of an administrative decision in time are presupposed.

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DELIVERY OF CITIZENS TO POLICE AS AN ADMINISTRATIVE PROCEDURE

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The article with the involvement of the judicial practice analyzes the provisions of the Federal Law of February 7, 2011 № 3-FL "On Police" and other legal acts regulating the grounds and procedures for the implementation by police of such an administrative procedure as delivery of citizens to the premises of police stations and other equivalent areas. It provides an interpretation of the most complex for practical application norms of the law, dealing with the mentioned administrative procedure. The articles contains a well-argumented conclusion that enshrining of norms, according to which delivery of citizens to police and their detainment appear as independent measures of state coercion or administrative procedure, but not a single logically separate sequence (totality) of administrative actions, called in general "detainment", is not conducive to ensuring adequate legal protection of citizens against administrative (police) arbitrariness.

It is noted that the detainment of citizens by police must be regulated by law as a constituent, and optional, component of their detention. This article contains specific legislative solutions, the embodiment of which in the Federal Law "On Police", in author's opinion, will allow significant strengthening of the legal safeguards for abiding by police the constitutional right of everyone to liberty and personal security.

Keywords: police, delivery of citizens, forced reconduction, detainment, administrative procedure, premise.

Administrative procedure is a logical isolated sequence of administrative actions in the exercise of a state function (provision of public services) with the final result and allocated in the execution of the state function (provision of public services). Although this definition is fixed only on a sublegislative level[1], it is rather meaningful and without any clarification explains why classical coercive (protective) police measure, applied in any of the contemporary countries, – delivering people to the police can (and should) be considered as an administrative procedure.

Not surprisingly that the "delivery" is on the list of 24 administrative procedures provided for in paragraph 31 of the Administrative Rules of the Ministry of Internal Affairs of the Russian Federation, which is related to the execution of the state function of control and supervision over compliance with the requirements of road safety, approved by the order of the MIA RF No. 185 from March 2, 2009 (hereinafter – the Administrative Regulation), and performed in the implementation of the said state function by employees of the State Traffic Safety Inspectorate of the MIA RF authorized to draw up protocols on administrative offences in

1 See: Resolution of the Russian Federation Government No. 373 from May 16, 2011 "On the Development and Approval of Administrative Regulations for Performing State Functions and Administrative Regulations for Rendering State Services" [Postanovlenie Pravitel'stva Rossiiskoi Federatsii ot 16 maya 2011 g. № 373 «O razrabotke i utverzhdenii administrativnykh reglamentov ispolneniya gosudarstvennykh funktsii i administrativnykh reglamentov predostavleniya gosudarstvennykh uslug»]. SZ RF – Collection of Laws of the RF, 2011, no. 22, art. 3169; no. 35, art. 5092; 2012, no. 28. art. 3908; no. 36, art. 4903; no. 50 (part 6), art. 7070; no. 52, art. 7507; 2014, no. 5, art. 506.

the field of road traffic, local district police officers, as well as by other police officers in the established order[2].

It should be emphasized, however, that the administrative procedure does not become such only because it is enshrined in the normative legal act called "administrative regulation". Currently many administrative procedures performed, inter alia, by the police, are still governed by federal laws, presidential and governmental acts, as well as issued in accordance with them instructions, provisions, statutes and other traditional normative legal acts of the Ministry of Internal Affairs of Russia. And their comparison with administrative regulations, contrary to the opinion of some authors, does not always indicate that the last – "are procedural acts of "new generation" that govern administrative procedures contained therein "at a fundamentally different level" [3]. An example is the departmental legal regulation of delivery citizens to police: this administrative procedure is "described" in the Charter of patrol and inspection service of the police (paras. 260-275), approved by the order of Ministry of Internal Affairs of Russia from No. 80 from January 29, 2008 (hereinafter – the Charter) [4] and not containing the term "procedure" at all, significantly in more details than in the Administrative Regulation (paras. 187-190).

Consideration of citizens' delivery to police as an administrative procedure is of scientific and practical interest, especially in terms of respect for human rights and civil rights, improvement of administrative and legal regulation of police activity.

The main legislative act, defining the grounds and procedure for the delivery of citizens to police, is the Federal law No. 3-FL "On Police" from February 7, 2011 (hereinafter – Law on Police) [5]. In accordance with paragraph 13 part 1 article 13 of this law in order to fulfil police officers' duties they have the right "to deliver citizens, that is, to carry out their forced reconduction in the premises of a territorial body or police units, in the premises of a municipal authority, in other premises

2 Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015..

3 Davydov K. V. Administrative Regulations of Federal Executive Bodies of the Russian Federation: Theory Issues [Administrativnye reglamenty federal'nykh organov ispolnitel'noi vlasti Rossiiskoi Federatsii: voprosy teorii]. Under edition of Yu. N. Starilov, Moscow: NOTA BENE, 2010, p. 32.

4 See: Bulletin of Normative Acts of Federal Executive Bodies [Byulleten' normativnykh aktov federal'nykh organov ispolnitel'noi vlasti]. 2008, no. 27; 2009, no. 16; Russian Newspaper [Rossiiskaya gazeta]. February 19, 2010; April 27, 2012; April 9, 2014.

5 See: Collection of Laws of the RF [SZ RF]. 2011, no. 7, art. 900; no. 27, art. 3880, 3881; no. 30 (part 1), art. 4595; no. 48, art. 6730; no. 49 (part 1), art. 7018, 7020; no. 49 (part 5), art. 7067; no. 50, art. 7352; 2012, no. 26, art. 3441; no. 50 (part 5), art. 6967; 2013, no. 14, art. 1645; no. 26, art. 3207; no. 27, art. 3477; no. 48, art. 6165; no. 52 (part 1), art. 6953; 2014, no. 6, art. 558, 559, 566; no. 30 (part 1), art. 4259; no. 42, art. 5615; no. 52 (part 1); 2015, no. 7, art. 1021, 1022, 1105; no. 14, art. 2008.

with a view to settlement the issue of detention of a citizen (if the issue cannot be resolved at the place); establishment of identity of a citizen if there is reason to believe that he is wanted as hiding from inquiry bodies, investigation or court, or as deviating from punishment or as missing; protection of a citizen against a direct threat to his life and health, if he is not able to take care of himself, or if the danger cannot be avoided otherwise, as well as in other cases stipulated by the Federal law with the drafting up a protocol" in the manner prescribed by parts 14 and 15 article 14 of the Law on Police.

The Law of the Russian Federation "On Militia" from April 18, 1991 that became invalid with the passing of the Law on Police did not contain such norms. I believe that due to their lack of certainty they need not only the proper interpretation, but also, to some extent, improvement.

Coercive nature of delivery is that in case of failure or refusal to follow to specified by police officer place a citizen can be delivered there with the use of physical force and then (depending on the nature of resistance) brought to administrative responsibility under part 1 article 19.3 of the CAO RF or criminal responsibility under the relevant article of the Criminal Code of the Russian Federation.

Paragraph 13 part 1 article 13 of the Law on Police binds the ability to deliver citizens to police with the presence of one of the four legal grounds.

The first legal ground is the solution of the issue of citizen's detention. Lawmaker for the first time singled out such a goal (ground) of delivery citizens to police. This is a very common practice, when citizens are delivered to police by the most numerous category of police officers who have the right to decide on the application of only administrative but not criminal-procedural and other kinds of detention (Patrol-Guard Service, Road Patrol Service, precinct police commissioners, etc.). The decision to detain delivered citizens in accordance with the Code of Criminal Procedure and other legislation is taken by other officials.

All the categories of persons, who may be subject to police detention, are mentioned in paragraphs 1-13 part 2 article 14 of the Law on Police. It is obvious that delivering a citizen to police in order to address the issue of his detention would not comply with the requirements of the law in the absence of circumstances that may serve as grounds of detention. These circumstances, as it known, are provided for in the Code of Criminal Procedure of the Russian Federation, CAO RF, the Law on Police and other federal laws.

In other words, a police officer, who delivers a citizen to police to decide on his detention, must necessarily have any actual data that allow to suspect a person of committing a crime or an administrative offence, or evasion from enforcement

of administrative punishment in the form of administrative detention, imposed by court coercive measures of a medical nature, etc., i.e., that such citizen belongs to one of the categories of persons listed in paragraphs 1-13 part 2 article 14 of the Law on Police.

It is noteworthy that delivering of citizens for addressing the issue of their detention is allowed by the Law on Police only "if there is no possibility to solve the problem on the spot». This wording, obviously, if we assume the laws of logic, outlaws the natural practice of delivery citizens to police , the issue of detention of which, in view of the current situation, has already been positively solved by police officers on the place (of incident).

Despite the provision of the Law on Police, paragraph 187 of the Administrative Regulation stipulates the taking by a police officer "the decision on administrative detention of a person who committed an administrative offense entailing administrative arrest" as one of the grounds of delivering. Moreover, according to the results of consideration the application of citizen Ch. V. on the recognition certain provisions of the Administrative Regulation, including its paragraph 187, as partially invalid, the Supreme Court of the Russian Federation confirmed that this provision does not contradict the current legislation on administrative offenses. As stated in the decision of the Supreme Court of the Russian Federation No. AKPI12-245 from March 27, 2012 "in accordance with part 4 article 27.5 of the Code on Administrative Offences of the RF, the term of administrative detention of a person is calculated from the moment of delivery in accordance with article 27.2 of the CAO RF, which confirms the necessity of delivery of a person in each case, when the decision on his detention is taken. In case of an administrative offence punishable with an administrative arrest, a police officer may decide to detain that person, and in this case it is subject to delivery" [6].

Such reasoning, however, looks unconvincing, given that part 1 article 27.2 of the CAO RF "Delivery" includes the only basis to deliver citizens, namely "for the purpose of drawing up a record of an administrative offence, where it is impossible to draw it up at the place of detecting the administrative offence and where it is obligatory". Hence it follows that, if at the place of detection of an administrative offense, even if that may entail imposition of administrative detention, it is possible to draw up a protocol on administrative offense, the delivery of a citizen to police is prohibited.

Surprisingly, but the Appeals Board of the Supreme Court of the Russian Federation having considered the appeal of the citizen Ch. V. against the decision

6 Decision of the Supreme Court of the Russian Federation No. AKPI12-245 from March 27, 2012 [Reshenie Verkhovnogo Suda Rossiiskoi Federatsii ot 27 marta 2012 g. № AKPI12-245]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015

of the Supreme Court of the Russian Federation No. AKPI12-245 from March 27, 2012, came to the conclusion that, in particular, paragraph 187 of the Administrative Regulation, which provides for as one of the grounds for delivering the taking by a police officer "the decision on administrative detention of a person who has committed an administrative offense entailing administrative arrest", not only meets the norms of the CAO RF, but also the norms of the Law on Police that "directly regulates the considered legal relations" [7]. However, anyone who will compare the analyzed provision of paragraph 187 of the Administrative Regulation and paragraph 13 part 1 article 13 of the Law on Police, will notice their apparent discrepancy. The Law on Police clearly shows that, if the issue of detention is positively solved by a police officer at the place of contact with a citizen, delivery to police cannot be applied.

Such a norm of the Law on Police, of course, defies common sense, but it is hardly correct to amend it through judicial or sublegislative and, all the more, departmental law-making. Appropriate legislative solutions are needed.

It seems that the real intention of the legislator was to limit the right of police officers to deliver people to premises to those cases where it was impossible to solve on the spot an issue, which requires police intervention, without detention of citizens. A similar restriction is contained in article 27.2 of the CAO RF, according to which the delivery of citizens is carried out by the police officers in order to draw up a protocol on administrative offence in case of impossibility of its drawing up on the spot of administrative offence if the drawing up of the protocol is obligatory. And in this part, the paragraph 187 of the Administrative Regulation, providing for "the impossibility of drafting up a protocol on administrative offence at the place of identifying the administrative offence if the drawing up of a protocol is obligatory" as a ground for delivery, is in full compliance with the law.

Thus, the wording "in case of impossibility to resolve this issue on the spot" with regard to the right of the police to deliver citizens to address the issue of detention, from my point of view, obliges a police officer to take all possible measures at the place (taking into account the information available, existing organizational and technical resources, the number of police officers, temporary restrictions, compliance with requirements of ensuring safety of police officers and surrounding citizens, etc.) to resolve the situation requiring police response, without delivery of a citizen to police (for example, make sure of the veracity of the oral statement of any person about an offence by a specific citizen; carry out

7 Ruling by the Appeals Board of the Supreme Court of the Russian Federation No. APL12-393 from June 28, 2012 [Opredelenie Apellyatsionnoi kollegii Verkhovnogo Suda Rossiiskoi Federatsii ot 28 iyunya 2012 g. № APL12-393]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

an express-poll of a person, peculiarities of his appearance, behavior, actions, time and location of which give reason to suspect him of having committed an offence, establish his identity by checking documents or with help of nearby witnesses; carry out at the place personal inspection of a citizen if there is evidence that he has got weapons; get the explanation of a person committed an administrative offence, draw up a protocol on the offence on the spot (in any suitable premises, service vehicle), etc.).

Measures taken by police officer at the place of contact with the citizen can exhaustively settle the situation and eliminate the need to deliver it to police and subsequent detention. If, in this situation, the police officer is sure that without the detention of a citizen his duties will not be executed properly (for example, in front of the police officer somebody is committing a violent offense) or the measures taken allow the police officer to make sure (at least not eliminate his reasonable suspicion) that the person shall be detained, he delivers the mentioned person to internal affairs body.

Returning to the paragraph 187 of the Administrative Regulation, which considers a police officer's "decision on administrative detention of a person committed an administrative offence entailing administrative arrest" as a ground for delivery, we should pay attention to one more fact. Under part 1 article 27.3 of the CAO RF, administrative detention can be applied in exceptional cases, if it is necessary to ensure proper and timely consideration of an administrative case, execution of a decision on the case of administrative offense. Thus, the grounds for delivery citizens to police in this case must match with the objectives of administrative detention. At that, unlike the Administrative Regulations, the CAO RF quite normally allows delivery and detention of citizens by police officers in connection with any committed by them administrative offences, including those that do not entail administrative arrest.

Against the background of the provisions of the CAO RF, emphasizing by the paragraph 187 of the Administrative Regulations of such ground for delivery citizens to police, as decisions of its employee on administrative detention of a person who has committed an administrative offence, entailing administrative arrest", in practice could be interpreted as assignment of duties of police officers to carry out similar administrative procedure in all cases, regardless of the situation.

So, October 11, 2003 Mr. G. g was delivered to the Leninsky Regional Department of Internal Affairs (RDIA) of Ivanovo city and subjected to administrative detention from 19:45, October 11 till 09:00 October 12 in connection with the commission of an administrative offense under article 19.3 of the CAO RF that could

result in administrative punishment in the form of administrative arrest. Along with the protocol on the specified administrative offence, operational duty officer of Leninsky RDIA also drafted up a protocol on administrative detention under articles 27.3-27.7 of the CAO RF in respect of Mr. G.

Mr. G. appealed in court the administrative detention applied in respect of him.

The decision of the Deputy Chairman of the Supreme Court of the Russian Federation on this case No. 7-AD04-2 from April 11, 2005 notes that in violation of part 1 article 27.4 of the CAO RF the grounds for detention of Mr. G. were not identified in the protocol on administrative detention. Arguments of the duty officer of RDIA about that the detention was due to the need to establish presence of Mr. G. in the consideration of the case by the justice of the peace, according to Deputy Chairman of the Supreme Court of the Russian Federation could not be considered justified, since Mr. G. had his permanent residence in the city of Ivanovo, family and there was no data about his intention to evade appearance in court. According to the results of the proceedings, the protocol of administrative detention of Mr. G. was declared illegal[8].

This example is quite demonstrative. Many police officers believe that a person against whom there are administrative proceedings, considered by the court and which may lead to an administrative penalty in the form of administrative detention, must always be delivered to an internal affairs agency and stay there until the consideration of the case by judge in the room for administrative detainees. And operational duty officer of Leninsky RDIA of the city of Ivanovo with certain discretion in dealing with the issue of administrative detention of Mr. G. acted, as they say, in accordance with the usages of law enforcement practice. The possibility to let Mr. G. go before consideration of the case by the justice of peace most likely has not only been considered by them, but even has not been perceived as allowable by law. It seems that exactly for this reason, in order to avoid such practices, Deputy Chairman of the Supreme Court of the Russian Federation during the proceedings on Mr. G.'s case made an important legal position that says "the mere fact of drawing up a protocol on administrative offense in relation to a person, for

8 See: Bulletin of the Supreme Court of the Russian Federation [Byulleten' Verkhovnogo Suda Rossiiskoi Federatsii]. 2005, no. 11, pp. 7-8. From my point of view, it was necessary to invalidate not the protocol on administrative detention, but administrative detention itself. A detailed analysis of this judgment, see : Malakhova N. V. Towards the Issue of Legality of a Decision of Administrative Detention [K voprosu o zakonnosti prinyatiya resheniya ob administrativnom zaderzhanii]. Zakon Rossiiskoi Federatsii «O militsii»: 15 let na zashchite prav i svobod grazhdan: Mat-ly nauch.-prakt. konf. – Federal Law of the RF "On Police": 15 Years of Protection the Rights and Freedoms of Citizens: Materials of scientific-practical conference, April 21, 2006, Moscow: Moscow University of the RF MIA, 2006, pp. 97-102.

which he may be sentenced to administrative arrest, cannot serve as a ground for administrative detention of the person"[9], and therefore, I would add for myself, its delivery to police.

The second legal ground of delivery, under paragraph 13 part 1 article 13 of the law on Police, is establishment of identity of a citizen if there is reason to believe that he is wanted as hiding from inquiry bodies, investigation or court, or as deviating from the execution of criminal penalties or as missing. Most often this refers to cases where a police officer discovers a citizen who is similar in description with a wanted person. It should be stressed that the Law on Police does not require police officers (from our point of view, this refers to the number of its shortcomings) in a mandatory order to establish identity of a person, who is similar in description with the wanted person, by his documents before the decision on delivery the citizen to police. However, if there is such a possibility, the police officer must use it (of course, with the necessary precautions). This requirement derives from the principle of reasonable sufficiency to limit citizens' rights and freedoms, which corresponds to the spirit of the Law on Police, but, unfortunately, has not obtained its full embodiment in the text.

In his time, taking part in work over the official draft Law of the Russian Federation "On Militia"[10] from April 18, 1991, and 20 years later over the official draft Law on Police Act, the author offered to devote this principle an independent article. The Law on Police Act was added only by one of the four parts, and only as a snippet of article 6 "Legality" (part 2). The other three parts on the principle of reasonable sufficiency in restricting rights, freedoms and lawful interests of citizens, rights and legitimate interests of organizations, which were not included in the official draft law, had the following content:

"The police, in accordance with the Federal Law, restrict the rights, freedoms and legitimate interests of citizens, rights and legitimate interests of organizations, if without this its mandated responsibilities cannot be fulfilled.

Police, in accordance with the Federal law, shall elect such mode of action, which at the prevailing situation in the smallest degree restricts the rights, freedoms and legitimate interests of citizens, rights and legitimate interests of organizations.

A police officer, in carrying out its work, should not put others and, whenever possible, himself at unjustified risk".

9 Bulletin of the Supreme Court of the Russian Federation [Byulleten' Verkhovnogo Suda Rossiiskoi Federatsii]. 2005, no. 11, p. 8.

10 See: Solovei Yu. P. Legal Regulation of Police Activity in the Russian Federation [Pravovoe regulirovanie deyatel'nosti militsii v Rossiiskoi Federatsii]. Omsk: Higher Police School of the RF MIA, 1993, p. 216; Solovei Yu. P. New Federal Law "On Police" (draft) [Novyi Federal'nyi zakon «O politsii» (proekt)]. Zakonodatel'stvo i praktika – Legislation and Practice, 2002, no. 1, p. 75.

I believe that at the present time, these provisions (along with the already contained in part 2 article 6 of the Law on Police) are worthy of inclusion in chapter 2 "The Principles of Police Activity" of the said law as a separate article with the name of "Reasonable sufficiency in the restriction of the rights, freedoms and legitimate interests of citizens, the rights and legitimate interests of organizations".

The third legal ground of delivery is protection of a citizen against a direct threat to his life and health, if he is not able to take care of himself, or if the danger cannot be avoided otherwise. The norm about this kind of delivery by itself refers to the novelties of the Law on Police. Sources of threat to human life and health may be different, the main thing is that he is not able (because of age, health or other reasons) to take care of his security, or (due to the lack of time, money, etc.) it is impossible to avoid the threat in another way. It should be emphasized that the threat to life and health must be direct, obvious to a police officer and surrounding people. It is about delivery to police, for example, citizens who are in public places and are not able, due to an illness, to call (remember) their name, place of residence, understand where they are; citizens who have attempted suicide, or have expressed the signs of mental disorder and their actions create a danger to themselves and others; citizens, whom the surrounding people have accused of a felony and are trying to arrange a lynching, etc. It should be emphasized that delivery to police of such a category of citizens can be also exercised against their will in other situations provided for under the Law on Police.

The fourth legal ground of delivery citizens to police is "other" cases stipulated by the Federal law, at that, not only by the Law on Police (e.g. its paragraphs 14 and 15 part 1 article 13), but also by other legislative acts. Thus, in accordance with article 27.2 of the CAO RF, police officers may carry out delivery of citizens when identifying the administrative offenses which, in accordance with article 23.3 of the CAO RF, are considered by internal affairs bodies (police) or administrative offenses the protocols of which, in accordance with paragraph 1part 2 article 28.3 of the CAO RF, are drawn up by internal affairs bodies (police). In addition, when officials authorized to draw up protocols on administrative offences identified by them ask for help police officers, they have the right to deliver citizens to police in connection with the commission of any administrative offence. Such assistance to the mentioned officials may be also provided by the police through the use of administrative detention (article 27.3 of the CAO RF).

As another example we may consider paragraph 1 part 3 article 11 of the Federal Law No. 35-FL "On Combating Terrorism" from March 6, 2006 allowing on the territory (objects), within which (in which) there is a legal regime of counter-

terrorist operation, in accordance with the legislation of the Russian Federation, for the period of counter-terrorist operation, application by police such measures as verification individuals' documents certifying their identity, and in the absence of such documents – delivering the said persons to internal affairs bodies of the Russian Federation (other competent authorities) for establishment of identity.

A person is deemed delivered and delivery completed after he or she reached the threshold of a building where territorial authority or police premise, municipal body premise, other official premises. "Other official premises" referred to in the Law on Police, in our view, may be considered any place suitable for implementation of police procedural and other official actions, in which he may lawfully be, for example, a stationary post, police car, etc. Ignoring of this circumstance sometimes leads to judicial errors.

So, Mr. B. N. appealed to the Supreme Court of the Russian Federation to declare inoperative the norms of paragraph 6 subparagraph "a" clause 70 of the Administrative Regulation regarding providing the right of a police officer (hereinafter – employee) to offer the road user to get out of the vehicle when his participation is required in exercising procedural actions. According to the applicant, the contested provision is contrary to parts 4 and 4.1 article 28.2, paragraph 4 part 1 article 29.7 of the CAO RF. As indicated in the application by Mr. B. N., an employee is entitled to draw up a protocol on administrative offence in the absence of the person against whom the case of an administrative offense has been initiated, but the giving of explanations and comments is the right of the said person, and not his obligation; when making decision on administrative punishment at the place where the offence was committed, the personal presence of the person, against whom the administrative offense has been initiated, is also optional. However, in law enforcement practice, there are cases when the right of an employee to offer road user to get out of the vehicle is regarded as implying an obligation of the driver to commit this action for drawing up in respect of him a protocol on administrative offence or taking a decision on administrative offence. Refusal of the applicant to get out of the car in such cases may lead to bringing to responsibility under part 1 article 19.3 of the CAO RF (disobedience to a lawful order of a police officer).

Having examined the application of Mr. B. N., the Supreme Court of the Russian Federation found it not subject to satisfaction. According to the Court, "the literal interpretation of the norm allows concluding that it is not about the order or requirement of an employee, which is compulsory for the road user, but about the employee's right to offer the road user to get out of the vehicle when he is needed to participate in procedural actions. Accordingly, the unconditional duty of the road

user to perform such an offer does not derive from the contested norm. Paragraph 35 of the Administrative Regulation, which establishes that the actions on preparation of procedural documents, with exception of the cases provided for by the Administrative Regulation, must be carried out at the scene of commission (prevention) of an administrative offense, corresponds to the contested rule. At that, they may be drawn up in the premise of a stationary post of road patrol service, patrol car salon. This implies the right of the road user to use the appropriate offer and go into the premise of a stationary post of RPS or to take a seat in the patrol car.

In connection with stated *the applicant's argument that the failure of a driver to leave the vehicle for drawing up a protocol on administrative offense or making a decision on an administrative offense may lead to bringing to responsibility under part 1 article 19.3 of the CAO RF, is wrong* (italic is mine – *Yu. S.*) because this rule establishes responsibility for actions, which are expressed in direct refusal to obey orders (requirements) of an employee, in the physical resistance and countering him"[11].

After the fair refusal to Mr. B. N. regarding the satisfaction of his application for invalidation of the norm of paragraph 6 subparagraph "a" clause 70 of the Administrative Regulation, the Supreme Court of the Russian Federation, together with the motivation for its decision contrary to the law actually deprived the police officers the right to deliver the driver of vehicle stopped by them to the official premises and any other place that is suitable for implementation procedural actions with respect to him, in other words the right to demand (exactly demand, but not ask) to leave the vehicle and follow to a specified place for drawing up a protocol on administrative offense (which, incidentally, can encroach on objects other than road safety), and, consequently, the right to use physical force to ensure fulfillment of their demand and subsequent bringing of such a driver to administrative responsibility for disobedience under part 1 article 19.3 of the CAO RF or criminal responsibility for ruder forms of counteraction to legitimate activity of the police.

From my point of view, the deprivation of police officers the said right in respect to drivers of stopped by them vehicles is unjustified restriction of discretionary powers, no doubt given to them by part 1 article 27.2 of the CAO RF (the right to "deliver, i.e. forced reconduction of physical person... in order to draw up a protocol on administrative offence if it is not possible to do it at the place of identification of administrative offence if the drawing up of protocol is mandatory, in official premises) and paragraph 13 part 1 article 13 of the Law on Police (the right "to deliver citizens, that is, to carry out their forced reconduction in … official premise

11 Decision of the Supreme Court of the Russian Federation No. 1358-AKPI from February 28, 2013 [Reshenie Verkhovnogo Suda Rossiiskoi Federatsii ot 28 fevralya 2013 g. № AKPI-1358]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015].

with a view to settlement the issue of detention of a citizen (if the issue cannot be resolved at the place)").

The term for delivery of a citizen to an official premise of police is not determined by the Law on Police, however, part 2 article 27.2 of the CAO RF provides for that the delivery shall be made as soon as possible. It seems that, in the light of the principles of police activity embodied in the Law on Police, police officers should be guided by that provision in implementing delivery regardless of its grounds.

Analysis of the provisions of article 14 of the Law on Police leads to the conclusion that the maximum term of delivery, as well as the maximum term of detention citizens before (without) a judicial decision cannot exceed 48 hours.

It must be borne in mind that, in accordance with part 4 article 14 of the Law on Police the term for all types of detention, except for administrative detention (i.e. detention, carried out in accordance with the legislation on administrative offences) shall be calculated from the moment of actual restriction on the freedom of person's movement. Therefore, the time taken by a police officer on actions with the detained person on the spot and its delivery to police shall be counted in the term of detention.

As for administrative detention, its term shall be counted from the moment of delivery of a person to the premise of an internal affairs body (police) or to the premise of a local self-government of a rural settlement, and as for a person in a state of intoxication – from the moment of his sobering. In other words, the period for delivery of an arrested person under the CAO RF is not included in the term of administrative detention, and such legislative exception, in my opinion, is hard to explain by any rational reasons. But in this case, as in all others, a delivered person has the right to assistance of a lawyer (defence counsel) from the moment the restriction of his constitutional rights, especially to the freedom and personal inviolability, becomes real. As pointed out by the Constitutional Court of the Russian Federation, "the right to legal assistance of a lawyer is guaranteed to every person regardless of his formal procedural status, including the recognition him as a detainee and suspect, if empowered public authorities have taken measures in relation to that person that really limit freedom and personal inviolability, including freedom of movement – detention by official authorities, forced reconduction or delivery to the bodies of inquiry and investigation, incommunicado detention, as well as any other actions that substantially restrict freedom and personal inviolability" [12].

12 See: Decision of the Constitutional Court of the Russian Federation No. 11-P from June 27, 2000 "On the case of verification the constitutionality of the provisions of part 1 article 47 and part 2 article 51 of the Criminal Procedure Code of the RSFSR in connection with the complaint of a citizen V. I. Maslov" [Postanovlenie Konstitutsionnogo Suda Rossiiskoi Federatsii ot 27 iyunya 2000 g. № 11-P «Po

Separate issues relating to delivery of citizens to police are regulated only at the departmental level. So, according to paragraph 268 of the Charter, delivery of citizens to police is carried out by special police transport, and in its absence – by cars owned by organizations and citizens. It is not allowed to use public transport, special-purpose vehicles (fire truck, cash-in-transit vehicle, ambulance (except for the cases when medical assistance is needed), as well as transport belonging to diplomatic, consular and other representations of foreign states, international organizations.

In accordance with paragraph 189 of the Administrative Regulation, delivery of a citizen could be carried out by his vehicle or a patrol car. In the case of delivery of a citizen by his vehicle, the vehicle shall be driven by a police officer.

In the opinion of the previously mentioned citizen Ch.V., who appealed to the Supreme Court of the Russian Federation to declare partially invalid certain provisions of the Administrative Regulation, including its paragraph 189, in these cases police officers are endowed by this normative act with the right drive the vehicle of a delivered person in violation of the current legislation. The Supreme Court of the RF denied Mr. Ch. V's application, stating the following: "Federal Law "On Police" gives the police the right to deliver citizens, that is, to carry out their forced reconduction in the premises of a territorial body or police units, in the premises of a municipal authority, in other premises with a view to settlement the issue of detention of a citizen, to detain vehicles that are wanted (paragraphs 13, 20 part 1 article 13). The procedure for the implementation of the rights granted to the police, unless it is subject to regulation by federal laws, normative legal acts of the President of the Russian Federation or normative legal acts of the Government of the Russian Federation, is determined by the federal executive authority in the sphere of internal affairs (part 3 article 13). Therefore, the provision provided for by the Administrative Regulation concerning the driving of a detained vehicle by a police officer cannot be regarded as exceeding of the rights granted to the police" [13].

Meanwhile, it is not about the procedure of exercising rights of police, but about its new right, since paragraph 37 part 1 article 13 of the law on Police does not provide for delivery citizens to police as a ground for use the vehicles of organizations

delu o proverke konstitutsionnosti polozhenii chasti pervoi stat'i 47 i chasti vtoroi stat'i 51 Ugolovno-protsessual'nogo kodeksa RSFSR v svyazi s zhaloboi grazhdanina V.I. Maslova»]. SZ RF – Collection of Laws of the RF, 2000, no. 27, art. 2882.

13 Decision of the Supreme Court of the Russian Federation No. AKPI12-245 from March 27, 2012 [Reshenie Verkhovnogo Suda Rossiiskoi Federatsii ot 27 marta 2012 g. № AKPI12-245]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015. See also: Ruling by the Appeals Board of the Supreme Court of the Russian Federation No. APL12-393 from June 28, 2012 [Opredelenie Apellyatsionnoi kollegii Verkhovnogo Suda Rossiiskoi Federatsii ot 28 iyunya 2012 g. № APL12-393]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015.

and citizens. Therefore, to use the specified transport in order to deliver citizens to police its staff must obtain the consent of the owner of the transport, even if it is the person who is being delivered to police.

A police officer during delivery of a person must provide precautions in case of attempt on the person's part or on the part of others to create conditions for escape or rescue, ensure that the delivered person does not threw or convey to anyone material evidence and does not get from anyone a weapon or other offensive means (paragraph 269 of the Charter). The importance of comply with this requirement is shown by the following case.

November 17, 2004 Tikhomirov and Surhoev were stopped on the street for document checks by police officers of the regiment of patrol and inspection service N., L. and Ju. Having checked identity documents of Surhoev and Tikhomirov, who submitted forged passport and driver's license, the police officers decided to deliver them to police station for identification and verification through data base of wanted persons, and reported about this to Tikhomirov and Surhoev. Not being aware of the involvement of these individuals to criminal activity, the police officers failed to detect during the personal search that Tikhomirov had the pistol "TT". Having placed Surhoev and Tikhomirov in official car, police officers went to the place of destination.

On the way to the police station Tikhomirov shot in the head of L., who was sitting in the driver's seat, and shot in the head Ju., who was sitting in the front passenger seat. N., trying to suppress criminal acts of Tikhomirov, intercepted his hands. During the fight Tikhomirov made from the same weapon random shots in the car. Surhoev punched N. to the body and tried to seize his sidearms − the pistol "PM", but could not do this because of counteraction from N., then leaped out of the car and tried to flee but was apprehended by the policeman Ju.

Tikhomirov, having freed from N. and thrown the pistol "TT", leaped out of the patrol car and fled.

Police officer L. died at the scene from gunshot wound[14].

Police practice strongly demands that all delivered by police officers (in particular by official transport) persons and things in their possession are subjected to a thorough inspection. However, the Law on Police (part 6 article 14) allows you to do so only in respect of "detainees" (i.e. already delivered to police). Citizens that are being delivered to police can be inspected only "when there is evidence that

14 See: Decision of the Presidium of the Supreme Court of the Russian Federation No. 112-P10 from July 28, 2010 [Postanovlenie Prezidiuma Verkhovnogo Suda Rossiiskoi Federatsii ot 28 iyulya 2010 g. № 112-P10]. Konsul'tant Plus. Professional version [Electronic resource], Moscow: 2015

these people are carrying guns, ammo, ammo for weapons, explosives, explosive devices, narcotic drugs, psychotropic substances or precursors either poisonous or radioactive substances" (paragraph 16 part 1 article 13 of the law on Police). In the vast majority of delivery cases police officers do not and cannot possess such information. It is therefore advisable, in my opinion, to add to the Law on Police a provision that authorizes police officers to implement personal search of citizens that are being delivered to police and their things, in the manner prescribed by the legislation on administrative offences. In turn, part 4 article 27.7 of the CAO RF shall allow the holding of such searches without witnesses, regardless of whether a police officer has reasonable grounds to believe that a person has arms or other objects used as weapons, or not.

A police officer, who delivers a person to internal affairs body, makes a report addressed to his superior. The report shall contain the following: name, surname, home address of the person delivered, the time, place, circumstances and grounds of delivery, the names and addresses of witnesses, as well as persons who have assisted in the apprehension and delivery (paragraph 270 of the Charter).

Unlike the previous Law of the Russian Federation "On Militia" the law on Police obliges police officers to draw up a protocol about every delivery of citizens to official premise. The protocol of delivery, which is drawn up in accordance with the requirements set by parts 14 and 15 article 14 of the Law on Police, contains the date, time and place of its drawing up, position, surname and initials of the police officer who has made the protocol, information about the delivered person, the date, time , place, grounds and motives of delivery, as well as the fact of the notification of close relatives or close ones of the delivered person.

Delivery protocol must be signed by the police officer, who has drawn it up, and the delivered person. If the delivered person refuses to sign the protocol, an appropriate entry is made in the delivery protocol. A copy of the protocol shall be given to the delivered person.

It appears that in cases when a person delivered to police is detained the delivery protocol may be not drawn up, because any entered to it information on a mandatory basis will be reflected in the detention protocol.

In general it can be argued that the "having enshrined" in the norms of the Law on Police and the CAO RF independent grounds of delivering citizens to police, obliging it to draw up a protocol on delivery (and not just, as it was before, on detention), the legislator has attempted to make this administrative procedure more "transparent". However, as shown by the analysis, legislative enshrining of norms, according to which delivery of citizens to police and their detention appear

as independent measures of state coercion or administrative process, and not as a single logical sequence (totality) of administrative actions, called in the whole "detention", is not conducive to ensure adequate legal protection of citizens against administrative (police) arbitrariness.

It appears that delivery citizens to police should be legally regulated as an integral, and optional, part of their detention. In this regard, in my opinion, it is necessary, firstly, delete paragraphs 13, 14 and 15 from part 1 article 13 of the Law on Police, that are devoted to delivery to police and other institutions of different categories of citizens, and enshrine the specified categories of citizens in part 2 article 14 of the Law on Police "Detention". Secondly, the initial sentence of part 2 article 14 of the Law on Police "The police have the right to detain:" shall be replaced by the words:

"The police in order to prevent offenses, establish identity, draw up a protocol on administrative offense, if the drawing up of a protocol is obligatory, to ensure the timely and proper consideration of a case on administrative offence and execution of decision taken on the case, to participate in procedural actions, to transfer to the relevant bodies or agencies a decision on detention on suspicion of committing a crime or to use other measures in accordance with the federal law have the right to detain, that is, to restrict the freedom, to hold in place and (or) as soon as possible reconduct (deliver) to police, an appropriate institution or any other official premise, as well as retain in custody in specially designated premises or special institutions of internal affairs bodies not more than three hours, unless other term is established by federal law:" (further the relevant categories of persons are listed).

Thirdly, it is necessary to adequately edit the provisions of part 2 article 14 of the Law on Police, which enshrine the categories of persons to whom detention may be applied (respectively, delivery as an optional part of detention), necessarily highlighting (now it is not) the following categories:

- persons caught in the committing of a crime or administrative offence or immediately after the committing;
- persons referred by victims or witnesses as perpetrators of a crime or an administrative offence;
- persons on themselves or on their clothes, with them or in their dwelling having clear traces of a crime or an administrative offence;
- persons in respect of whom there are other not provided for in this Law data that give reason to suspect them of committing a crime or an administrative offense, if they tried to escape or do not have place of stay or residence, or their identity is not established;
- persons at the scene that could be witnesses of a crime.

It seems that the adjustment of the Law on Police in the proposed direction and the development on its basis of new provisions of relevant administrative regulations, which are devoted to administrative procedure of detention (including delivery) citizens by the police, will significantly strengthen the legal safeguards for compliance by the police of constitutional right everyone to freedom and personal inviolability.

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