Universal Decimal
Classification 342.9

Demin A. A.

CORRELATION OF ADMINISTRATIVE COURT PROCEDURE AND ADMINISTRATIVE PROCESS: THEORY OF THE ISSUE[1]

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Critical analysis of the draft Code of Administrative Court Procedure (CACP) of the Russian Federation is given on the base of author's understanding of the correlation of administrative court procedure and administrative process. The author's statement that the draft Code of Administrative Court Procedure of the Russian Federation "contains many doctrinally inconsistent and sometimes directly controversial provisions" is disclosed in the article.

Keywords: administrative process, administrative court procedure, code of administrative court procedure, administrative justice.

In the discussion of a new draft law we should be based on objective correlation of basis and superstructure. The superstructure in this case is a draft of Law, and the basis – authoritative operational activity of administration. In other words, the parameters of a law may be relevant regularities of social development only then when they are not contrary to the basis. Consequently, the law must also reflect the main feature of administrative process – servicing of namely operational activity of administration, and, therefore, such a law has to ensure the efficiency of justice servicing this activity.

[1]Published on materials of I All-Russian scientific-practical conference of students, postgraduates and young scientists «Modern Problems of Administrative Court Procedure and Administrative Process» (Novosibirsk – 2014)

Discussion of the draft Code of Administrative Court Procedure of the Russian Federation (hereinafter – CACP RF) shows that in the science of administrative law the issue of the concept, principles, essence, and hence the specificity of administrative court procedure still has not been resolved. One of the drafts of such Code is revoked [3], and rightly so. Adoption in such a situation of this draft law is premature and once again it can undermine citizens' respect for the law because of its unpreparedness. At the same time, not having a settled procedure for resolving disputes with administration, it is also impossible to introduce administrative tribunals. Since the courts of administrative justice operate according to the rules of the independent type of procedural law –administrative process [8].

We should agree with the opinion of some scholars that the question of essence and structure of administrative process and administrative-procedural law is inevitably linked "with overcoming of the prevailing in doctrine dichotomy "managerial approach – jurisdictional approach" in its various theoretical interpretations" [16, 4]. However, A. I. Kaplunov believes, that "today there is a reason to talk about three main approaches to the understanding of administrative process: managerial, judicial and integrated (combining the first two approaches)" [17, 23]. While ignoring our researches on this issue, the essence and conclusion of which is the statement that understanding of administrative process requires banal ability to distinguish the substantive law from procedural one, as well as the judicial branch of power from the executive one [13]. Absence of ability to distinguish these elementary for legal profession categories – lack of professionalism, consequence of a long in the history of Soviet Russia neglect to procedural means of defense in courts. At those times, the decision of political party organizations was enough to resolve conflicts.

The term of "administrative court procedure" is taken from article 118 of the Constitution of the Russian Federation of 1993, however, it enters into a conflict with the term of "administrative process" [5; 22; 20].

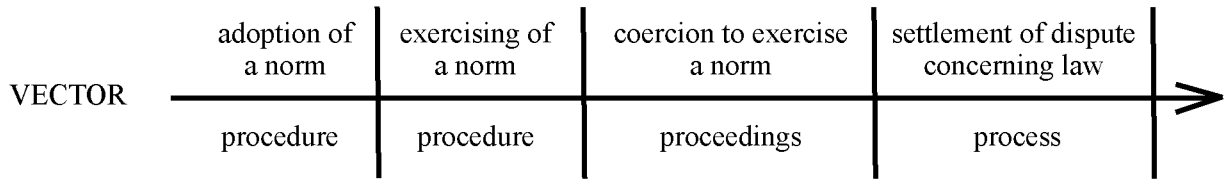
Experts distinguish in civil process judicial acts taken in 1) action 2) special proceedings and 3) proceedings on cases arising from public legal relations [4, 36]. These types of court procedure, as noted by V. V. Argunov, proceed according to the rules of civil process. That is, in his interpretation, process is wider than court procedure. By analogy, in the bowels of administrative process we could also distinguish a number of types of administrative court procedures, for example, taking into account the peculiarities of the process in disciplinary tribunals, regarding other types of management, finally, regarding the peculiarities of the chapters of the Especial Part of Code on Administrative Offences of the RF

and the branch of substantive administrative law. This may also include court procedure on materials of gross disciplinary offences when applying to servicemen disciplinary arrest and on execution of disciplinary arrest on the basis of the Federal Law No. 199-FL from December 01, 2006 [2]. Departmental special quasi-litigation for resolving disputes arising from administrative relations has long implemented and is natural [9]. However, in the countries of Anglo-Saxon legal system, for example, in England or the United States, with such a separation of powers when the existence of any departmental courts is legally impossible, administrative tribunals are also created.

The difficulties of determination the content of the Code of Administrative Procedure are primarily associated with the lack of consistent teachings on the subject matter of procedural legal relations. Therefore, the definition of I. V. Panova, that administrative court procedure is called "consideration of administrative cases according to the norms of administrative-procedural law" [18, 20], doesn't work, because first one has to determine how such an article has appeared in the procedural code, and whether it correctly located in it.

For example, although in the draft CACP RF appropriate relations of a judge with people in courtroom and with the parties to a dispute are equally referred to the measures of *procedural* coercion, they are by their legal essence completely different, where you can feel the difference of which just knowing the difference of substantive and procedural law. If the removal out of courtroom of a violator, such as paparazzi, is possible, then the removal of a party to a dispute out of the courtroom is impossible due to the negation of the very essence of judicial way to resolve legal collisions. It would be tantamount to a denial of justice. Thus, in the first case the relations of judge with the paparazzi are substantive-legal ones, and relations in the second case, with a party to the dispute, – procedural legal ones. Their equalizing presence in the same article 118 of the draft CACP RF is an indication of incorrect theoretical positions of the drafters of the Code, their legal illiteracy, inability to distinguish between the substantive law and procedural law.

We propose the following algorithm of managerial activity and life of the legal norm that allows extracting of material and procedural aspects from the whole range of legal relations. Because the legal norm is implemented in legal relation, otherwise it is almost meaningless. The scheme is such:

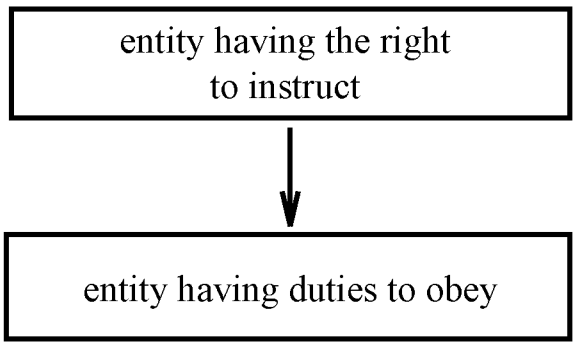


In our view, substantive law defines the specific rights and duties of specific subjects of law. The realization of these rights and duties take place in substantive-legal relations. It does not require attraction of terms related to procedural activity of public authorities. That is why we find managerial concept in the notion of administrative process wrong, despite the fact that it is supported by many highly respected luminaries of administrative law: V. D. Sorokin, A.P. Alehin, Yu. A. Tikhomirov and others. Here is acceptable the other term – *procedures*.

We agree with Yu. N. Starilov that it is necessary to adopt separate "Code of Administrative Court Procedure of the Russian Federation" and the Federal Law "On Administrative Procedures" [21, 28]. Since one of them belongs to administrative substantive law, and the other is obliged to belong to administrative-procedural law. However, the distribution of legal matter into two codes is a big technical difficulty. In the procedural codes still continue to find substantive norms (for example, organization of courts), and in substantive codes – procedural norms. Strictly speaking the issues of organization of courts refer to constitutional law. And they are often included in procedural codes.

Procedural law regulates specific activity of the specialized state bodies, whose competence includes a special litigation procedure: a) of disputed cases of application of law, b) arising out of authoritative legal relations, c) at a special procedure for the determination of legal truth in a particular conduct of the subjects of a disputed case (process), d) implemented by a special subject of law, court or quasi-court, and e) aimed at the education of the population in the spirit of conscious respect for the law through justification of its justice.

We have a simplified criterion to distinguish between substantive and procedural law. There are two aspects in substantive relations:



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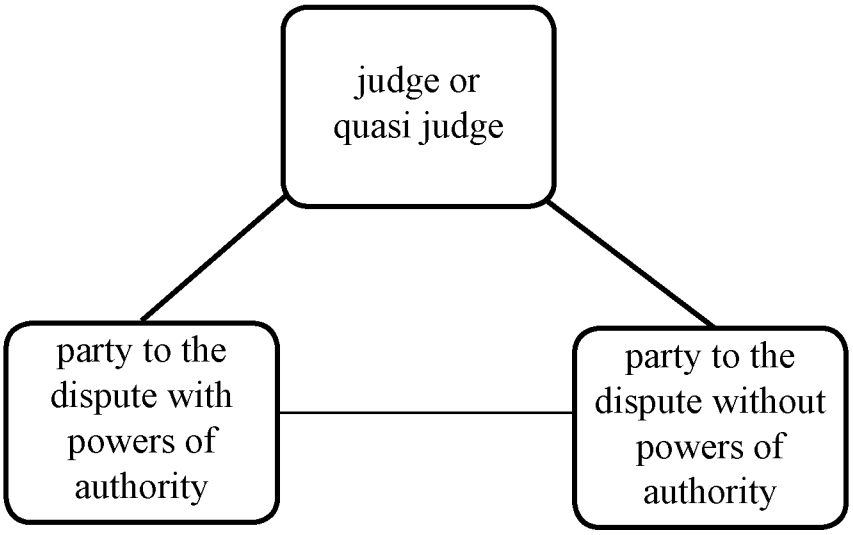
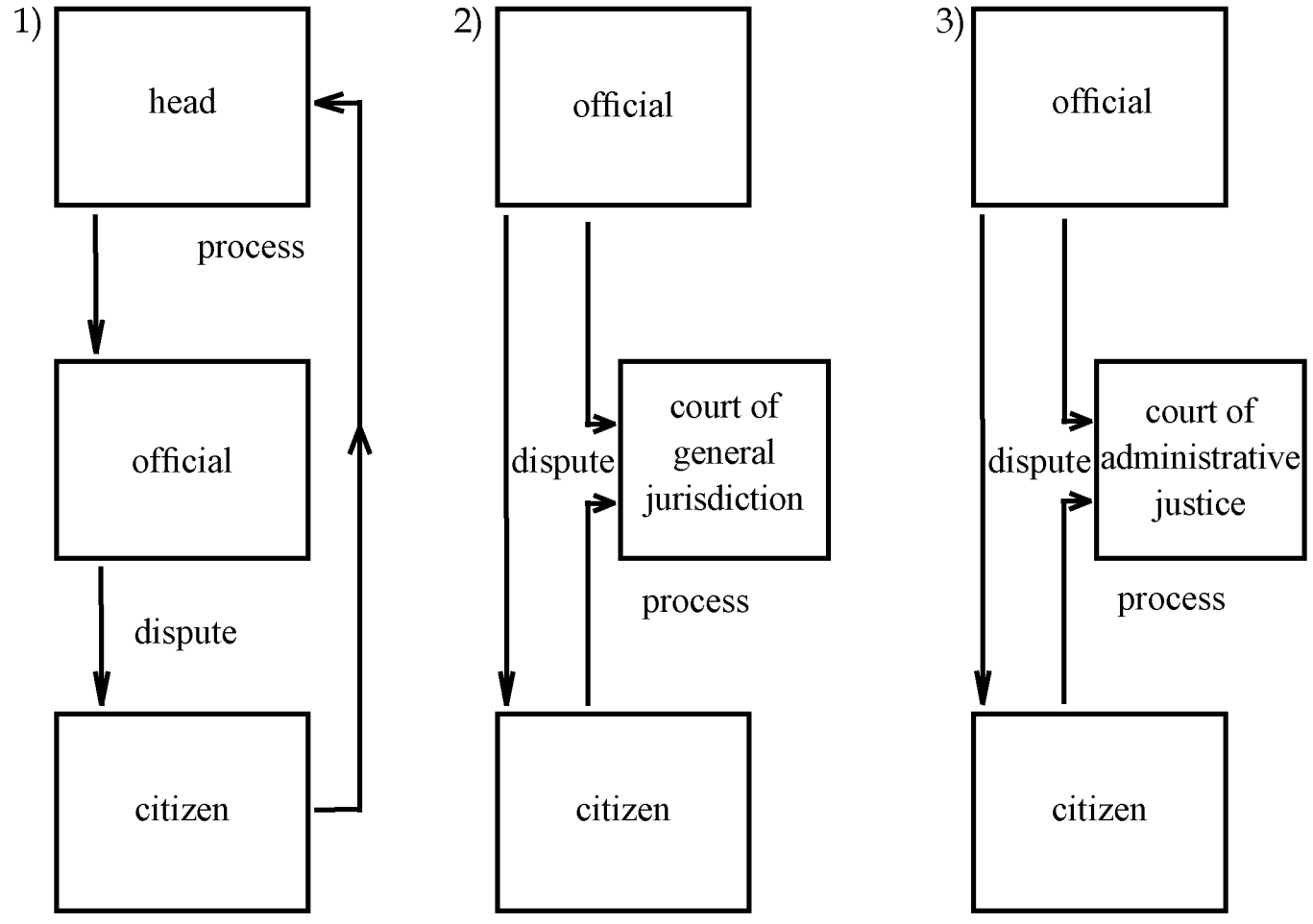
and in procedural relations – three:



And in terms of a strict approach to the procedural law of O. Byulow, who defined the process as the relationship of parties with court [6], legal bond in this scheme between the parties to the dispute (the bottom line) should be absent.

In our opinion there are three cases where administrative process, as a procedure to protect rights in administrative court procedure, has or has to have place [11]:



In each of these cases, procedural legal relations are singled out when pass through contacts with an authoritative entity with the powers of resolving administrative disputes. Cases, where the legislator confers not judicial bodies the right to resolve administrative disputes, relate to the quasi-courts. There are such cases in the legislation of the Russian Federation, for example, the Commission for Review of the case on violation of antimonopoly legislation in the bowels of the Federal Antimonopoly Service, the Chamber on patent disputes of the Russian Agency for Patents and Trademarks (now the Federal Institute of Industrial Property), City Housing-conflict Commission based on the decision of Moscow Government No. 321 from May 06, 1997, and so on.

There are quite a lot of features of administrative process as an independent type of procedural law [8], but, generally, they show that administrative process cannot be carried out according to the rules of civil procedure, and therefore administrative courts cannot be included in the system of courts of general jurisdiction. Almost all features are due to the operational nature of the activity of administration and the relatively harmless nature of administrative offenses. In a concentrated expression we note the following features which are to be reflected in the Administrative Procedure Code. They include: inquisitorial nature of administrative process: civil competition in a dispute with the authorities is not justified (that is, court is active, it is not an indifferent viewer of the competition of parties, court is a public authority and through its decision dictates the will of the States concerning an issue that is disputed by the parties); short time terms of limitation periods and resolving of cases; operativity, because this type of procedural law resolves disputes with operational authorities and multi-year civil litigations of disputing parties would paralyze the activity of active administration; onus probandi lays on authoritative party to an administrative dispute, since dissatisfaction of subordinated entity with authorities' decision casts doubt on the competent implementation of authorities' powers (presumption of administration's guilt [12, 102], once subordinated entities question its actions); absence of multi instances (the draft of CACP include appeal, cassation and reconsideration that do not reflect such peculiarity of administrative process in comparison with other branches of procedural law as operativity); symbolic, not cruel punishments aimed at the development of respect for the law; absence of a state duty for functioning of the public authority that resolves administrative disputes (such a body is financed from the state budget, taxes for the formation of which citizens have already paid [14]), and so on.

The real aim of adoption the Code of Administrative Procedure is the establishment of courts of administrative justice, the form of activity of which is exactly administrative process.

Decree developed by N. G. Salichsheva and adopted in 1968 [1], which existed for a long time, seems to us a sample of brief Document governing the operational process for resolving disputes arising from administrative legal relations. Most of it was a procedural mini code, since its foundation was based on the tripartite nature of legal relations in its exercising.

On the basis of the stated positions we carry out an express analysis of the content of the draft CACP RF submitted by the Russian Federation President to the State Duma.

The draft Code of Administrative Court Procedure of the Russian Federation contains many doctrinally inconsistent and sometimes directly contradictory provisions.

The first comment to it – there is no justification for the special title of court procedure on administrative cases. As in any other area of law, its procedural part should be titled as the "Procedural Code". Administrative law should not be an exception. Consequently, the document that governs the procedure of settlement disputes arising from administrative legal relations, like in other areas of law should be titled as Code of Administrative Procedure of the Russian Federation.

The question of authorship of the Code in this case is important because it reflects private views on administrative process [15, 10-13], in our view, distorting its original main features. While criticizing prolixity of the draft law on CACP RF, Professor L. A. Gros' notes that the draft "is cumbersome and fails both "on the merits" and "in publishing" [7, 19]. The authorship of the draft law increases personal responsibility in front of colleagues and enhances the credibility of originator. Draft law of such an important level, as we are discussing, is usually prepared in the Institute of Legislation and Comparative Law under the Government of the Russian Federation. Opinion of Yu. A. Tikhomirov has an authority in this Institute. But the influence of lobbyists and advocateship is also felt in the text of the draft law. This draft of CACP RF represents a characteristic for our time verbiage, the desire to include in that document all the information about the state legal system, not paying attention to specific qualification of exactly administrative cases, and such document immediately becomes heavy, hard to read, and also harder to execute. But its lack of general concepts or rules is a pleasant opportunity for attorneys to implement customers' difficulties in mastering such a complex document. Therefore, in the totality, we see the reactionary nature of

the provision of the draft Code on mandatory conduct of a case when the actual monopoly of the advocateship. That is how we evaluate the essence of part 1 article 57 of the draft, which provides that only persons having higher juridical education may be the representatives in courts concerning administrative cases. This requirement is coordinated with the position of the Constitution of the Russian Federation concerning qualified legal assistance in Russia, but it limits the right of a citizen to personally decide the issue of conducting its case through a trustee, representative. Commercialization of justice should not be indulged. The credibility of the State is based on the "independent" (from lawyers) justice. Justice should not be measured in money. Administration of justice is more important.

This is also accompanied by the issue of opportunity to conduct a case in order to protect the interests of other persons or an indefinite number of persons (articles 41 and 42 of the draft). We also see the reactionary nature in providing a number of persons (authorities, organizations and citizens) the right to speak on behalf of complainant without its consent and without a power of attorney to represent its interests. There is no reason to believe that the interests of these types of the subjects of law are the same or necessarily match each other. The suggestion of the draft of CACP RF to consolidate the right of a wide range of people to act in the interests of other persons, even without the need to request consent of the represented persons, who have not expressed their will, is not even a communist concept of unlimited self-government and destruction (necrosis) of the State. As soon as the will of a citizen is not asked, it may not be recognized as a subject of law in general [10]. The problem of administrative process aimed at protecting the rights of citizens, in this case is removed. Then, completely different interests than the interests of a legally capable person, as a full subject of law, are under protection.

The draft does not meet many of the features of administrative process, such as operativity, low degree of public danger, low cost of process, aim – education of subordinate subjects in a spirit of voluntary compliance with the rules of administrative regulation established in the country.

Administrative disputes, disputes arising out of activity of authoritative entities of administrative law essentially refer to the scope of the administrative justice courts, administrative tribunals, which have gained prestige and place in the judicial system of many countries of the world due to their specific features. They should not refer to the scope of courts of general jurisdiction, the activity of which is based on civil basis – adversarial nature. Still the draft of CACP RF in part 2 article 1 imputes this procedure to the courts of general jurisdiction. It is impossible to do with just a specialization in administrative cases of the judges of

general jurisdiction courts, since the isolation of such judge from the realities of administrative activity of the state apparatus always manifests itself.

The draft of the Code of Administrative Court Procedure of the Russian Federation, unfortunately, has not identified a list of officials, claims of the citizens to which on the issues of their competence fall under its jurisdiction. We recall that the draft Federal Constitutional Law "On the Federal Administrative Courts in the Russian Federation" of V. I. Radchenko [19] contained such a list and included contesting of actions and inactions by the RF President, ministers and other officials of the Russian state apparatus, potential violators of civil rights in administrative-authoritative issues. At the same time, "the resolution of disputes between federal public authorities and public authorities of the constituent entities of the Russian Federation" (paragraph 11 part 1 article 23 of the draft CACP RF) is rather a constitutional issue, and it cannot be regulated by the code of administrative procedure. Executive authorities are not legal entities of public law, therefore, the dispute of two ministries concerning the limits of competence of each of them, which is resolved by their direct supervisor (Chairman of the Government or the President of the Russian Federation respectively), is resolved in the procedure of administrative subordination. Such disputes can be referred to the courts' jurisdiction only if their immediate superiors themselves generate conflicts by acts on creation of countless administrative structures, are not qualified or shirk their duties to coordinate the activities of the state apparatus.

Short time periods for review of administrative disputes are one of the features that separate administrative process into an independent kind of procedural law. They must not potentially slow operative activity of administration. So if there is a need to consider and resolve contentious cases for a long time, with many instances, within full procedure, there is no reason to include such disputes exactly in the Code of Administrative Procedure. For example, if "Administrative cases on contesting normative legal acts are considered by court within a period not exceeding two months from the filing of an administrative statement of claim, and by the Supreme Court of the Russian Federation – within three months from the date of its filing" (part 1 article 215 of the draft CACP RF), it is desirable to subject them to full procedural proceedings in courts of general jurisdiction under the rules of civil court procedure, within an adversarial procedure. Then, it makes no sense to call such disputes subject of administrative-procedural dispute.

It seems that there is a need for development of a new text of such a draft Federal Law. As well as clearer distinguishing between substantive and procedural content of the Code.

The issues of formation the Code of Administrative Procedure of the Russian Federation are not so simple, this is evidenced, including, also by long periods (since 1993) of realization article 118 of the RF Constitution, which provides for the introduction of various types of procedural legal relations. The solving the issue on independent administrative court procedure requires the participation of young, new personnel, who are not overburdened by the stratum of the past in theory and practice.

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