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## Action and Procedure: The Paradigm Actualization (in the Context of Current Legislative Reforms)

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*The article is devoted to the ontological problems of an action and a civil law procedural form arising from the development of the Concept of the unified Civil Procedure Code of the Russian Federation and the adoption of the Administrative Proceedings Code.*

*The author proves a thesis of the immutability and legal relevance of a historically generated paradigm – actio habere-ius habere. Despite their contradictory, modern legal reforms demonstrate inexhaustibility of an action, methodological significance of actionability in the development of procedural safeguards and judicial procedures, a high creative potential of the traditional paradigm of an action and a de lege ferenda procedure.*

*Keywords: civilistic procedure, action, paradigm, proceedings in cases arising from public legal relations, judicial procedure.*

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### Introduction to the Problem

The second decade of the 21<sup>st</sup> century marked the aspiration to create a common procedural space in Russia – in December 2014 the Committee of the State Duma of the Federal Assembly of the Russian Federation approved a unified Concept of the Civil Procedure Code of the Russian Federation<sup>1</sup>. Almost at the same time – in February 2015 – the Administrative Proceedings Code was adopted<sup>2</sup>.

Development of a unified Civil Procedure Code of the Russian Federation is based on the idea of the ontological unity of the civilistic procedure – with a diversity of judicial

procedures<sup>3</sup>. The unification of a procedural form of judicial protection in the differentiation of procedural means and methods embodied in judicial procedures is a dual trend of the contemporary civilistic procedure that acquires legal shape.

In this context, the adoption of the Administrative Proceedings Code looks like dissonance undermining the very idea of unity of the procedure. Information content of the new code was the legal regulation of proceedings in cases arising from the public (replaced to “from the administrative”) legal relations, the algorithm of which is borrowed from the Civil

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Procedure Code of the Russian Federation. From a procedural point of view, the Administrative Proceedings Code is a calque of a procedural form established in the Civil Procedure Code of the Russian Federation. However, the text of the law introduced the concept of an “administrative statement of claim”, “administrative claimant”, “administrative defendant”.

Does the concept of the civilistic procedure change in this context? Can we speak of the change of ontology of the category of “action”, which is central for understanding of the judicial protection and the nature of the civilistic procedure? Whether the new legal realities indicate of its “splitting” and diversification?

We believe that we should not hurry in this matter. The “novelty” of legal terminology is not a complete proof of conceptual changes.

### **Legislative contradictions**

It is known that development of the draft Concept of the unified CPC of the Russian Federation and the draft the Administrative Proceedings Code was carried out simultaneously without coordination with each other. Let us compare: Subsection 3 of the Concept of the unified CPC of the Russian Federation (as amended on December 8, 2014) is referred to as “Proceedings in cases arising out of public legal relations” (includes all categories of cases, the proceedings of which is regulated by the Civil Procedure Code of the Russian Federation and the APC of the Russian Federation, including cases arising out of administrative legal relations). At the same time the Administrative Proceedings Code describes the proceedings in cases arising from public legal relations (regulated by the CPC of the Russian Federation) as its object of regulation (although under a different name: “Proceedings in cases arising from administrative legal relations”). This suggests *de lege ferenda* the removal of this kind

of proceedings from the Civil Procedure Code of the Russian Federation (at the same time the Administrative Proceedings Code withdraws the Civil Procedure Code of the Russian Federation from the subject of legal regulation, as well as some other proceedings: in cases of involuntary admission of a citizen in a psychiatric hospital and compulsory psychiatric examination; in cases of the award of compensation for violation of the right to trial within a reasonable time or the right to the execution of judicial decision within a reasonable time<sup>4</sup>).

### **On the concept of “administrative proceedings”**

The dilemma “civil proceedings” – “administrative proceedings” cannot be solved by the adoption of the Administrative Proceedings Code; the CAP does not have an independent procedural concept; the new code does not create a new form of judicial protection (as well as the possible establishment of administrative courts)<sup>5</sup>.

The term “administrative proceedings” introduced in S. 2 Art. 118 of the Constitution of the Russian Federation in 1993 did not have a conceptual content and led to the ambiguity of interpretation in practice: (1) administrative proceedings are part of the civilistic procedure – a position elaborated in the rulings of the Constitutional Court, the Supreme Commercial Court of the Russian Federation<sup>6</sup>; (2) administrative proceedings are a special procedure for consideration of administrative cases according to the rules of the Code of Administrative Offences, and therefore do not belong to the civilistic procedure – a position elaborated in a number of rulings of the Supreme Court of the Russian Federation<sup>7</sup>.

In the procedural doctrine of the second half of the 20<sup>th</sup> century a civil procedural nature of a) legal regulations governing judicial proceedings in cases arising from administrative (since 2002 –

from public) legal relations, as well as b) judicial proceedings in such cases was never in doubt<sup>8</sup>.

Accordingly, the withdrawal of the rules and procedures of one legislative act (CPC) and their transfer to another (the Administrative Proceedings Code) does not change the legal nature of these rules and procedures as the civil law proceedings.

Terminological novels (“administrative statement of claim”, “administrative claimant”, “administrative defendant”) do not give rise to an action and cannot produce it by themselves.

The potential opportunity of protection is associated with two prerequisites: (1) an immediate object of protection makes up a subjective right; (2) a subject of the procedure has private-law roots. In any case, there must be a dispute on the right that generates a claim correlated with a legal relationship in dispute by a private interest. Even from the viewpoint of the theory of an administrative action the directness of protection of the right and the presence of the subjective right (subjective public right) were thought as necessary messages for the action as the procedural defence means<sup>9</sup>. As is well known, the idea of subjective public rights has not been received by the Russian legislation.

#### **On the direct (actionable) and indirect mechanism of judicial protection**

The idea of creating direct (actionable) judicial protection of constitutional rights and freedoms was discussed when developing the concept of the Fundamentals of the procedural law in the early 1990's. The draft Civil Procedure Code of 1995 proposed “special actionable proceedings” instead of “proceedings in cases arising from administrative (according to the terminology of the CPC of RSFSR, 1964) legal relations”. But because the mechanism of judicial protection was still indirect (through challenging

acts, actions and decisions of officials, but not through protection of the right of a claim to the state, other public entities), the algorithm of judicial proceedings on the draft Civil Procedure Code of 1995 reproduced the algorithm of proceedings of the Civil Procedure Code of 1964. For this reason, the final version of the draft Civil Procedure Code in 1997 returned to the idea of the type of proceedings – “the proceedings in cases arising from public legal relations”. At the same time, we should note fundamental achievement of the CPC of 2002: essentially, the code created a universal mechanism of judicial protection of the legitimate interests related to the implementation of constitutional rights (albeit in the indirect way). *De facto* all acts, decisions, actions (inaction) of bodies, officials and other entities vested with public powers could be challenged in court, if the applicant had a private-law interest in that. The category of “public legal relations”, according to the CPC of 2002, was of no hermeneutic, but ontological meaning; it marked a new qualitative level in the creation of the procedural guarantees in the implementation of constitutional rights and freedoms.

It is important to note that the realization of the idea of the direct judicial protection of constitutional rights and freedoms is not possible only through the novelization of procedural law (a decade of legislative experience in the creation of the RF CPC confirmed this) – there should be a different concept of the mechanism of realization of constitutional rights and freedoms of a man and a citizen in the regulatory legal relations, in cooperation with the state, executive authorities. The current realities are that it is impossible to realize many constitutional rights and freedoms without entering into legal relations with the relevant state (or other) bodies, officials, state or municipal employees. >>>

These are the origins of the indirect mechanism of judicial protection of constitutional

rights and freedoms, which apprehended the current procedural legislation (transfer of the existing rules of the Civil Procedure Code into the Administrative Proceedings Code does not change the approach). The indirect mechanism of protection cannot derive any action, other than some kind of formal structure when an action is defined as any legal requirement, regardless of its nature. Such formalism is not only invalidates the action, but it also dilutes the essence of judicial protection.

The direct mechanism of judicial protection of constitutional rights and freedoms, the subject of which would be a dispute about the law, could seek a status of the actionable, and, therefore, the procedural means of protection – a status of an action (there is no need to call it administrative in this case).

#### **On the nature of procedures in dealing with cases of public legal relations**

Background to the issue on understanding the nature of judicial procedures in cases arising from administrative legal relations (including, in the narrow sense, as it is understood, for example, by the Administrative Offences Code of the Russian Federation) has formed in the procedural doctrine.

Since the second half of the 20<sup>th</sup> century the Russian processualists defended a thesis of the identity of the procedural nature of cases arising from the administrative legal relations and cases of action proceedings<sup>10</sup>. With the introduction of the 2002 Code of Administrative Offences the administrative cases on appeal of decisions and actions of administrative bodies related to the imposition of administrative penalties within the jurisdiction of the court are considered by the rules of the Code of Administrative Offences (but not by the CPC as it was before). However, such a transfer of legislative rules (from the Civil

Procedure Code to the Code of Administrative Offences) has not changed the nature of judicial proceedings: they remain civil procedural, i.e. they are subordinate to the general principles and rules of the civil procedural form historically developed and fixed in the RF CPC. Let us compare: cases of the similar nature after 2002 are also “under the jurisdiction” of the Arbitration Procedure Code (chapters 25-26). It would be strange to argue the different nature of the procedural form of their consideration depending on the source of legal regulation.

Judicial proceedings in cases on appeal of administrative penalties have special character in relation to the judicial proceedings in cases arising from public legal relations (just as the cases arising from the administrative legal relations are a special case of cases arising from public legal relations). Legislative “downgrading” of proceedings in cases arising from public legal relations, its leveling with the proceedings in cases arising from actually administrative legal relations undertaken in the Administrative Proceedings Code do not change the essence of the above ratios and seem ontologically flawed.

Similarly, judicial proceedings in cases arising from public legal relations are a special case of the civil (civil law) procedural form that is subordinate to its general laws. They may be classified as special – by characteristics of the methods of judicial protection, different (in comparison with the ordinary proceeding) ratio of the private and the public, a significant proportion of the powers of the court *ex officio*, which is due to the need for procedural harmonization of legal relations in judicial protection.

Differentiation of judicial proceedings does not presuppose the diversification of the procedure and the procedural form, but, on the contrary, it is methodologically designed to perform the opposite function: to promote the ontological unity of the civilistic procedure ensuring, on

the one hand, freedom of its development, on the other hand, maintaining a system-forming center-piece.

Even in countries where the administrative justice is seemingly procedurally detached, the legislator seeks to ensure functional integrity of the procedure. The most vivid (and often cited) example: in Germany, there are five types of proceedings (including administrative, as well as financial and those in social cases that are defined as the types of administrative proceedings), each of which has its own legal regulations. However, the base and the backbone still remains CPC (ZPO), and the legal acts regulating certain types of proceedings are included in the system of sources of the civil procedural law<sup>11</sup>.

Features of methods of activity are inextricably linked with the function of activity understood as its internal component and guide. In the civilistic procedure such a role is played by an interest as an internal component and guide of the procedure (understood as activity, relations, legal relations and their combinations). The civil (civil law) procedural form that characterizes the dynamic component of the procedure and determines the order and sequence of procedural actions and procedural activities in general are the outward expression of methods and means of justice. Accordingly, we should judge the nature of a judicial procedure or a type of proceedings in procedure by the methods embodied in them.

Neither the subject, nor the object, nor the protection authority, nor, especially, a source of legal regulation do not predetermine the legal nature of procedures by which judicial protection is provided.

The question of determining the nature of legal proceedings, the nature of procedural means and methods of protection is a question of basic relations in the system: the subject-object-method of the procedure that inevitably brings us to the historical paradigm of the civilistic procedure

built by the Roman procedure: *actio habere-ius habere*.

### **On the evolution of the paradigm *actio habere-ius habere***

The whole history of the civilistic procedure and judicial procedures are a reflection of development of the paradigm *actio habere-ius habere*. Actually, in the ratio of *actio-ius* or *ius-actio* lies the question: What comes first: the right to be protected or the procedure and procedures to protect it? Whether the subject (or the object) of protection predetermines the nature of procedures, or the procedures and the procedure “create” the law as a result of the procedure? The Romans were convinced that the procedure creates the law, the procedural form is primary.

Scientific understanding of the Digest of Justinian in the middle of the 19<sup>th</sup> century led to “reformatting” of the Roman formula: the ratio *actio-ius* transformed into its contradiction – *ius-actio*, in full accordance with the dialectical law of negation of negation.

This phenomenon in the science of civil procedural law became known as the substantive-law theory of action and the right of action (the founding fathers: F.K. Savigny, G. Puchta, B. Windsheid). Its methodology was based on the translation of logic of the existing material (the promissory type) legal relations to the subject of the procedure, and then to the procedure itself. The right of action is a metamorphosis of the subjective civil law of the creditor (F.K. Savigny<sup>12</sup>), and the action is “annexed” by the law making its element (G. Puchta<sup>13</sup>). B. Windsheid introduced the concept of “claim” (*Anspruch*) and was the first to reveal the differences in the German (19<sup>th</sup> century) and the Roman understanding of the action. The German doctrine of the 19<sup>th</sup> century confirms derivation of the action from the subjective law. The law is productive, the action is a product; the legal order

is the order of law. The Roman understanding of the action is different: the action expresses relations between the disputing parties; the action is not a product, but something independent and primordial, and the legal order is the order of the judicially realized claim. The claim is judicial persecution – consequentia of the law – the logic built by Bernhard Windscheid when analyzing the Roman view on the action.<sup>14</sup>

The end of the 19<sup>th</sup> century actualizes debates on the ratio of the claim (*Anspruch*) and the subjective civil law. E.R. Bierling thought of the claim as a part of the subjective law, whereas C. Crome, E. Zitelmann, A. Thon argued for independence of the claim as the right of the action<sup>15</sup>. In this dispute, we can see different approaches to the interpretation of the ratio of the Roman *actio* and *ius*: *actio* is derived from the relation giving rise to the possibility of the judicial claim; judicial protection and judicial authority correlated with each other without becoming identical. But still, the roots of the action and the right of action were seen in the perspective of the private material law.

In the same period, another view on the nature of the ratio of *actio* and *ius* emerges: Theodor Muther, the opponent of Windscheid, saw the right of action as an independent right of the public law nature, including the right addressed to the state, and the right of the state addressed to the offender<sup>16</sup>.

However, the methodology *ius-actio* remains in any of these approaches – in contrast to the Roman view.

The end of the 19<sup>th</sup> – beginning of the 20<sup>th</sup> century are marked with awareness of the importance of the public-law component in the ratio of *actio-ius*. Justice is thought of as a social and public matter, and the claim of the authorized person is due not to a subjective right, but to the circumstances of the action and/or objections against it or civil legal capacity (H. Degenkolb,

A. Wach, E.A. Nefediev)<sup>17</sup>. Consequently, a right of action was interpreted as a public legal claim to the state represented by the court. It was the first attempt to adopt the legal independence and value of the right to judicial protection. The same approach also involved methodological sources of the theory of subjective public rights (e.g., Georg Jellinek<sup>18</sup>), and the right of action was the first subjective public right in that understanding. Public-law view concerning the nature of the *claim* served as a methodological basis for the objective (subjective public right as a possible subject of the civilistic procedure) and procedural (public and legal concept of the civilistic procedure) development of the German-Austrian model of the civilistic procedure (Franz Klein, a founder of the theory of the social procedure<sup>19</sup>). But the methodology of the procedure was still determined by the *ius-actio* ratio.

The Procedural Doctrine of the mid 20<sup>th</sup> century was marked by the compilation approach attempting to combine the advantages of the substantive-law and public-law concepts in one structure (the action and the right of action are a single category, but it has two components: a substantive-law component as a claim of the plaintiff to the defendant and a procedural component as the requirement for the court for protection<sup>20</sup>). However, this has not solved the ontological problems of the *actio-ius* ratio (as well as the understanding of the methodological principles and the paradigm of the civilistic procedure)<sup>21</sup>, but this approach has gained great recognition. In our view, it is hardly possible to consolidate the ratios *action-ius* and *ius-actio* into one algorithm because of their opposing ontology and original assumption.

Historically, we think the legal reforms of the 21<sup>st</sup> century have designated a new stage: the law, developing in spirals, goes back to basics; a historical paradigm *actio habere-ius habere* takes on a new lease of life going back to the legal life

with a new content. The private-law principles of the civilistic procedure are expressed through methods of judicial procedures, procedural life of the civilistic procedure.

Having been established for centuries, having experienced the influence of the ratio “subject-object of the procedure” the civil law procedural form today is strong enough to be the ancestor of various legal proceedings, without fear of losing its own identity. This is the procedure we are now witnessing.

### **Modern relevance of the paradigm *actio habere-ius habere***

The modern changing world demonstrates the richness of views on the civilistic procedure and the diversity of its national legal concepts. This is the guarantee of future creative development (self-development) of the procedure. – However, the emphasis in the historical formula *actio habere-ius habere* is transferred from the static elements (the subject of the procedure, the object of the procedure – which was typical of the doctrine of the 19<sup>th</sup> and 20<sup>th</sup> centuries) in the dynamic elements – the methods and methodology of the procedure expressing ontology of ratios and connections of the “internal” image of the procedure.

The formula *actio habere-ius habere* is out-of-ideology and expresses the methodology not only of the actionable protection as a mechanism for immediate protection of the right, but also the overall paradigm of the civilistic procedure.

Bright contemporary evidence of this are: the materialization of the procedure and the right to judicial protection as the substantive procedural right, its constitutionalization and internationalization that are internally conditioned by the substantivity of the right to judicial protection.

Substantivity of the right to judicial protection explains (and includes) the essential universalization of the action conjugated with the

realization of axiological values of the procedure in the legislating methods of protection and procedural safeguards. Developing “in breadth”, the action deepens “into itself” demonstrating actionability through methods of protection, which – in turn – come to the fore in the horizontal structuring of the civilistic procedure. This, as we think, is the main feature of a modern reading of the Roman formula *actio habere-ius habere*.

The action maintains not only its “own face”, but also the most important and backbone significance for the judicial protection tools. It finds a freer life in the ratio of private and public practices in the procedure giving the opportunity to develop other, non-actionable judicial procedures, which are, however, associated with the action (in the Roman understanding *actio*) through the procedural form that was historically created by the action. It is a deep “motherly” link that not only limits, but provides scope for the development of various judicial procedures.

The above makes it obvious, in our view, to assert that the determination of the nature of a particular legal procedure and procedural means of protection are undeniably linked to their essence predetermined by the entire history of the development of interconnections of *actio* and *ius* in the procedural space and objective laws of the procedural form itself.

### **Conclusion**

Unity of the civilistic procedure is predetermined by the whole ontology of its formation and development. The evolution of action, various modern national legislative concepts of the civilistic procedure, actualization of judicial and non-judicial procedures and even contradictory legal decisions confirm the viability and inexhaustibility of the paradigm *actio habere-ius habere* as a necessary methodological basis to create a harmonious legal mechanism of the judicial protection.

- <sup>1</sup> See: the Concept of the unified Civil Procedure Code of the Russian Federation was approved by the decision of the Committee on Civil, Criminal, Arbitration and Procedural Legislation of the State Duma of the Federal Assembly of the Russian Federation. Economy and life. December 17, 2014; On the introduction in the State Duma of the Federal Assembly of the Russian Federation of the draft federal law "On Amendments to the Civil Procedure Code of the Russian Federation and the Arbitration Procedure Code of the Russian Federation: Resolution of Plenum of the RF Supreme Court dated February 17, 2015 No. 7.
- <sup>2</sup> On February 25, 2015 the RF Federation Council approved the federal law "On the Code of Administrative Procedure" adopted by the State Duma in the third reading on February 20, 2015, which is expected to enter into force on September 15, 2015.
- <sup>3</sup> Author's opinion on this subject, see: *Sakhnova T.V.* On the concept of a unified Civil Procedure Code of the Russian Federation (notes). Journal of civil procedure. 2015. No. 1.
- <sup>4</sup> See: On the Draft Federal Law No. 246965-6 "On Amendments to Certain Legislative Acts of the Russian Federation in connection with the introduction of the Code of Administrative Procedure of the Russian Federation" Resolution of the State Duma of the Russian Federation dated February 17, 2015 No. 6074-6D.
- <sup>5</sup> For details on the author's view see e.g.: *Sakhnova T.V.* The course of civil proceedings. Moscow: Status, 2014. P. 563, 550-562.
- <sup>6</sup> See y.g.: Art. 5, S. 3 P. 7 Resolution of the Constitutional Court dated January 27, 2004 No. 1-P "On the case on verification of constitutionality of certain provisions of paragraph 2 of the first Section of Article 27, the first, second and fourth Sections of Article 251, the second and third Sections of Article 253 of the Civil Procedure Code of the Russian Federation..."; p. 2.1 of the Resolution of the Constitutional Court dated January 17, 2008 No. 1-P "On the case on verification of constitutionality of provisions of Articles 9 and 10 of the Federal Constitutional Law "On arbitration courts in the Russian Federation" and Articles 181, 188, 195, 273, 290, 293 and 299 of the Arbitration Procedure Code of the Russian Federation..."; Resolution of the Plenum of the Supreme Arbitration Court of the Russian Federation dated December 9, 2002 No. 11 "On some issues related to the introduction of the Code of Arbitration Procedure of the Russian Federation", Resolution of the Presidium of the Supreme Arbitration Court of the Russian Federation dated October 4, 2005 No. 7445/05.
- <sup>7</sup> See e.g.: p. 9 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated January 20, 2013 No. 2 "On some issues arising in connection with the adoption and entry into force of the Civil Procedure Code of the Russian Federation" (p.8-10 were subsequently excluded p. 33 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated February 10, 2009 No. 2 "On the practice of judicial proceedings in cases on the revise of decisions, actions (inaction) of state authorities, local self-governing authorities, officials, state and municipal employees"). However, the essence of the approach the Supreme Court of the Russian Federation remains the same, which is reflected in p. 17 of the Resolution of the Plenum of the Supreme Court of the Russian Federation dated February 10, 2009 No. 2.
- <sup>8</sup> See: The course of the Soviet civil procedural law: in 2 vols. V. 2. Editor A.A. Melnikov. M., 1981, pp. 140-141.
- <sup>9</sup> See e.g.: *Rozhdestvensky A.A.* The theory of subjective public rights: critical and systematic study. M. 1913.
- <sup>10</sup> See: *Melnikov A.A.* The right of citizens to appeal against actions of officials. the Soviet state and law. 1978. No. 11.
- <sup>11</sup> See e.g.: *Zivilprozessrecht. begr. von Leo Rosenberg, fortgef. von Karl Heinz Schwab.* München, 1981. S. 24-27.
- <sup>12</sup> See: *Savigny F.* System des heutigen römischen Rechts. 1841. Bd. V. S. 3, 4-5 ff..
- <sup>13</sup> See: *Puchta G.F.* Pandekten. 1 & 2. Auflage. Leipzig, 1832-1844. § 81.
- <sup>14</sup> See: *Windscheid B.* Die Actio des römischen Civilrechts vom Standpunkt des heutigen Rechts. Düsseldorf, 1856. S. 2-7 ff.
- <sup>15</sup> See: *Thon A.* Rechtsnorm und subjektives Recht: Untersuchung zur allgemeinen Rechtslehre. Weimar, 1878. S. 112, 121 ff; *Crome C.* System des deutschen bürgerlichen Rechts. V. 1-5. Tübingen, 1900-1912. V. 1. S. 71 ff.; *Bierling E.R.* Juristische Principienlehre. V. 2. Leipzig, 1894; *Zitelmann E.* Irrtum und Rechtsgeschäft. Eine psychologisch-juristische Untersuchung. Leipzig, 1879.
- <sup>16</sup> See: *Muther Th.* Zur Lehre von der Römischen Actio dem heutigen Klagerechts der Litiscontestatio und der Singularsuccession in Obligationen. Eine Kritik des Windscheid'schen Buchs: "Die Actio des römischen Civilrechts vom Standpunkt des heutigen Rechts". Erlangen, 1857; *Windscheid B.* Die Actio. Abwehr gegen dr. Theodor Muther. Düsseldorf, 1857.
- <sup>17</sup> See: *Wach A.* Handbuch des deutschen Civilprozessrechts. Leipzig, 1885; *Degenkolb H.* Einlassungszwang und Urteilsnorm — Beiträge zur materiellen Theorie der Klagen insbesondere der Annerkennungsklagen. Leipzig, 1877; *Nefediev E.A.* Study about the action. Kazan, 1885. *Nefediev E.A.* Selected works. Krasnodar, 2005, P 61 et seq.
- <sup>18</sup> See e.g.: *Jellinek G.* System der subjektiven öffentlichen Rechte. Tübingen, 1919 (3. Auflage; 1. Auflage – 1892). S. 119-120 ff. Later this approach was approved by the German law. See this in retrospect: *Gordon V.M.* Claims for recognition. Yaroslavl, 1906. § 1 of Chapter Three.
- <sup>19</sup> See: *Klein F.* Der Zivilprozess Österreichs. Mannheim; Berlin; Leipzig, 1927.
- <sup>20</sup> It is a general algorithm worked out by the so-called "Complex theory", which is embodied in the various scientific views on the ratios of action, the right of action, a subjective right. See e.g.: *Gordon V.M.* Actions of recognition. Chapter 3, § 3. Yaroslavl, 1906; *Dobrovolsky A.A.* The claim form of protection of the right. M., 1965; *Kleinman A.F.* The main issues of the doctrine of the claim in the Soviet civil procedural law. M., 1959; *Kengyel M.* Rechtsschutzanspruch und Rechtsschutzbedürfnis: Beiträge zur Theorie des Klagerechts. Pecs, 1987; *Kollmann A.* Begriffs- und Problemgeschichte des Verhältnisses von formellen und materiellem Recht. Berlin, 1996.
- <sup>21</sup> The author's analysis, see e.g.: *Sakhnova T.V.* The course of civil proceedings. M.: Statut, 2014. pp 324-331.



**Иск и процесс:  
актуализация парадигмы  
(в контексте современных  
законодательных реформ)**

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*Статья посвящена онтологическим проблемам иска и цивилистической процессуальной формы, возникающим в связи с разработкой единого Гражданского процессуального кодекса Российской Федерации, принятием Кодекса административного судопроизводства.*

*Автор доказывает тезис о неизменности и законодательной актуальности исторически выработанной парадигмы *actio habere-ius habere*. Современные правовые реформы, несмотря на их противоречивость, демонстрируют неисчерпаемость иска, методологическую значимость исковости в развитии процессуальных средств защиты и судебных процедур, высокий творческий потенциал традиционной парадигмы иска и процесса *de lege ferenda*.*

*Ключевые слова: цивилистический процесс, иск, парадигма, производство по делам, возникающим из публичных правоотношений, судебная процедура.*

*Научная специальность: 12.00.00 – юридические науки.*

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