Subject of administrative law: content novelty

Ryabchenko Olena

D.J.S., Prof., Chief of the administrative law and procedure and customs Department, University of the State Fiscal Service of Ukraine

Abstract. *The article is about what administrative legal proceedings is one of the forms of protection of rights, freedoms, legal interests – judicial protection, substantially different by the fundamentals (i.e. principles, subjects, grounds, procedure, consequences of the decision) from defence under administrative procedure (in particular, by way of appeal). The author proposed a change of approach to the definition of the jurisdiction of administrative courts may* be proposed by way of including categories of public-law disputes, based not on the specifics of the power entities' activities, but on specific violations of the rights, freedoms of citizens, rights and legal interests of legal entities in public-legal relations.

Key words: jurisdiction of administrative courts, principles, subjects, grounds, procedure, consequences of the decision

Problem statement

The need to modernize doctrinal approaches in defining the subject of administrative law is stipulated by several factors, the priority of which is the rapid introduction and development of democratic principles of public administration, which implies the intensification of civil society institutions influence on state creation and the transformation of the state role from "police-supervisory" to "serving" public needs. Under such circumstances, the subject, method, and principles of administrative law as of a fundamental area of public law shall be subject to an adequate change, which in its turn determines the need for proper theoretical and legal analysis.

Making no claims to cover all the problematic issues of the doctrine of administrative law development, it is necessary, however, to focus on the issue of administrative justice including regulation by administrative law.

Academician V.B. Averianov in determining the content of the subject of administrative law pointed out that it belongs to "a set of legal norms that regulate social relations, which are formed during the provision of executive bodies and local self-government bodies to implement and protect the rights, freedoms and legal interests of individuals and legal entities, as well as in the process of state and self-government management in the spheres of socio-economic, administrative and political development and public order protection." The scientist considered the inclusion of administrative justice in the sphere of regulation of the existing administrative law to be a temporary phenomenon. Academician V.B. Averianov predicted that in the near future an independent legal and procedural branch should be established, which would separately regulate legal proceedings in administrative courts [1, p. 263].

Indeed, pursuant to the above-mentioned approach to the formation of the subject of administrative law, administrative justice acquires significance only from the standpoint of guarantees of the protection of rights, freedoms, legal interests in public relations, concerning the interaction between a citizen, a legal entity and the legal entities while implementing public law administrative functions by the latter ones (in understanding the essence of the term "subject of public law", pursuant to Article 4 of the Code of Administrative Justice of Ukraine [2; 3]).

If you turn to procedural norms of criminal, civil, economic law, they are systematized into codified acts which exist along with the relevant material norms.

The codification of material rules of administrative law can only be considered in the theoretical plane. From the practical point of view, such codification is unlikely to be implemented, considering that substantive rules of administrative law are contained in a large number of normative legal acts of various legal force, including – the codes, in particular – the Code of Ukraine on Administrative Offences, the Customs Code of Ukraine, The Water Code of Ukraine, the Code of Merchant Shipping of Ukraine, the Air Code of Ukraine and others. Such a feature of rules of administrative law regulation is specified by a large volume of regulatory influence, namely, social relations in the economic, administrative-political and socio-cultural spheres. In this regard, the formation of a separate administrative law branch of procedural law governing the administration of administrative courts is perceived ambiguously.

On the other hand, administrative legal proceedings is one of the forms of protection of rights, freedoms, legal interests – judicial protection, substantially different by the fundamentals (i.e. principles, subjects, grounds, procedure, consequences of the decision) from defence under administrative procedure (in particular, by way of appeal):

- judicial defence in administrative courts is carried out in the form of justice in administrative cases (cases of administrative jurisdiction), as opposed to defence that is carried out under administrative procedure. Justice is a special state power function, carried out by the court on its behalf through the consideration and resolution of criminal, civil, administrative and economic affairs [4, p. 25];

- the grounds for judicial recourse is a dispute over the right in public-legal relations (public legal disputes), as opposed to defence that is carried out under administrative procedure, in which the ground is a violation of the existing public order established by the legal norm;

- the resolution of a public-legal dispute takes place within the framework of court proceedings, carried out by a specially authorized state body – an administrative court, as opposed to defence that is carried out under administrative procedure, which is characterized by the polysubjectivity;

- the procedure for judicial review is strictly regulated by a separate procedural law – the Code of Administrative Legal Proceedings of Ukraine, in which the procedural stages are defined in separate parts of this Code – in the Sections, as opposed to defence policies under administrative procedure, the legal regulation of which is carried out pursuant to the norms contained in many normative and legal acts;

- the result of the administration of justice in administrative matters is a judicial decision, the execution of which is strictly regulated, as opposed to decision resulting from defence results under administrative procedure. The court decision is of general binding nature and is enforceable throughout the territory of Ukraine, it is adopted in the name of Ukraine.

Recognizing the existence of significant differences in the implementation of judicial and extrajudicial protection, K.O. Tymoshenko calls the jurisdictional activity of administrative courts an independent form of administrative and jurisdictional activity of state authorities, which is implemented through the administration of justice in administrative cases [5, p. 12]. Academician A.O. Selivanov notes that the judicial administrative jurisdiction is an independent activity, which is connected with judicial control over the acts of the authorities, the resolution of disputes of a public-law nature, an assessment of the legality of the use of power and the protection of the rights and freedoms of citizens [6, p. 358].

The scientists' opinion on the essence of administrative procedure does not contain fundamental contradictions. Problems arise in the process of defining the terminological apparatus of the administrative law procedural categories and the formation, in this regard, of a single approach to the denotation of the administrative justice, especially given the existence of the "administrative process" definition in the Code of Administrative Court Procedure of Ukraine.

The scientific thought is represented by three main concepts of the administrative process, judiciary (A.F. Kleynman, S.M. Mahin, et al.) jurisdictional (N.G. Salischeva, O.A. Diomin, S.I. Kotiuhin et al.) and

regulatory (V.O. Luchin, S.S. Studenikina, V.M. Horsheniov et al.) [7, p. 383-385]. According to V.K. Kolpakova, it is appropriate to separate administrative and law-making process (activities of state administration on adopting regulatory legal acts as established by the administrative and procedural forms), administrative empower (operational and administrative) process and administrative and jurisdictional process (activities of state executive authorities, aimed at resolving disputes between different subjects, and the application of administrative and disciplinary coercion exercised in the administrative procedural form) [8, p. 127].

The scholars share an approach by which the administrative process is defined as procedural rule-making and enforcement activities. At the same time, administrative-procedural activity is defined as part of the administrative (executive-administrative) activity, which is subject to legal regulation. In this case, three legal types of activity are distinguished: administrative-normative, administrative-law-enforcement (application of material norms of a positive nature), administrative-jurisdictional (I.V. Panova) [9, p. 36].

Consequently, the content of the "administrative process" category is not well-established and requires scientific research and formation of a single scientific approach.

Appeal to legal doctrines concerning the judicial power allows us to distinguish the doctrine of judicial law, the origins of which lead to scientific research results by V.O. Ryazanovsky, I.V. Mykhailovsky, Ye.V. Vaskovskiy dedicated to defining the common principles of the judicial process.

S.V. Prylutsky, presenting the concept of judicial law and the prospects for its introduction into the legal system of Ukraine, identified several independent meanings of the category of "judicial law": 1) a right contained in judicial precedents; 2) a set of norms governing the judicial system and legal proceedings; 3) a scientific concept of the Great Judicial Reform of 1864 in tsarist Russia; 4) a separate branch of law, which comprehensively examines judicial power and justice in their in conjunction with organization and actions [10, p. 6-7]. Appeal to the concept of judicial law in the "classical" sense is stipulated by the idea of judicial law, developed V.O. Ryazanovsky. S.V. Prylutsky provides the following key provisions formulated by V.O. Ryazanovsky, who defined the task of the court in all three processes – civil, criminal and administrative – to establish the right, and if necessary, protect and implement it. The right which should be established by the court may be different: subjective civil law, subjective public law; the right of the state to punish. The task of any process is to achieve real or substantive truth, that is, the conformity of the decision with the rule of law (lawfulness) and the actual circumstances of the case (real or substantive truth in the narrow sense) [10, p.10].

Conclusion

The carried out research allowed us to formulate the following conclusions.

First of all, there arises a need for substantial updating of terminology in administrative law, especially in the procedural part of it and working out common scientific approaches to determine, first of all, the essence and content of the category of "administrative process" in order to avoid the use of this term to refer to virtually different legal phenomena.

Secondly, taking into account the development of the science of judicial law, it is logical to envisage the inclusion of judicial administrative process into the system of judicial law. At the same time, judicial law should be understood in its "classical" meaning, when it embraces civil, criminal and administrative processes (according to V.O. Ryazanovsky's approach), as well as economic process.

Thirdly, the set forward approach will allow to avoid in the future some features in the legal regulation of judicial jurisdictions that are relevant in modern terms but are actually false. This applies, in particular, to disputes over the petition of the authorities, the appropriateness of including which into to the jurisdiction of administrative courts is doubtful, especially in view of the very idea of introducing administrative justice in the capacity of the institution of judicial protection of rights, freedoms, legal interests in public-law relations.

Fourthly, the above-mentioned suggests including the grounds for appeal to the administrative court in the administrative law, which refer to the activity (actions or inactivity) of the authority in the

sphere of public administration whose legal assessment should take place in the form of justice in administrative courts. It is clear that this approach needs to be specified, especially since the norms of Article 19 of the Code of Administrative Justice of Ukraine, which define the jurisdiction of administrative courts, are formed on the basis of the functions of the authority, and not the rights that may be violated as a result of functions realization by the indicated power entities. In this regard, a change of approach to the definition of the jurisdiction of administrative courts may be proposed by way of including categories of public-law disputes, based not on the specifics of the power entities' activities, but on specific violations of the rights, freedoms of citizens, rights and legal interests of legal entities in public-legal relations.

References:

1. Aver'janov Vadim Borisovich. Vibrani naukovi praci / [red. Ju. S. Shemshuchenko, O. F. Andrijko]. — K.: Inst-t derzhavi i prava im. V. M. Korec'kogo NAN Ukraïni, 2011. — 448 s.

2. Kodeks administrativnogo sudochinstva Ukraïni vid 06.07.2005 № 2747-IV (red.. z 15.12.2017)// Oficijnij visnik Ukraïni, 2005, N 32 (26.08.2005)

3. Pro vnesennja zmin do Gospodars'kogo procesual'nogo kodeksu Ukraïni, Civil'nogo procesual'nogo kodeksu Ukraïni, Kodeksu administrativnogo sudochinstva Ukraïni ta inshih zakonodavchih aktiv: Zakon Ukraïni vid 03.10.2017 №2147-VIII// Golos Ukraïni, 2017.

4. Jasinok M. M. Sudovi ta pravoohoronni organi Ukraïni / [Jasinok M. M., Kuz'menko S. G., Krojtor V. A. i dr.] ; za zag. red. M. M. Jasinka. – Sumi

: Vid-vo «MakDen», 2008. – 280 s.

5. Timoshenko K. O. Publichno-pravovij spir jak predmet jurisdikciï administrativnih sudiv: avtoref. dis. … kand. jurid. nauk: 12.00.07 / Timoshenko Katerina Olegivna; Institut derzhavi i prava im. V.M. Korec'kogo NAN Ukraïni. — K., 2012. — 20 s.

6. Pravova doktrina Ukraïni: u 5 t. — H.: Pravo, 2013. — .— T. 2: Publichno-pravova doktrina Ukraïni / [red. Ju. P. Bitjak]. — 864 s.

7. Kurs administrativnogo prava Ukraïni: pidruch. / [V. K. Kolpakov [ta in.]; red. V. V. Kovalenka. — K.: Jurinkom Inter, 2012. — 808 s.

8. Kuz'menko O. V. Administrativno-procesual'ne pravo Ukraïni: pidruch. / O. V. Kuz'menko, T. O. Gurzhij; red. O. V. Kuz'menko. — K.: Atika, 2007. — 416 s.

9. Panova I. V. Administrativno-processual'noe pravo Rossii: monogr. / Panova I. V. — M.: Norma: INFRA-M, 2012. — 336 s.

10. Priluc'kij S.V. Koncepcija sudovogo prava ta perspektivi ïï vprovadzhennja u pravovu sistemu Ukraïni: Naukova dopovid'. – K.: Institut derzhavi i prava im.. V.M. Korec'kogo NAN Ukraïni, 2011. – 28s.