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THE ROLE OF PROCEDURE, PROCEEDING AND PROCESS IN ADMINISTRATIVE AND TORT RELATIONS FROM THE POINT OF VIEW OF JUSTICE AND THE ACTIVITY OF PUBLIC ADMINISTRATION BODIES

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Tkachenko O.H., Kravchuk M.V. The role of procedure, proceeding and process in administrative and tort relations from the point of view of justice and the activity of public administration bodies.

The article analyzes the application of the concepts of 'procedure', 'proceedings' and 'process' in administrative-offense relations with the aim of determining the feasibility of granting courts the authority to consider cases of administrative offenses. The concept of 'administrative process' is disclosed in three well-known key aspects, distinguishing its general and specific features. It is determined that the process and proceedings, in a broad sense (as the activity of state bodies in general), are correlated as general and specific. Aspects of the concept of 'administrative proceedings' are identified. It is established that proceedings are part of the process, which may be interrupted, change subjects, i.e., the process consists of several proceedings, being their totality. It is proposed to consider proceedings as a certain period of time allocated for the consideration of a specific case. Instead, the procedure is a set of norms and rules regulated by legislation for subjects of any legal order in the understanding of Article 19 of the Constitution of Ukraine and in the context of the new legislation on administrative procedure. The characteristics of administrative procedure are disclosed. It is concluded that the administrative process is universal for any set of proceedings of state bodies, and this concept does not affect further research on the issue of excluding the consideration of cases of administrative offenses from judicial competence. In turn, the introduction by the legislator of the term 'administrative procedure' excludes the possibility of equating its rules and norms with judicial proceedings. It is analyzed that judicial procedures are provided for by procedural codes but do not define the specifics of considering cases of administrative offenses. It is determined that the Code of Ukraine on Administrative Offenses does not meet the requirements for modern judicial procedures and is essentially more akin to a regulator of administrative procedure, which constituted the foundation of Soviet heritage. This dissonance is revealed through differences between judicial proceedings in the judicial process and the consideration of cases provided for in the Code of Ukraine on Administrative Offenses, including in decision forms, stages of consideration, etc. It is proposed to designate the consideration of cases of administrative offenses by the court as judicial proceedings and by other bodies as administrative procedure.

Key words: judicial process, administrative offences, administrative procedure, administrative process, administrative proceeding.

Ткаченко О.Г., Кравчук М.В. Місце процедури, провадження і процесу у адміністративно-деліктних відносинах з точки зору правосуддя та діяльності органів публічної адміністрації.

У статті здійснено аналіз застосування понять «процедура», «провадження» і «процес» у адміністративно-деліктних відносинах з метою визначення доцільності покладення на суд повноважень з розгляду справ про адміністративні правопорушення. Розкрито поняття «адміністративний процес» у трьох відомих ключових аспектах, виокремлено його загальні та специфічні риси. Визначено, що процес та провадження у широкому розумінні (як діяльність державних органів загалом) співвідносяться як загальне й особливе. Визначено аспекти поняття «адміністративне провадження». Встановлено, що провадження є частиною процесу, який може перериватися, змінювати суб'єктів, тобто процес складається з декількох проваджень, є їх сукупністю. Запропоновано вважати провадженням певний проміжок часу, що виділяється для розгляду конкретної справи. Натомість, процедура є сукупністю норм і правил, регламентованих законодавством для суб'єктів будь-якого правового порядку у розумінні статті 19 Конституції України та в контексті нового законодавства про адміністративну процедуру. Розкрито характеристики адміністративної процедури. Зроблено висновок, що адміністративний процес є універсальним для будь-якої сукупності проваджень державних органів, та це поняття не має впливу на подальші дослідження питання виключення розгляду справ про адміністративні правопорушення з судової компетенції. Своєю чергою, введення законодавцем термінології «адміністративна процедура» виключає можливість прирівнювання її правил і норм до судочинства. Проаналізовано, що судові процедури передбачаються процесуальними кодексами, але ними не визначено специфіки розгляду справ про адміністративні правопорушення. Визначено, що Кодекс України про адміністративні правопорушення не відповідає вимогам до сучасних судових процедур і за своєю суттю більш подібний до регулятора адміністративної процедури, що складало фундамент радянської спадщини. Вказаний дисонанс розкрито через відмінності судового розгляду у судовому процесі від закріпленого у Кодексі України про адміністративні правопорушення розгляду справ, зокрема у формулярах рішень, стадіях розгляду тощо. Запропоновано іменувати розгляд справ про адміністративні правопорушення судом судовим процесом, іншими органами – адміністративною процедурою.

Ключові слова: судовий процес, адміністративні правопорушення, адміністративна процедура, адміністративний процес, адміністративне провадження.

Problem Statement. The European Court of Human Rights has repeatedly emphasized that certain administrative offenses in Ukraine possess criminal characteristics. In 2020, the concept of a 'criminal offense' was introduced in Ukraine. However, this legislative innovation did not address the question of the advisability of adjudicating cases of administrative offenses by courts, as the Ukrainian Code of Administrative Offenses remained unchanged.

Current Status of Processing. The issues of distinguishing administrative offences from criminal ones, the advisability of extrapolating criminal procedures to administrative procedures, and synchronizing the consideration by courts of cases of administrative offences with the functions of justice have been given attention by a significant number of scientists, among whom are I.V. Boiko, I.L. Borodin, V.V. Halunko, O.V. Kuzmenko, H.V. Rybikova, etc. At the same time, to date, no consensus has been reached on these issues.

The aim of this research is to explore the potential advantages and drawbacks of transferring the adjudication of cases concerning administrative offenses from the judicial system to public administrative bodies. The primary motivations for such a transition include reducing the workload on the judicial system, potentially leading to expedited case resolution and decreased waiting periods for judicial decisions; streamlining and reducing costs associated with case adjudication processes, particularly through the utilization of less formal procedures within the realm of administrative law; facilitating more efficient application of administrative sanctions and management measures, as they can be promptly executed by public administrative bodies without the need to await a judicial ruling. Additionally, such a transition may contribute to enhanced accessibility to justice for citizens, reduction

of bureaucratic barriers, and improvement of interaction between citizens and governmental bodies. However, it is necessary to conduct research to assess potential negative consequences of such a transition, including possibilities of abuse of power, violation of citizens rights, and ensuring legal protection in the administrative process.

Presentation of the Core Material. Since Soviet times, there has been no significant differentiation between the spheres of justice and public relations. Cases of bringing to responsibility that were more compelling for the state apparatus were considered by the courts. Today, there are two special laws that separately regulate the administrative process (Code of Administrative Proceedings of Ukraine, hereinafter referred to as the 'CAP of Ukraine') and the administrative procedure (Law of Ukraine 'On Administrative Procedure'). According to these normative acts, the moderators of the process are judges, the moderators of procedures are bodies and officials of the public administration. According to the same provisions, judges carry out the protective function of individuals from violations of rights, freedoms and legitimate interests by bodies and officials of the public administration due to non-compliance with administrative procedures in the exercise of powers. The provision of the Code of Ukraine on Administrative Offences, according to which the courts consider some cases of administrative offences, which, by the way, is not provided for by the CAP of Ukraine, is nonsense. The question arises about the advisability of entrusting the courts with the authority to conduct an administrative procedure. Due to the urgent need to replace the Code of Ukraine on Administrative Offences (hereinafter referred to as the 'CAO') with a new, high-quality product of legal doctrines in the field of administrative and tort relations, the problems of consideration by courts of cases inherent in public administration bodies must be resolved before the adoption of new legislation in this area.

In our opinion, a clear understanding and correct application of the terms 'process', 'proceeding' and 'procedure' are significant in the context of administrative offences.

The terms 'procedure' and 'administrative procedure' are difficult to characterize in the system of national law and require consideration of conceptual issues. Despite the fact that the concept and content of administrative procedures are known, their research is insufficient, and there is no single theory regarding the determination of the legal nature of administrative procedures and their place in modern scientific research.

The need for the existence of a category called 'administrative procedure' can be explained by reflecting the judicial concept of the administrative process. In this case, the administrative procedure is defined as an independent institution that occupies a key position in administrative law and may also indicate the possibility of creating a separate branch of legal science dedicated to administrative procedures.

The main provisions that regulate the administrative procedure are enshrined in the Constitution of Ukraine. Thus, Article 19 stipulates that the legal order in Ukraine is based on the principles according to which no one can be forced to do anything that is not provided for by law. State authorities, local self-government bodies, as well as their officials, are obliged to act only on the basis, within the limits of authority and in the manner provided for by the Constitution and laws of Ukraine [1]. This norm of the Basic Law defines the fundamental principles of relations between government bodies and private individuals.

The category 'administrative procedure' and related terms have not been clearly defined in the field of administrative law science for a long time; therefore, this concept was considered from two sides. I.V. Boiko noted that firstly, the procedure, as indicated, is the order in which actions are performed to achieve a certain result. Secondly, according to science, the term 'administrative' is interpreted both as one that is associated with management and as one that is intended to serve. This dual interpretation of the basic category of administrative law determines the existence of two types of legal relations that arise in the field of public administration. Firstly, these are those relationships that are of a managerial nature, arise on the initiative of the ruling entities, in which private individuals are mainly entrusted with the performance of duties. Secondly, in relations with the public administration, private individuals exercise a significant part of their rights. These two types of legal relations need different principles and rules for their settlement [2, p. 116-117].

In turn, V.V. Halunko believes that administrative procedures are the procedure established by law for the consideration and resolution of individual administrative cases by public administration bodies in order to ensure the rights, freedoms and legitimate interests of individuals and legal entities, the normal functioning of civil society and the state [3, p. 276].

The main task of the researchers was to create a concept for the interpretation of legal categories that would be recognized by scientists regarding their essential content and serve as the basis for the development of relevant bills.

Finally, the Law 'On Administrative Procedure' defined a new way of interaction between the state, local governments, citizens and enterprises, including almost all areas of relations. The law became a true innovation. Now the decision-making procedure is more transparent and easy to understand. Competition rules similar to those existing in litigation were introduced. This phenomenon has once again shown that the obligation of a public authority to prove the credibility of its statements equalizes the conditions of the attracting body and the attracted person when further appealing the actions of this body in court. When considering cases of administrative offences by courts, such an equation does not occur. Moreover, when considering a case, the court checks the credibility of the position of the public administration body and its strict compliance with the administrative procedure. At the same time, the court is deprived of such powers as collecting evidence to prove a person's guilt. The determinant of most of the closed cases of administrative offences in the courts is the failure of public administration bodies to prove the guilt of a person beyond a reasonable doubt.

As you can see, a procedure specifies the established rules and order of performing a specific action. The characteristic of a procedure is a set of steps or stages that should be followed in solving a particular issue. This step-by-step scheme contains all legal acts; codes of judicial procedure are no exception.

At the same time, judicial and administrative procedures cannot be equated both due to the will of the legislator to regulate these issues by two different legislative acts, and because of their different legal nature: protection of individual rights in the first case, discipline of a person's behaviour in society.

In this context, attention should be paid to the example of separate regulation of judicial and administrative proceedings in Germany, which are called the process in the first case.

As I.L. Borodin and H.V. Rybikova noted, the functional purpose of administrative courts is not to impose penalties and punishments, but to abolish unlawful acts of public authority [4, p. 47].

We can only add that the functional purpose of any courts is not to acquire the authority to initiate administrative procedures and collect evidence for the purpose of imposing penalties and punishments for a person's failure to comply with the rules of behaviour in society, which harms the authority of the authorities and the order established by them.

The consideration and resolution of administrative cases related to the commission of administrative violations, as well as the conditions and procedure for bringing offenders to administrative responsibility or the application of other administrative coercive measures to them by the competent authorities on the basis of the law are recognized as proceedings in cases related to violation of administrative legislation.

The Law of Ukraine 'On Administrative Procedure' gives a specific definition that administrative proceedings are a set of procedural actions performed by an administrative body and procedural decisions taken to consider and resolve a case, ending with the adoption and, if necessary, execution of an administrative act [5].

The characteristics of the concept of 'administrative proceeding' in administrative and tort relations include the following aspects:

– organization and management of affairs: proceeding provides for the proper organization and systematization of the process of resolving administrative issues. They take place in competent bodies that have the authority to exercise control and apply sanctions;

– compliance with legal requirements: proceeding is based on the rules defined by law. This includes reviewing materials, interacting with the parties, collecting and evaluating evidence, making a decision;

– legal obligation: proceeding is based on the principles defined by administrative legislation and ensure the legal binding of decisions made;

– protection of the rights and interests of the parties: the purpose of the proceeding is not only to establish facts of violations, but also to ensure the protection of the rights and interests of all parties in the consideration of the case, including both offenders and victims.

Therefore, a proceeding is a period/periods of activity of an authorized entity to consider a specific case of an administrative offence. The characteristics of such activities are consideration of facts, arguments, decision-making and issuance of administrative acts or decisions.

At first glance, in their essential structure, judicial proceedings differ only in the subject carrying out such proceedings. However, in the course of practical research, we can understand that the distinguishing features of such proceedings from administrative ones are the lack of powers to exercise control, that

is, the court does not control compliance with the rules by individuals and does not initiate a case of an administrative offence; lack of evidence collection function to the detriment of the individual.

There are also different requirements for the content of the final solution. The forms of decisions in cases of administrative offences meaningfully reflect only a reference to the norm providing for liability and a brief content of this norm. There are no motivational parts in decisions of administrative bodies.

Article 106 of the Law of Ukraine 'On the Judiciary and Status of Judges' defines the failure to indicate in a court decision the reasons for accepting or rejecting the parties' arguments on the merits of the dispute as one of the grounds for disciplinary liability of a judge [6].

It should be noted that the CAO does not require specifying the reasons for making a decision when drawing up resolutions. Moreover, a dispute in cases of administrative offences cannot exist between any parties, which, by the way, excludes such a mandatory stage of the judicial process as judicial debate.

Another discrepancy with the requirements of the CAO is the deliberation room secrecy. Of course, judges do not allow themselves to make decisions without proper motivation while in the deliberation room. And all this clearly indicates that administrative and judicial proceedings are not identical concepts.

As for the process, it is considered to be a general term that can include both procedures and proceedings, as well as other aspects of administrative regulation. A characteristic feature of this concept is the framework aspect, which can cover the entire cycle of an administrative decision, including problem definition, decision-making and its implementation.

A genuine discussion of the essence of the administrative process in the administrative and legal science of Ukraine is determined by a complex of historical, legal and socio-economic factors influencing the development of the country as an independent state.

One of the key aspects is the legacy of Soviet law, including the system of administrative procedures and practices. In the decades following independence, Ukraine underwent important changes to its legal system, including administrative law. The current state of the administrative process in Ukraine is due to the desire to adapt it to the requirements of the rule of law and international standards.

The peculiarities of the legal system of Ukraine formation take into account national traditions and cultural characteristics, as well as determine priorities in the development of law. Reforms aimed at improving the administrative process involve the creation of a transparent, effective and guaranteed protection of rights of an administrative justice system.

Taking into account these challenges and transformations, the administrative and legal science of Ukrainian law is actively studying the essence of the administrative process, as well as looking for optimal solutions for modern society. This may include an analysis of the legal responsibility principles, procedures for appealing government bodies' decisions, protecting the rights of citizens during administrative proceedings and other aspects.

The concept of 'administrative process' in administrative law science can be interpreted in three most well-known aspects.

A broad understanding of the administrative process is defined as the procedure established by law for the consideration and resolution of individual specific cases arising in the sphere of public administration or courts (whether of general jurisdiction or specially created). This may include the consideration of cases related to administrative issues, not necessarily related to offences, but arising in the context of the activities of government bodies or other regulated institutions. It should be noted that this approach was inherited by modern legal science as the basis of Soviet legislation, the eradication of which is a demand of the Ukrainian people and a challenge to domestic science.

Narrow understanding of the administrative process: the process is considered as proceedings in cases of administrative offences and the application of administrative penalties to offenders. This is the so-called tort approach. It may include reviewing cases and making decisions regarding the commission of an administrative offence, as well as the application of administrative sanctions, such as fines or other restrictions. Meanwhile, such a narrowed approach has the same circle of power subjects as its predecessor. However, we noticed that the Law 'On Administrative Procedure' does not use the term 'process'. In contrast to the procedural decisions provided for by the CAP of Ukraine as interim in the course of ongoing proceedings, this law calls similar decisions procedural.

Finally, in a narrow sense, the administrative process is identified exclusively with legal proceedings. This approach is the least common. Scientists not associated with the field of justice do not recognize the peculiar monopoly of the judiciary on this concept. Meanwhile, the term 'administrative process' existed for 12 years in the CAP of Ukraine.

Of course, the administrative process should be considered as a type of legal process that has all the key features:

– it consists of resolving a specific legal matter, usually relating to an offence or conflict of rights;

– it represents activity in the application of legal norms, including acts related to laws;

– the content of the legal essence consists of legal results, including decisions and solutions to legal issues;

– it arises in accordance with the competence of the corresponding branch of state power according to the competence branching and represents the form of its legal activity;

– it is a dynamic concept that reflects the complex activities of the relevant government bodies, through which their various functions, such as rule-making and law enforcement, are realized;

– it includes successive stages – from beginning to completion.

The specific features of the administrative process can be formulated as follows:

a) it deeply interacts with the country's governance system and its legal forms, carried out in a legal context;

b) it leads to the emergence of public relations regulated by the rules of procedural law.

Without exception, all scientists agree with the thesis about the mobility of the process phenomenon.

At the same time, O.V. Kuzmenko notes that any statement about the limitation of the legal process within the framework of the subject composition is actually equal to the point of view that the general phenomenon of the process is the progress or regression of only a separate type of objects. However, according to the logic of this concept supporters, the development of all other phenomena cannot be called a process [7, p. 11].

There are similarities in the relationship between the concepts of 'administrative process' and 'judicial process'. This is always a set of procedures regulated by law, implemented by authorities in a certain period of time on a specifically defined issue, called proceedings.

However, according to its functional purpose, the administrative process regulates managerial practices, while the judicial process concerns exclusively the function of administering justice.

In our preliminary studies, we have already analysed that the provisions of the CAO contain elements of procedural codes. Based on the results of this study, we can specify that the code contains both norms of the administrative process and norms regulating the judicial process.

Moreover, our point is that there is no reason to regard an administrative procedure, or any procedure at all, as a static phenomenon. This is due to the fact that the procedure follows a specific order and algorithm, suggesting a sequential transition from one stage to another. As a result of reaching the final stage, there is usually a transformation or modification of the participants' status in the relevant legal relationship, which indicates the 'mobility of the relevant legal relationship. Therefore, both process and procedure are dynamic phenomena. The static nature of the procedure should be considered from the point of view of the independence of its unchanged state from the subject of the offence or appeal, the constancy of application in the context of a non-discriminatory approach, the stability of the legislation that defines it, but in no case from the point of view of the phenomenon during its implementation.

Conclusions. The study of the relationship between the concepts of 'procedure', 'proceeding' and 'process' in administrative and tort relations led to the conclusion that process and proceeding are related as general and specific. A proceeding is a part of a process, and a process is a set of proceedings. A proceeding is a period/periods of activity of an authorized entity to consider a specific case of an administrative offence. In practical terms, judicial proceedings differ from those of other bodies and officials, but such a difference is not the merit of the Soviet CAO. Judges 'adjust' powers identical to public administration bodies to the function of administering justice, applying the analogy of the law by introducing judicial rules established for them by procedural codes and the Law 'On the Judiciary and Status of Judges', and thereby creating a judicial proceeding unique to the consideration of cases about an administrative offence: without the stage of judicial debate, but with the stage of entering the deliberation room and the motivational part of the resolution.

In turn, the procedure is the order, the rules, which the subjects to whom they are addressed must comply. Since the adoption of the Law 'On Administrative Procedure,' which does not apply to the administration of justice, it is inappropriate to deny that the administrative procedure in the context of the topic under study is characterized by: a) order; b) the subject of implementation, that is, the public administration body; c) constant participation of the public administration body in monitoring

compliance with the legal order in the area of its activities; d) initiative to initiate a case by a public administration body.

The legal procedure for the initial consideration of a case is not provided for by independent law. In order to separate the activities of the court as a separate branch of government with a unique function, it is fair to operate the concept of 'judicial process' at the same level as the concept of 'administrative procedure' for other bodies.

In our opinion, it is possible to combine the judicial process and the administrative procedure into the general concept of the administrative process. However, in the context of the issue of the court (a judicial body or a public administration body) role in the consideration of cases of administrative offences, the thesis about the non-inherent features of the administrative process in judicial consideration of administrative offence cases has lost its relevance, since it was not confirmed as a result of the research.

In the future, it is necessary to study and specify the functions of justice and compare them with the functions of public administration in order to clarify the status of the court when considering administrative offences cases.

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