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Administrative and Legal Act: Classical Theory and Practical Problems

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The article is devoted to one of the most interesting theoretical and practical problems of Russian science of administrative law – administrative acts. It appears that many difficulties encountered in the domestic law enforcement and judicial practice are associated with poor elaboration of the theory of acts in the science of administrative law in Russia, and, accordingly, insufficient legal regulation of administrative procedures. The article highlights the concept and features of administrative-legal acts, their types, the complexity of the judicial practice, imposed by the lack of theory of acts. Decisions of higher courts that can compensate these deficiencies are described. Particular attention is paid to the problems of the theory of acts and their classification, types of acts that science “does not notice”, but in practice, they do exist and create some difficulties. The author emphasizes the idea that the theory of acts and regulation should be aimed at maximum protection of citizens’ interests. The article can be useful to law students and legal practitioners, as well as all interested in the problems of administrative law.

Keywords: administrative-legal acts, administrative law in Russia.

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Research area: law.

Point

The classical theory of administrative act is supposed to occupy the central place in the science of administrative law. The classical theory defines the nature of administrative act and its characteristics among other forms of public-administrative activity, the classification of acts and the requirements for acts. However, so far domestic administrative law has not achieved comprehensive results of research on the subject and has not developed a clear and stable doctrine of an

administrative act. The legislation has even a more complicated situation: still there are no laws on administrative procedures and on administrative acts. However, law enforcement and judicial practice face serious problems in the first place due to the imperfection of the legislation and the lack of doctrinal positions.

Firstly, there are still difficulties in determining the nature of an action, a decision of the authorities, namely, whether an action or a decision can (or cannot) be attributed to administrative acts.

Secondly, there is still a problem with the lack of clear criteria for distinguishing regulatory and non-regulatory acts, and acts of dual or mixed type, having signs of both normative and individuality.

Third, the ongoing debate about the possibility of a judicial litigation of acts of governance adopted in accordance with the prescribed form or in violation of the established order (procedure), as well as non-compliance of certain requirements (for example, publication or registration requirements).

Fourth, the concept of dividing the acts into burdening and favoring has not been formulated (Mitskevich, 2011). It would define the different “legal fate” of such acts in the first place, the possibility of cancellation and modification of such acts.

Example

The essence of the administrative-legal act

The most important legal significance of legal acts lies in their legal implications. In this sense, the legal acts in the legal theory include any legal actions (by both authorities and citizens). In the administrative and legal sense legal acts are a form of management activities, which entail legal consequences. The nature of the legal consequences of the act depends on the body of the executive branch which issued the act. But this relationship is not mechanical, as authorities may not be in a hierarchical relationship, yet the acts form a hierarchical system: e.g. Federal acts must not only conform to the laws of the federal and regional legislation, but also decrees of the President, government regulations and acts of federal executive authorities .

The theory of administrative acts in the Russian science should occupy the central place, as it happened and is happening in other civil law countries, such as Germany (Mickiewicz,

2008). However, until now the discussion on domestic administrative law includes not only unsolved theoretical problems listed in the introduction, but even terminology: how to call these acts – administrative or administrative-legal acts, acts of executive authority or legal acts of public administration (Khamaneva, 2007, Alekhin, Karmolitskii, Kozlov, 2005). Some scholars use the term “acts of state administration” (Bakhrakh, 1993). There is also a term “administrative acts” (Galligan, Polyanskii, Starilov, 2002). However, this term is borrowed from foreign administrative law, and in strict sense, it refers only to the individual (deviant) act, they are not covered by the regulations of the executive power, therefore, misunderstandings in the translation of special texts are possible, and accordingly, the lack of understanding on the part of foreign colleagues. Recently, a compromise variant is used: legal and administrative acts of public administration (Starilov, 2002), or administrative-legal acts, which are designated as both normative and non-normative legal acts of their externally directed character (Andreev, 2010).

To be consistent, it should be recognized that the term “act of the executive authority” is the least successful concept, since administrative and legal acts can be published not only by the executive authorities (in the institutional sense), but also by other actors performing the functions of government (bodies in the functional sense). Examples are acts of other state bodies, as well as acts of the powers delegated to local authorities, self-regulatory organizations, organizations engaged in important public functions and other subjects. It appears that the recognition of this fact by not only higher courts (the decision of the Supreme Court of the Russian Federation, 10.02.2009), and the legislator (st.5.59 Administrative Code) should be evaluated as a very progressive movement in science and

practice, which reflects the transition from the *institutional* concept of a *public authority act* (as the determining factor is *who* produces the act) to the *functional concept of an act of management* (the main point here is not the status of the body, but the content of the activity, the function which the current act mediates).

*The concept and features
of the administrative-legal act*

The administrative-legal act is a complex legal phenomenon, which is characterized by dual nature – its management content and legal form, i.e. the act constitutes a “legal version” of an administrative decision. Thus, as part of the scope of management and an element of the mechanism of legal regulation, the act contains the features and characteristics of the two areas of public relations. Legal acts of management as the most important form of governance provide a “translation” of content management solutions to the legal language of state and government regulations and requirements” (Lazarev, 1976). This means that their existence should be based on the principles of law and the principles of public administration (e.g. rule of law as a legal principle and expediency as the principle of governance, the rule of law and proportionality, etc.) This dual nature of acts of management determines the diversity of their functions, complex and multifaceted connections and relationships that exist in the course of their training, and at the stage of adoption, implementation and monitoring of their implementation (Galligan, Polyanskii, Starilov, 2002).

Based on the synthesis of definitions proposed in the administrative and legal literature the administrative-legal act can be defined as *a sub statutory official one-sided authoritative decision (will) adopted by an executive authority (or other subject of public administration) in the prescribed manner within its competence, put in the statutory*

form and with legal consequences in the form of administrative law or legal relationship.

Thus, the main features contained in this definition, give an idea about the nature of the act. First of all, it is *the decision* that is the will of the subject, who has powers. Consequently, there is an expression of will; it is an act of expression of will power. *Imperious entity* that adopts the act is a state body or other entity with public power. The authority, acting as a carrier of public will, adopts a one-sided act powerfully, this implies the sign of *authoritativeness* of the act bound to fulfillment for all its recipients, their consent to the implementation of the act is not required. Mandatory requirements are reflected in the fact that the implementation of the act is provided by organizational measures, methods of persuasion and coercion. Of course, this feature does not wear shades of administrative arbitrariness, since the adoption of the act is related to the authorities within the law, their acts are by-law character. In addition, the one-sided nature of the domineering does not preclude taking into account the views of the other relationship. In some cases, such as the implementation of positive governance through the provision of public services, for the adoption of the act requires not only consent, but the will of a proactive citizen. The *official nature* of the act is that it was a management decision taken on behalf of the state; its performance is safeguarded by the power of the state. The *statutory character* indicates not only that the act is adopted on the basis of law and in accordance with the law, but also on the ratio of its legal force with the law.

The question of attributing the so-called intra-organizational acts to administrative and legal acts is quite complicated. This is a large group of acts, including the official acts, acts on the organization of the internal structure, etc. Of course, these acts are acts of the executive bodies (or other public bodies) and in this sense – they are administrative and legal acts. But the

state-management activity is an independent kind of state activity on the organization of the implementation of laws and regulations, which implies focus on public relations outside the state apparatus. The internal performance does not have this feature, it is of auxiliary character. Therefore, administrative and legal acts *in the strict sense* should be recognized as externally-directed, not internal to the system of executive power acts.

Another sign of the act in the definition is a reference to the fact that the acts are to be adopted *in the prescribed manner*, in accordance with *the competent authority in the form* prescribed by law. These features require special consideration because they have serious implications for practice. Theorists and practitioners discuss the question of whether one can or cannot litigate an act in terms of standard-control that was not published in the manner prescribed by law. This clearly formed two diametrically opposed positions. Proponents of the first (these are mainly from courts of general jurisdiction) believe that because it was not published or registered in the prescribed manner, therefore, does not possess the attributes of a normative act, so cannot be litigated, and if they can be litigated, then only as a decision, action (inaction) of the body (i.e., not in the order of standard-control).

Supporters of the other position (judges of the Constitutional Court, the authors of the comments for the Civil Code of Russia) believe that the lack of publication does not provide grounds for a refusal to accept the application on litigating, and can be the basis for the recognition of the act invalid, otherwise the situation would not allow to provide the guarantee of judicial protection of the rights of citizens.

It is possible to provide additional theoretical arguments in favor of the supporters of the second view from the standpoint of science of administrative law, namely, the section on

forms of governance. Administrative-legal act has content and form, but, in addition, must comply with the requirements. Its content is a management solution, a will aimed at creating legal consequences. Its form is an outward expression of the content in a written document. Of course, the form and content form a unity. But the publication or registration is not a sign of the act itself, and the requirements for the procedure of its adoption, the necessary conditions for it to become valid, the consequences entailed, which was directed and powerful will of the subject. Thus, the act may be defective in content management solutions in the form and procedure for acceptance, but it is an act anyway if there is the will of the subject, aimed at legal consequences.

In this regard, great significance can be attributed to the decision of the Constitutional Court on March 31, 2015, which was confirmed by the existence (and, accordingly, the possibility of litigating,) of such acts of the federal executive bodies that do not meet the formal requirements of the regulatory legal acts according to the form and subject of the order acceptance, registration and publication, but contain binding for clarification (normative interpretation) of regulations.

Form of management acts

The literature highlights classic forms of acts – the division of the acts into verbal and tacit, verbal, in turn, are divided into written and oral (Khamaneva, 2010). The written form is a classical form, as a rule, provided by law and defining the legal status of the body in recent times – the Administrative Regulations. In some cases, the legislator explicitly states the written form of the act (for example, a resolution for bringing to responsibility in case of an administrative offence). Current administrative procedures provide for an electronic form of the act, the emergence and

application of which represents a revolutionary change in the public administration (Vasilieva, 2012). The federal law “On electronic signature” provides for the use of electronic signatures in the provision of public and municipal services, the performance of state and local government functions in the commission of other legal actions, including, in cases established by other federal laws. Depending on the importance of an administrative act, it is confirmed by various types of electronic signature: simple and enhanced. Enhanced electronic signatures may be skilled and unskilled. Electronic administrative act is equated with the act of writing on paper. If the electronic certificate signed by a simple electronic signature or reinforced unskilled signature, it is equivalent to writing only in cases expressly provided by law. If the electronic certificate signed by reinforced qualified electronic signature, it is equated with the act of writing, signed with a handwritten signature, always, except in cases when the legislator directly indicates in the law on the admissibility of administrative act only in writing. In accordance with the part 2.1 Article 14 of the Federal Law “On Enforcement Proceedings” a decision of a bailiff may be made in the form of an electronic document signed by reinforced qualified electronic signature. An increasing number of acts adopted electronically. Thus, in accordance with Article 11 part 8 of Federal Law “On technical inspection of vehicles”, accreditation decisions adopted by a professional association of insurers can be sent in the form of electronic documents to an e-mail specified by the applicant.

Verbal acts adopted in specific areas of public administration – on air and rail transport, military management, etc. The administrative law recognizes these acts as binding and entailing legal consequences. When litigating in the court the difficulties arise because of the lack of the written form, it is proposed to regard them not

as acts but as actions of bodies and officials. Sometimes the law provides detailed regulation of action and verbal acts, as a rule, in the areas of public administration related to operational management and strict discipline (military management, in the field of internal affairs, rail and air transport).

The administrative law recognizes the existence of acts in tacit form. For example, road signs, traffic controller signals. Just like verbal acts they are also attributed not to acts, but to actions of officials, indicating that the regulations should take the form of a document, that is, should be in writing. Moreover, in practice, special acts – resolutions are often made. Regardless of the form all these acts have the main feature of acts of management – legal consequences.

Classification of administrative acts

One of the most important classifications is the division of the content of the legal acts in *the regulatory* and *non-regulatory (individual)*, depending on the adoption procedure and the procedure of litigation in court. Legal acts establish, amend or abolish the law, that is, contain *generally binding rules* of conduct of a general nature, required an indefinite number of people, designed for repeated use to all provided cases, act independently of any specific legal relationships that emerged or disappeared due to the act (Resolution of the Plenum of the Supreme Court, 25.05.2000).

Individual acts are acts of law enforcement in particular public relations, they represent a way of implementing the law. These acts serve as the legal facts that give rise to, modify or discontinue the specific relationship. They contain the imperious will of generating legal consequences for individual citizens and organizations (Resolution of the Plenum of the Supreme Court, 10.02.2009).

From this we can deduce the main features: concrete provisions and personal addressing to certain subjects (personified), a single application, but the main feature is legal consequences of emergence, modification or termination of certain relationships.

Thus, all of the signs of both normative and individual acts allow the system to use them for distinguishing between the acts, but most important sign is *the nature of legal consequences*, and the remaining symptoms are of secondary importance. This was once again confirmed by the already leading judgment of the Constitutional Court on March 31, 2015. Please note that the formal regulations may not be so, but in fact may have regulatory properties.

Very interesting is the description of (Vasileva, Prikhodko, 2010) *non-standard acts* in the national literature, which cannot be attributed to any statutory nor to individual acts. In German theory, these acts are called generally *binding orders*, they do not contain rules of law, addressed to an indefinite number of people, but do not have a specific destination, and establish a general rule for a particular managerial situation. These acts are addressed to a certain common attribute or group of persons related to the properties of the order or use public legal item. Examples include road signs, requirements to stop the demonstration, Library Rules adopted by the administration of the library, and other similar actions (Maurer, 2009). The theory of these acts was formed on the basis of jurisprudence and received legal confirmation in the Law on Administrative Procedures of Germany; this structure was caused by the needs of the state-management activity and is quite applicable to domestic administrative law.

It should be noted that the domestic science of administrative law has a much more

developed theory of regulations, while the theory of individual acts received much less attention. The literature offers certain regulations, various classifications; the law defines requirements for such acts, the procedure for their adoption, the provisions on the bodies are fixed types of acts, preparation, special requirements (for example, of the anti-corruption expertise or compulsory publication, etc.).

This situation can be explained by the fact that the traditional individual legal act in the domestic science is not seen as an increasingly important form compared to a normative act. Normative legal acts affect the rights and legitimate interests of citizens had a significant influence on public life. It is therefore natural that the focus of scientists lies in the study of it regulations, requirements, and consequences of non-compliance. However, in accordance with the theory of separation of powers, the main purpose of the executive branch is the organization of law enforcement, and not the implementation of legal regulation of social relations (this is a legislative function). This thesis is confirmed by the court and the extent of litigating of non-normative acts of state authorities and local self-government and their officials.

Conclusion

The theory of administrative acts in Russian science should occupy the central place, as it is customary in other civil law countries. It is necessary to adopt laws on administrative procedures and on administrative acts favorable to introduce the concept and burdening of acts. Lack of legislation and the lack of doctrinal provisions give rise to difficulties in enforcement and judicial practice. Judicial decisions internally compensate these shortcomings, particularly in recent years, introduced the concept of administrative acts in the functional sense, taken not only by the authorities, but also

other entities, defining the criteria of division by regulatory and non-regulatory in order to distinguish between the act in a formal sense and the essential, and distinguish the signs of the act and the requirements for its adoption. The focus of academicians is on regulations, but the main form of activity and the focus should be on individual acts.

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Административно-правовой акт: классическая теория и практические проблемы

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Статья посвящена одной из наиболее интересных теоретических и практических проблем науки административного права России – административным актам. Представляется, что значительная часть трудностей, возникающих в отечественной правоприменительной и судебной практике, связана именно с недостаточной разработанностью теории актов в науке административного права России и, соответственно, с недостаточной правовой регламентацией административных процедур. В статье освещаются понятие и характерные черты административно-правовых актов, их виды, сложности судебной практики, обусловленные отсутствием теории актов, приводятся компенсирующие эти недостатки решения высших судебных инстанций. Особое внимание уделяется проблемным моментам теории и классификации актов, тем видам актов, которые наука «не замечает», но в практике они реально существуют и создают определенные трудности. Подчеркивается тезис о том, что теория актов и правовое регулирование должны быть направлены на максимальную защиту интересов граждан. Статья может быть полезна студентам юридических вузов и юристам-практикам, а также всем интересующимся проблемами административного права.

Ключевые слова: административно-правовые акты, административное право России.

Научная специальность: 12.00.00 – юридические науки.
