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INSTITUTIONAL FEATURES OF SERVICE-TORT LAW[1]

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Service-tort law is regarded by the author as a complex institute of administrative (administrative-tort) law, which takes place within the framework of service law.

The author determines specific classification of substantive norms of service-tort law by the criterion of legal content.

Considers service and material responsibility of public servants as a public form of disciplinary coercion, which lays in the application of the rights restorative sanctions for damage inflicted to the property of state (municipal) body as a result of an employee's service tort.

Keywords: administrative law, administrative-tort law, service-tort law, service legal relations, service and financial responsibility, service and disciplinary responsibility.

Intensive development of modern administrative law as a legal branch and relevant area of the Russian legislation stipulates refinement of the subject of its legal regulation, reforming of nearly all its institutes.

Recently, in the administrative-legal science have appeared works, which substantiate the existence of administrative-tort law [4, 72; 1, 256; 9] as a subbranch or even as a branch of the Russian law [10, 10-13; 13]. But so far none of the scientists has raised the issue about the need to build within administrative law

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the institute of service-tort law, which would include the norms of service legislation, whose main purpose is to prevent deviation of service legal relations from proper implementation and which are the means of their ensuring.

Any legal institute is a part of the largest and relatively independent unit of law system – branch (sub-branch) of law. Service-tort law is an institute of service law, the existence of which was firstly substantiated by Yu. N. Starilov, who had defined service law as law of public service (state and municipal) – sub-branch of administrative law governing public-service relations that develop in public service bodies concerning its organization and functioning, implementation of competence of state bodies and bodies of local self-government [14, 445]. The idea of forming service law as a system of norms governing relations in public and municipal service has received support of a number of other scholars [18, 107].

Service-tort law is a comprehensive institute of administrative law within the framework of service law. At the same time, it must be admitted that between administrative-tort and service-tort law must be a definite relationship. Not being a supporter of distinguishing administrative-tort law as an independent branch of law, we support the position of those scientists who uphold its independent status of a sub-branch. At that, their views on the institutional content of administrative-tort law do not match.

Thus, some scholars define administrative-tort law as a specific unified complex of legal institutes that combine substantive and procedural administrative-legal norms governing the grounds and procedures for application by authorized entities of administrative jurisdiction of measures of administrative responsibility (administrative punishments) for administrative offenses.

According to Yu. M. Starilov, administrative-tort law covers: types, measures of administrative coercion and the procedure through which they are applied; determination of bodies and officials dealing with the cases of administrative offences; regulation of the principles of proceedings on cases of administrative offences [11, 65]. Special position is occupied by D. N. Bakhrakh, who has complemented the content of administrative-tort law by issues of disciplinary and financial responsibility using as the title one of the sections of the textbook on administrative law of Russia "Disciplinary Coercion as a Method of Public Administration" [3].

Given that disciplinary responsibility of public servants has administrative-legal nature and is applied within the framework of service relations governed by the norms of service law, and, consequently, to it can be applied the definition of "disciplinary administrative responsibility" [6, 65-77], service-tort law is an institute of administrative-tort law as a sub-branch of administrative law.

Thus, service-tort law within the framework of service law represents itself a comprehensive institute of administrative law, being at the same time an institute of administrative-tort law. When addressing the issue of determining the boundaries of service-tort law one must conclude that the boundaries of service-tort law should be defined by the scope of service relations that arise both in connection with the commission by officials of disciplinary offenses (service torts) associated with non-compliance with service discipline and bringing perpetrators to service and disciplinary responsibility, and in connection with infliction by them of material damage to the property of state (municipal) body. In both cases the norms of service-tort law will be aimed at ensuring service relations (see read more: Channov S. E. "Official Legal Relation: Concept, Structure, Securing") [19, 88-137].

Feature of service-tort law is its integrated nature. One of the most significant factors that substantiates the integrated nature of the institute of service-tort law is the existence of a number of sub-institutes included in the structure of the institute of service-tort law. Such sub-institutes include:

a) sub-institute of disciplinary responsibility of public (municipal) servants;

b) sub-institute of financial responsibility of public (municipal) servants for infliction damage to property of a state (municipal) body.

Another factor that confirms the complexity of the legal regulation of the institute of service-tort law is the inter-branch nature of the legal regulation of disciplinary and financial responsibility of public (municipal) servants within the framework of service relations, the application of which takes place in the case of service torts committed by servants. This is evidenced by the presence of totality (complex) of interrelated legal norms on application these measures that are contained in the various branches of law (such as administrative and labor one), which govern qualitatively homogeneous public relations.

Despite the identity of many concepts and institutes, disciplinary responsibility within the borders of labor and administrative law has serious differences that suggest that there are grounds for differentiation of disciplinary responsibility by subjects' composition and distinction between two separate kinds of legal responsibility, such as:

1) service and disciplinary responsibility;

2) disciplinary and labor responsibility.

Peculiarity of differentiation the disciplinary responsibility of public servants in the system of disciplinary responsibility and attributing it to the *service and disciplinary responsibility* is associated primarily with the circle of persons to which it applies, the sources of its legal regulation, the broader notion of disciplinary

offence, the target and the functional purpose, essence and content of legal relations in which public servants are brought to responsibility, the types of disciplinary penalties and the procedure for their application.

As for the financial responsibility of public (municipal) servants, despite law restorative (property) nature of penalties, financial responsibility itself in service law has a public nature; this, in turn, is a prerequisite for differentiation of financial responsibility, as a kind of legal responsibility, into two types:

1) service and financial one – sub-institute of service-tort law that has administrative-legal nature, which causes necessity of its detailed legal regulation by the norms of service-tort law;

2) material and labor one – responsibility of employees under labor law norms.

Service-tort law is an institute of public law, so if within the framework of service legal relations as a result of non-performance or improper performance by public (municipal) servant of its official duties a state (municipal) body suffers property damage, it means that there is a disciplinary offence (service tort), for which, along with disciplinary penalty, service and financial responsibility of administrative-legal nature should be applied to the public (municipal) servant. This type of responsibility is to be considered as a form of disciplinary coercion, a measure of additional disciplinary impact of law restorative nature.

It seems that the *service and financial responsibility* of public servants can be defined as a kind of disciplinary coercion measures of public nature, which consists in applying of law restorative sanctions for harm to property of state (municipal) body inflicted by a servant as a result of service tort, and which is an additional measure of disciplinary impact.

Given that in service and administrative-tort law, whose institutes also include service-tort law, we can distinguish both substantive and procedural norms, it can be concluded that another feature of service-tort law institute is that it contains norms of both substantive and procedural law.

The theory of law notes that if substantive law norms define the content of rights and duties, then procedural ones regulate the procedure for the execution of the first number of norms [16, 457]. In conducting a study of administrative-tort law norms, O. S. Rogacheva determines their characteristics, what may form the basis for analysis of the peculiarities of service-tort law norms [13, 187-188].

Thus, the substantive norms of service-tort law:

- legally enshrine official duties, restrictions and prohibitions for public and municipal servants, provide rights, warn of unfavorable consequences of legal requirements breach;

- have their own functional orientation. By content, these norms are of prohibitive, as well as of binding nature, non-performance or improper performance of which is a disciplinary offence (service-disciplinary tort), which entails bringing of servant to disciplinary responsibility and, in case of infliction damage to property of state (municipal) body within the framework of service legal relation – to service and financial responsibility;

- establish general provisions and principles of service legislation that governs disciplinary and service and financial responsibility of public (municipal) servants; kinds of subjects of disciplinary and service and financial responsibility, as well as subjects of disciplinary and service and financial jurisdiction; kinds of disciplinary penalties and general rules of their imposition; as well as separate compositions of disciplinary offences.

According to Yu. M. Starilov, in accordance with legal content substantive administrative-legal norms should be classified as follows: 1) binding norms (requiring commission of certain actions); 2) prohibitive norms (which bans certain activity or actions); 3) restrictive norms (imposing restrictions on certain activity or actions); 4) permitting or permissive norms (authorizing a recipient to act on its own discretion); 5) empowering or enabling norms (provide relevant bodies and their officials public-authoritative powers to implement special functions of public administration); 6) stimulating or encouraging norms (aimed at stimulating, ensuring of proper conduct of managerial relations participants); 7) registration or notification norms; 8) advisory norms [15, 402].

Analysis of substantive norms of service-tort law allows one to distinguish their following species classification in accordance with legal content:

1) binding norms (which include norms prescribing servants to observe service discipline, to protect state and municipal property);

2) prohibitive norms (contain requirements to observe the prohibitions established in connection with passage of state or municipal service);

3) restrictive norms (establish the requirement to comply with restrictions established by service legislation);

4) authorizing norms (provide representative of employer the right to bring employees guilty of a disciplinary offense (disciplinary tort) to disciplinary responsibility).

Procedural norms of service-tort law, like, in general, procedural norms and relations, are not external in respect of responsibility form of its existence, but a necessary component of responsibility, which itself represent a unity of substantive content and procedural form [13, 188]. At that, according to R. V. Shagieva,

the specificity of procedural norms does not deprive them of constructive qualities of the norms of law, does not exclude from the group of social norms and does not change any of the mandatory properties of legal norm [18, 20].

As noted by Yu. N. Starilov, procedural norms govern relations concerning the real execution of the provisions contained in the material legal norms, and in each specific institute of administrative law can be detect specific procedural provisions and procedures [15, 400].

Procedural norms of service-tort law determine: objectives and principles of disciplinary proceedings; stages thereof; procedural deadlines; participants to disciplinary proceedings, their procedural rights and obligations; types and conditions of the use of evidence; procedural results of disciplinary proceedings.

Procedural norms of service-tort law also include similar norms governing the procedure of bringing public (municipal) servants to service and financial responsibility within the framework of official legal relations.

Despite the fact that the subject matter and method of legal regulation in each branch of procedural law have their own specifics, the implementation of disciplinary proceedings occurs within a single legal (law-enforcement) service-tort process as an integral part of administrative process, which has one-type stages, similar mechanisms and procedures for recovery of violated or disputed rights.

Being an institute of service law – sub-branch of administrative law, service-tort law has a complex inter-branch nature. As you know, a comprehensive inter-branch legal Institute brings together similar, equal norms related to various branches of law. The complex interrelation of public relations objectively defines the existence of such normative formations in the system of law. At that, the most major inter-branch (complex) legal institutes are expressed, as a rule, in a relevant complex legislation branch [5, 448].

The problem of inter-branch institutes in law is not new. Back in 1947, V. K. Reiher theorized about the existence of fundamental and complex branches of law [12, 189-190]. His theory does not coincide with the common in jurisprudence doctrine of strict sectorial structure of law. V. K. Reicher's position was supported by Yu. K. Tolstoy speaking, however, with the assertion that the complex branches of law as opposed to the fundamental ones do not have place in the system of law, and they are given a conditional place depending on the purpose of systematization in the systematics of norms [17, 42-45].

The idea of the existence of complex branches of law initially was supported by the O. S. Ioffe and M. D. Shargorodskii, who considered it beneficial from the point of view of practical applications for the systematics of existing legislation.

However, they objected to the statement of V. K. Reicher that complex branches could enter in the system of law, considering it impossible [7, 362-365]. With similar standpoints E. A. Kirimova criticizes the existence of complex branches of law asserting that on the basis of understanding of the subject matter and method of legal regulation as the sole criteria for classifying branches of law "complex branches" of law do not exist, and there are only complex branches of legislation [8, 8]. According to S. E. Channov, in these cases the denial the possibility of building complex branches is based on mismatch complex branches with traditional criteria of systematization of law – unified subject matter and method [18, 106].

In fact the service-tort law is a symbiosis of branches of public and private law, which emerges and develops at the intersection of these branches and, consequently, is a complex legal institute. This approach originates in the Russian doctrine of the general theory of law, which justifies the concept of complex branches of law and complex legal institutes that include the norms of different sectoral affiliation, are cross-cutting in the normative material of law due to the diversity and tiered nature of expression of legal norms.

This situation is due to the similarity of goals and tasks aimed at ensuring service relations. All legal norms, which form the legal institute of service-tort law, have one target purpose – ensuring service relations, which is achieved through the application of disciplinary responsibility against public (municipal) servants as the primary type of disciplinary coercion within the framework of official legal relations, as well as measures of financial responsibility aimed at compensation for damage inflicted to state (municipal) bodies in connection with the failure of state (municipal) servants to perform their official duties.

There are considerations about the existence of, along with inter-branch, also intra-branch complex legal institutes, within the framework of which occurs a kind of secondary rearrangement of the norms of this branch of law that are covered by different sectoral institutes, as well as existence of general legal complex institutes combining homogeneous norms of all branches of law [2, 156-161].

We believe that service-tort law, being a complex inter-branch institute, in the future have to become an example of *intra-branch complex institute of administrative law* that covers within the framework of official relations and at the same time within the framework of administrative-tort law the norms, which regulate the measures of disciplinary and service and financial responsibility, applied to state and municipal servants for committing service torts.

Thus, within the framework of service law the service-tort law is a complex institute of administrative law, being at the same time an institute administrative-tort

law. Factors supporting the complex nature of the studied institute are: 1) inclusion in its structure such sub-institutes as service-disciplinary and service and financial responsibility of state (municipal) servants; 2) inter-branch legal regulation of application of responsibility measures for the commission of service torts (by the norms of administrative and labor law); 3) institute of service-tort law contains provisions of both substantive and procedural law.

References:

1. *Administrative Law of Russia: Textbook* [Administrativnoe pravo Rossii: uchebnik]. Under edition of N. M. Konin, Yu. N. Starilov, Saratov: 2006.
2. Bazylev B. T. Legal Responsibility as an Institute of Soviet Law [Yuridicheskaya otvetstvennost' kak institut sovetskogo prava]. *Aktual'nye problemy teorii sotsialisticheskogo gosudarstva i prava – Actual Problems of the Theory of the Socialist State and Law*, Moscow: 1974.
3. Bakhrakh D. N. *Administrative Law of Russia: Textbook. 6th edition* [Administrativnoe pravo Rossii: Uchebnik. 6-e izd.]. Moscow: 2011.
4. Bakhrakh D. N., Rossinskii B. V., Starilov Yu. N. *Administrative Law: Textbook for Higher Schools. 2nd revised and enlarged edition* [Administrativnoe pravo: Uchebnik dlya vuzov. – 2-e izd., peresmotr, i dop.]. Moscow: 2005.
5. Golovistikova A. N., Dmitrieva Yu. A. *Theory of State and Law: Textbook* [Teoriya gosudarstva i prava: uchebnik]. Moscow: Eksmo, 2005.
6. Dobrobaba M. B. Substantive Grounds of Disciplinary Proceedings in the Civil Service of the Russian Federation [Material'no-pravovye osnovaniya distsiplinarnogo proizvodstva v sisteme gosudarstvennoi sluzhby Rossiiskoi Federatsii]. *Nauchnye trudy Evraziiskoi akademii administrativnykh nauk – Scientific Works of the Eurasian Academy of Administrative Sciences*, vol. 2, Moscow: publishing house of Volgograd Institute of Economics, Sociology and Law, 2007.
7. Ioffe O. S., Shargorodskii M. D. *Issues of the Theory of Law* [Voprosy teorii prava]. Moscow: 1961.
8. Kirimova E. A. *Legal Institute: Concept and Types: Study Guide* [Pravovoi institut: ponyatie i vidy: ucheb. Posobie]. Under edition of I. N. Senyakin, Saratov: Saratov State Law Academy, 2000.
9. Kirin A. V. *Administrative-tort Law (theory and legislative foundations): Monograph* [Administrativno-deliktnoe pravo (teoriya i zakonodatel'nye osnovy): monografiya]. Moscow: Norma, INFRA-M, 2012.

10. Kramnik A. N. *Administrative-tort Law. General Part: Study Guide for Students of Higher Schools* [Administrativno-deliktnoe pravo. Obshchaya chast': posobie dlya studentov vuzov]. Minsk: 2004.

11. *General Administrative Law: Textbook* [Obshchee administrativnoe pravo: uchebnik]. Under edition of Yu. N. Starilov, Voronezh: publishing house of Voronezh State University, 2007.

12. Raikher V. K. *Socio-historical Types of Insurance* [Obshchestvenno-istoricheskie tipy strakhovaniya]. Moscow: 1947.

13. Rogacheva O. S. *Effectiveness of the Norms of Administrative-tort Law: Monograph* [Effektivnost' norm administrativno-deliktnogo prava: monografiya]. Voronezh: publishing house of Voronezh State University, 2011.

14. Starilov Yu. N. *From Recent Publications: Memories, Ideas, Opinions, Doubts...: collection of selected scientific papers* [Iz publikatsii poslednikh let: vospominaniya, idei, mneniya, somneniya...: Sbornik izbr. nauch. Trudov]. Voronezh: publishing house of Voronezh State University, 2010.

15. Starilov Yu. N. *Course of General Administrative Law. In 3 volumes. Vol. I: History. Science. Subject Matter. Norms, Subjects* [Kurs obshchego administrativnogo prava. V 3 t. T. I: Istoriya. Nauka. Predmet. Normy. Sub"ekty]. Moscow: NORMA, 2002.

16. *Theory of State and Law: Textbook* [Teoriya gosudarstva i prava: uchebnik]. 2nd revised and enlarged edition, under edition of A. S. Prigorkin, Yu. A. Dmitriev, Moscow: Vysshee obrazovanie, 2008.

17. Tolstoi Yu. K. About the Theoretical Foundations the Civil Law Codification [O teoreticheskikh osnovakh kodifikatsii grazhdanskogo zakonodatel'stva]. *Pravovedenie – Jurisprudence*, 1957, no.1.

18. Channov S. E. Service Law as an Emerging Branch of Russian Law [Sluzhebnoe pravo kak formiruyushchayasya otrasl' rossiiskogo prava]. *Vlast' Government*, 2011, no. 1.

19. Channov S. E. *Official Legal Relation: Concept, Structure, Securing* [Sluzhebnoe pravootnoshenie: ponyatie, struktura, obespechenie]. Moscow: Os'-89, 2009.

20. Shagieva R. V. *Procedural-legal Norms and their Exercising in a Socialist Society* [Protsessual'no-pravovye normy i ikh realizatsiya v sotsialisticheskom obshchestve]. Kazan: 1986.