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I. Доктринальні питання адміністративного судочинства

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LEGAL IDENTIFICATION OF ADMINISTRATIVE PROCEDURE

Abstract. Creation of the new court jurisdiction in Ukraine represented by administrative procedure gave rise to the relevant areas of scientific research, many of which are concerned with its legal identification and correlation with long-established legal categories. The analysis shows that differences in jurists' opinions are an indication of the pressing scientific issue, addressing which will stimulate ongoing comprehension of the essential characteristics of the judicial appeal against acts and omissions by public authorities.

Accordingly, the aim of this research is to carry out the legal identification of administrative procedure by showing its relation to the subject of administrative law and administrative proceeding.

This has been done by examining the opinions of administrative law scholars on interpretation and correlation of such concepts as administrative procedure, subject of administrative law, administrative proceeding as well as their views on the norms of the Code of Administrative Procedure of Ukraine and provisions of other norms and regulations.

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It has been emphasized that renovation of the Ukrainian administrative law and formation of its modern paradigm are inextricably linked with the number of factors which include theoretical and practical findings in the sphere of administrative procedure, efficiency of the scientific support for the reforms of the administrative and legal institutions, establishing the patterns of their reformation, legal review of the actions being taken, as well as providing legal grounding for political and philosophical developments, along with generating legislative and organizational initiatives.

This research also argues that administrative procedure is a fundamental component of the subject matter of administrative law and an integral part of the administrative proceeding.

As a result of this, the authors conclude that administrative procedure, being of administrative and legal nature, constitutes the part of the subject matter of administrative law and administrative proceeding. It is therefore proposed that administrative proceeding be defined as an umbrella term for the regulatory activities of public administration in relation to exercising their authority.

Keywords: administrative law; administrative procedure; administrative proceeding; relations of administrative obligations; the Code of Administrative Procedure of Ukraine; legal relations; subject matter of administrative law; public administration.

The analysis of processes of establishment and development of administrative procedure shows that understanding of views on its identification in the legal system and system of law has been passing through several stages where scientific visions of their concepts, subject and functional components, terminology and statutory definitions have been formed.

On this way, there were opinions that administrative procedure is a new independent judicial and procedural branch of law – administrative procedural law, administrative procedure can't coincide with administrative proceeding, administrative procedure is a component of administrative proceeding, administrative procedure is judicial administrative proceeding, and administrative procedure is the institute of administrative law.

As a result, there is a scientific challenge on the establishment of legal identification of administrative procedure and its correlation with a) subject matter of administrative law; b) administrative proceeding.

Its solution should stimulate the further comprehension of content characteristics of administrative procedure, and scientifically based and objective determination of its place in the legal system and system of law of Ukraine, in particular, in judicial and judiciary law in the sphere of procedural relations.

The introduction of administrative procedure in the legal practice was a motivational stimulus for scientific studies on its legal nature, correlation with judicial and judiciary law, subject matter of administrative law, administrative process and other theoretical and applied problems related to administrative justice.

The issues on legal identification took a special place among them. They were reflected in a number of researches, and it is necessary to mark the papers of S. Stefaniuk "Judicial Administrative Process" (2003), I. Koliushko, R. Kuibida "Administrative Justice: European Experience and Proposal for Ukraine" (2003), M. Tyshchenko "Administrative Process" (2007), O. Kuzmenko, T. Hurzhii "Administrative procedural law of Ukraine" (2007), E. Demskyi "Administrative Procedural Law" (2008), V. Kolpakov "Subject Matter of Administrative Law: Modern Dimension" (2008), "Administrative Procedure: Correlation with Administrative Proceeding and Subject Matter of Administrative Law" (2018), V. Bevzenko, A. Komziuk, R. Melnyk "Administrative Process of Ukraine" (2007) and "Administrative Justice in Ukraine" (2009), T. Kolomoiets, Yu. Pyrozhkova, O. Hanzenko "Administrative Judicial Procedure", V. Bevzenko "Participation of subjects vested with power in the administrative judicial procedure of Ukraine: legal framework, grounds and forms" (2010), S. Honcharuk "Administrative process" (2012), O. Riabchenko "Administrative Judicial Procedure" (2014), O. Konstantyi "Problems of Defense of Rights, Freedoms and Legal Interests in Administrative Procedure" (2015) and others.

The generalisation of views expressed in the researches permits to talk about the availability of several positions on legal identification of administrative procedure with some relevant suggestions. First, recognition of administrative procedure as a new independent branch of law – administrative procedural law (A. Komziuk, V. Bevzenko, R. Melnyk); second, as a component of administrative procedural law which, in its turn, forms an independent branch in the system of law (E. Demskyi); third, identification of administrative procedure as administrative proceeding (S. Honcharuk); the fourth, as a component of administrative proceeding (V. Bevzenko, V. Kolpakov); fifthly, as administrative litigation (V. Stefaniuk, M. Tyshchenko, O. Riabchenko); sixthly, as the institute of administrative law (T. Kolomoiets, Yu. Pyrozhkova, O. Hanzenko); seventhly, as a system-building component of subject matter of administrative law; eighty, as a constituent of the sphere of management activity (I. Koliushko, R. Kuibida); ninthly, as the institute of administrative law and process (O. Konstantyi).

The goal of the research is legal identification of administrative procedure in the system of law, the establishment of its correlation with the subject matter of administrative law and administrative process.

In the general philosophic interpretation, identification is the establishment of the identity of objects (from unknown to known) based on characteristics coincidence; the recognition those who are identified as belonging to a relevant system, "family"[1].

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[1] В Шинкарук (ред), *Філософський енциклопедичний словник* (Абрис 2002) 233.

For legal phenomena, identification (disclosure of a legal nature) means the establishment of their genetic background, attribution to a particular juridical category, belonging to one or another element of law system. It is peculiar to regulatory acts, branches of government, administrative cases, forms and methods of public administration etc.

The process of determining legal nature (juridical identification) is based, first, on objective a) concept of a relevant phenomenon and b) its doctrinal and regulatory definitions which are adequate from the point of ontological and gnosiological views; second, on the content and peculiarities of legal regulation of relevant legal relations. Identification may be "wide" (according to research object) or "narrow" (according to research subject), that it may be of a special purpose.

Therefore, legal identification of administrative procedure is the establishment of its pertaining to long-standing, scientifically or statutory determined juridical branches, sub-branches, institutes, sub-institutes of the legal system.

Introduction of administrative procedure in Ukrainian legal space was the most significant implementation of scientific researches in the practice of developing of legal state at the modern stage. This step was the realisation of objective needs for the democratic development of the society in relation to the defence of citizens' rights in the case of their violation by public administration. It found its practical expression in the establishment of administrative courts. Functioning of an individual judicial administrative jurisdiction is guaranteed by the Law of Ukraine "On the Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms, 1950, the First Protocol and Protocols № 2, 4, 7 and 11 to the Convention" dated July 17, 1997[2], and the Code of Administrative Procedure of Ukraine (herein after referred to as CAPU)[3].

Theoretical comprehending of the relations of administrative procedure has been passing through several stages which have formed scientific visions of their concepts, subject and functional components, terminology and statutory definitions[4].

They found their action-oriented reflection in amendments to the CAPU to which were devoted more than 100 acts of different focuses, and its new edition was adopted on December 3, 20175.

[2] Про ратифікацію Конвенції про захист прав людини і основоположних свобод 1950 року, Першого протоколу та протоколів № 2, 4, 7 та 11 до Конвенції: Закон України від 17 липня 1997 р. № 475/97-ВР. *Відомості Верховної Ради України.* 1997. № 40. Ст. 263.

[3] Кодекс адміністративного судочинства України: Закон України від 6 липня 2005 р. № 2747-IV. *Відомості Верховної Ради України.* 2005. № 35-37. Ст. 446.

[4] Валерій Колпаков, 'Адміністративне судочинство: співвідношення з адміністративним процесом і предметом адміністративного права' (2018) 2 Право України 26-38.

[5] Про внесення змін до Господарського процесуального кодексу України, Цивільного процесуального кодексу України, Кодексу адміністративного судочинства України та інших законодавчих актів: Закон

Defining aspect of this process was its coherent connection with the new understanding of basic administrative and legal categories, refreshment of the subject matter of administrative law.

As a result, it raised a number of issues on the establishment of correlation (cooperation) of administrative legal procedure with control activities of public administration, administrative-tort sphere, provision of administrative services, administrative process and administrative procedure.

In the course of their studying there were opinions that administrative procedure is essentially new branch of domestic procedural law[6]; that administrative procedure is a component of administrative proceeding[7]; that administrative procedure is administrative process[8]; that administrative procedure is administrative litigation[9]; that administrative procedure is the institute of administrative law[10].

It seems they are derivatives from the more general problem – establishment of the place of administrative procedure in the system of law through identifying its rules on basic components of this system (rules, institutes, branches, sub-institutes, sub-branches) that means issue solution on their unity or distinctiveness, first of all, with administrative law (system-building component of its subject matter).

A critical problem in this way is the fact that scholars don't have fundamental unity in the understanding of the subject matter of administrative law. Modern papers concerning this issue still introduce a marginal theory of the Soviet administrative law according to which its subject matter is only relations of state administration[11]. As a minimum, such kind of approach doesn't leave a place for judicial procedure in administrative law and as maximum, it prompts to the correlation with the concept of the law dictionary as of 1953 where a relevant article begins with: 'administrative justice doesn't exist in the USSR'[12].

We believe that polemic concerning this issue should be based on the modern administrative-legal researches. They open perspective ways for a scientific search for system ties of administrative procedure with sub-branches and other institutional entities of administrative law.

Renewal process of Ukrainian administrative law and the creation of its modern paradigm are associated with the introduction of the Administrative

України від 3 жовтня 2017 р. № 2147-VIII. *Відомості Верховної Ради України.* 2017. № 48. Ст. 436.

6 Анатолій Комзюк та Володимир Бевзенко та Роман Мельник, *Адміністративний процес України: навчальний посібник* (Прецедент 2007) 45.

7 Степан Гончарук, *Адміністративний процес: навчальний посібник* (НАУ 2012) 11.

8 Володимир Бевзенко, *Участь в адміністративному судочинстві України суб'єктів владних повноважень: правові засади, підстави та форми: монографія* (Прецедент 2010) 48.

9 Володимир Стефанюк, *Судовий адміністративний процес: монографія* (Консум 2003) 5.

10 Тетяна Коломоєць та інші, *Адміністративне судочинство: підручник* (Коломоєць Т ред, Істина 2009) 3.

11 О Гринь та О Донченко, *Правознавство: навчальний посібник* (Фенікс 2016) 150.

12 С Братусь и другие (ред), *Юридический словарь* (Госюриздат 1953) 15-16.

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Reform Concept[13] in Ukraine in administrative space. It defines that the purpose of reform efforts is a change of the relations between state and citizen where the state performs the function of so-called "service centre" for the interests of society and individual and administrative law – the function of legal support for the service.

In that sort of dimension, administrative law was the juridical branch which carries out scientific support of the administrative reform. The content of such support involves: a) establishing regularities of reforming; b) ensuring political and philosophic conclusions by legal substantiation; c) generating legislative and organisational initiations; d) legal expertise of measures performed; e) own reflections and evolution. The support led to the renewal of the doctrine of administrative law and its recognition as a key research topic, accuracy and correctness of identification of the subject matter of this branch[14].

A basic foundation of these researches was two theoretical conclusions which were elaborated for ideas' development for the Administrative Reform Concept in Ukraine. First, this conclusion states that administrative law can't develop as a monocentric branch that is a branch that has a unified system-building regulatory centre[15]; second, conclusion that administrative law is a poly-structural law[16].

Based on these achievements, the concept of the subject matter of administrative law becomes wider and crosses the lines of government control and serves as a branch of public regulation which ensures the functioning of public administration.

The following spheres are marked and delimited from government control within its regulatory space: public administration, administrative services, administrative agreements, responsibilities of society actors (individual and collective) for violation of order and rules established by public administration, responsibilities of public administration for illegal actions or passivity arising due to the appeal of its decisions.

According to this fact, new types of relations are objectified, and tasks on the establishment of their role and place in the subject matter of administrative law are formulated. These are relations of: a) public administration; b) administrative services; c) responsibility of society actors (individual and collective) for the violation of order and rules established by public administration or administrative tort relations; d) relations of

[13] Про заходи щодо впровадження Концепції адміністративної реформи в Україні: Указ Президента України від 22 липня 1998 р. № 810/98. *Офіційний вісник України*. 1999. № 21. Ст. 943.

[14] Вадим Авер'янов, *Вибрані наукові праці* (Андрійко О та інші упоряд, Шемшученко Ю та Андрійко О ред, Інститут держави і права ім В М Корецького НАН України 2011) 268-9.

[15] Вадим Авер'янов, 'Адміністративне право України: доктринальні аспекти реформування' (1998) 8 Право України 8.

[16] Валерій Колпаков, *Адміністративне право України: підручник* (Юрінком Інтер 1999) 193.

intermediated authoritativeness (they arise as a result of mutual compliance with administrative rules by the subjects which are not connected by powers of authority); e) relations of responsibilities of public administration for illegal actions or passivity arising due to the appeal of its decisions. According to the above, it is worth mentioning the CAPU clearly distinguishes administration relations and administrative services relations in Art. 4.

A pivotal issue of the understanding of the subject matter of administrative law is the clarification of the availability or lack of its components of integrative characteristics as a whole. Its fundamental importance is conditioned by the fact that the lack of such characteristics made the mentioned set conglomerate formation. Actually, it called in doubt their unity and hence the existence of the subject matter in a new format. The availability of integrative characteristics indisputably indicated that this set is a system and is eligible to be considered as the subject matter of law branch.

In this regard, it is necessary to mark that the Soviet legal doctrine presents subject matter of administrative law as a system formation. Scholars were proving the integrative nature of the cooperation of its component on the ground of the following features: a) all relations of the subject matter are similar ones; b) all relations of the subject-matter are relations of government and subordination; c) all relations of the subject matter arise as a result of exercising public administration by strictly identified structures – state administration bodies.

At the same time, it is essential to keep in mind that even the above approach was dominant, but it didn't get unanimous support from scholars. In this context, it is appropriate to refresh viewpoints of Ts. Yampolska, who introduced the idea that administrative is not focused on forming of an integral structure within its subject matter[17]; I. Mrevlishvili, who argued that administrative law is not an independent branch and it doesn't have own subject matter[18]; H. Petrov, who marked relations between citizens as administrative-legal ones, for example, between drivers under mutual compliance with road traffic rules[19].

None of the above integrative features is found in the set of new structural components of the subject matter of modern Ukrainian administrative law. It's impossible to qualify the relations of administrative services and relations of responsibility as similar ones. They are not also relations of government and subordination. Not all relations of updated subject matter emerge due to exercising government control.

[17] Ц Ямпольская, 'О месте административного права в системе советского социалистического права' (1956) 9 Советское государство и право 92.
[18] 'О системе советского социалистического права (обзор)' (1958) 1 Советское государство и право 104-5.
[19] Георгий Петров, *Сущность советского административного права* (Изд-во Ленинградского ун-та 1959) 82-4.

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The set of relations, which are regulated by administrative law in updated dimension, transforms other elements into a system and hence into the subject matter of branch. This is category "public administration" and category "relations of administrative obligations".

"Public administration" actually occupies the place which belonged to the category "government control" in the Soviet administrative law. Today, scientific understanding and further development of the theory of public administration are one of the main focuses of doctrinal renewal of Ukrainian administrative law, and an important foundation for its transformation into the modern juridical branch of the European type.

It is essential to mark that the concept of public administration is not new for Ukrainian law. It was mentioned in the papers of Ukrainian administrative law scholars who worked outside the Soviet law school, for example, in the papers of Yu. Paneiko who in "Basic Theory of Self-Government" (1963) wrote that foundation of administrative law is the fact that it regulates organization and activities of public administration[20].

Public administration as a legal category has two dimensions: functional and organisational-structural. Under the functional approach, public administration is the activity of relevant structural formations on exercising functions aimed at realising public interest.

Under the organisational-structural approach, public administration is apparatus which is established for implementation (realisation) of public authority. Ukrainian law calls public authority: a) people's rule as a direct democracy; b) authority – legislative, executive, judicial; c) local self-government[21].

Thus, public administration is the system of organisational-structural formations which legally got powers of authority for their implementation in public interests.

All these facts lead to the need to consider the theory of public administration as a methodological basis of administrative law and to use its concept as a basis in the forming administrative-legal relations including the relations of administrative procedure.

The following system-building component for the subject matter of administrative law is the category "relations of administrative obligations". The essence of these relations is determined by the content of the provisions of the Constitution of Ukraine concerning state responsibility to man, recognition of consolidation and guarantee of the rights and freedoms of man

[20] Ю Панейко, *Теоретичні основи місцевого самоврядування* (Мюнхен 1963) 194.
[21] В Погорілко, 'Публічна влада' в *Юридична енциклопедія, т 5* (2003) 196.

as the main duty of the state, rule of law, limitation of powers and actions of public administration by the Constitution and laws of Ukraine.

Consequently, in the context of formation, public administration undertakes to meet interests of the society and citizen. Among them, there are obligations of public nature, execution of which requires the use of powers of authority by public administration. In the course of their implementation, there are relations that are proposed to be marked as “relations of administrative obligations”.

This category – relations of administrative obligations – unites four types of relations, each of which is an integral part of the subject matter of administrative law. These are relations of public management; relations of administrative services; relations of responsibility of public administration for illegal actions or passivity; relations of responsibility of social actors (individual and collective) for the violation of order and rules established by public administration[22].

A characteristic feature of all above-mentioned types of administrative and legal relations is that bodies of public administration act as authority party, which implements its executive and regulatory powers. That is, it has the right to make an authoritative (mandatory) decision.

In the context of such understanding of the subject matter of administrative law, each component of the set of administrative-legal relations occupies a place clearly determined by specific legal grounds.

The relations of responsibility of public administration are derived from the relations of the appeal of its actions, which can be carried out, first, in extrajudicial order (filing an administrative complaint); and, second, in judicial order by filing a complaint to an administrative court (judicial appeal).

In the second case (application to the administrative court) there are relations of administrative justice.

Filing a complaint to a court (court appeal) is confirmed by means of administrative procedure, which is a form of justice. The external expression of administrative procedure is the activity of administrative courts regarding the consideration and resolution of public disputes.

In this regard, it is appropriate to rely on the book “Administrative Law and Process of the Ukrainian People’s Republic in Exile: Ukraine’s Unknown Legal Heritage”, which was published in 2015[23]. In our opinion, its value is determined not only by the presentation of developments of standards but also by the manifestation of scientific substantiation (motives) regarding the identification of administrative procedure.

[22] Валерій Колпаков, ‘Предмет адміністративного права: сучасний вимір’ (2008) 3 Юридична Україна 36.
[23] Гриценко І та інші (уклад), *Адміністративне право і процес УНР в екзилі: невідома правнича спадщина України* (Гриценко І ред, Дакор 2015) 428.

In this context, attention is drawn to the statement that the determination of the court is characterised not by the functions but by the competence of cases to which administrative law is applied.

Systemic understanding of administrative procedure involves establishing its place not only in the subject matter of administrative law. An important theoretical significance has solution on its relation with the whole set of administrative-procedural forms that form the concept "administrative proceeding".

Today it is believed that administrative proceeding is the only procedural activity of administrative courts[24]. It is based on the formula of the old edition of the CAPU: 'administrative proceeding is legal relations, which are formed during the administrative procedure' (Article 3 "Definition of concepts"). However, followers of this idea do not take into account that the same article had the following note: 'In this Code, the following terms are used in the sense <...>'[25]. It shows that terms defined in Art. 3 of the CAPU of Ukraine (including the definition of administrative proceeding) are indisputable only in the sphere of administrative procedure.

The above did not give grounds to consider that the legislator established a monopoly of administrative procedure on the use of the concept and the term "administrative process", and its use in other areas of administrative and legal space was justified.

The new version (dated 2017) of the CAPU does not involve the term "administrative proceeding". Instead of it, the term "judicial proceeding" has been introduced, and it has been established that judicial proceeding is legal relations, which are developed during the conduction of administrative procedure.

This novel meets traditional scientific visions of the legal nature, content, system and structure of administrative proceeding and also finishes the discussion of this issue.

The analysis of the current regulatory standards indicates the application of the term "process" to other (except administrative procedure) types of administrative-legal relations. This is, for example, the process of hazard identification, investigation process (in relation to aviation events and incidents), the regulatory process of aviation activities, budget process.

The Customs Code of Ukraine26 explicitly determines that proceeding on the case of customs violations (and this kind of proceeding, in accordance with Articles 487, 489 of the Code, are proceeding in an administrative offence case)

[24] Т Мотрук, 'Поняття адміністративної процедури у співвідношенні до поняття адміністративного процесу' (2017) 42 Науковий вісник Ужгородського національного університету Право 186.
[25] Кодекс адміністративного судочинства України (н 3).
[26] Митний кодекс України: Закон України від 13 березня 2012 р. № 4495-VI. *Відомості Верховної Ради України*. 2012. № 44-45, № 46-47, № 48. Ст. 552.

include the execution of procedural actions (drawing up a protocol on violation of customs rules, interrogation of persons, discovery of documents, temporary withdrawal of goods, consideration of a case, decision pronouncement and its reconsideration due to appeals, etc.).

Part 2 Art. 22 of the Law of Ukraine "On the Judiciary and Status of Judges"[27] stipulates that cases on administrative violations are considered in the context and in accordance with the procedure provided by the procedural law.

Thus, the definition of administrative proceeding as a generalized name of statutorily regulated activity of public administration regarding the exercise of powers is relevant. This kind of activity is carried out in the spheres generated by monogenic relations and objectified as structural components of the subject matter of administrative law.

Conclusions. The research on the legal identification of administrative procedure contains arguments that: a) prove the administrative and legal nature of administrative procedure; b) show that administrative procedure is a system component of the subject matter of administrative law; c) give grounds for the concept of administrative proceeding as statutorily regulated activity of public administration regarding the exercise of powers.

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ПРАВОВА ІДЕНТИФІКАЦІЯ АДМІНІСТРАТИВНОГО СУДОЧИНСТВА

Анотація. Створення в Україні нової судової юрисдикції – адміністративного судочинства, обумовило формування відповідного напряму наукових досліджень, серед яких особливе місце посіли питання його правової ідентифікації і співвідношення з усталеними правовими категоріями. Сформульовані з цього приводу позиції правників демонструють різноманітність підходів, аналіз яких свідчить про наявність наукової проблеми, розв'язання якої має стимулювати подальше осягнення змістовних характеристик судового оскарження дій та бездіяльності суб'єктів владних повноважень.

Метою статті є правова ідентифікація адміністративного судочинства шляхом розкриття його співвідношення з предметом адміністративного права й адміністративним процесом.

Для її досягнення досліджені погляди вчених-адміністративістів на розуміння і кореляцію відповідних понять (адміністративне судочинство, предмет адміністративного права, адміністративний процес); норми Кодексу адміністративного судочинства України; положення інших нормативних документів.

Підкреслено, що процес оновлення українського адміністративного права і створення його сучасної парадигми пов'язується з теоретичними і практичними здобутками в сфері адміністративного судочинства, ефективністю наукового супроводження реформ адміністративно-правових інститутів, встановленні закономірностей їх реформування, правовій експертизі здійснюваних заходів, а також забезпеченні політико-філософських висновків правовим обґрунтуванням, генеруванні законодавчих й організаційних ініціатив.

Наведено аргументи, що доводять обґрунтованість визнання адміністративного судочинства системоутворюючим компонентом предмета адміністративного права, а також невід'ємною складовою адміністративного процесу.

У результаті автори дійшли висновку, що адміністративне судочинство має адміністративно-правову природу і є складовою предмета адміністративного права й адміністративного процесу. Запропоновано визначати адміністративний процес як узагальнену назву нормативно регламентованої діяльності публічної адміністрації щодо реалізації владних повноважень.

Ключові слова: адміністративне право; адміністративне судочинство; адміністративний процес; відносини адміністративних зобов'язань; Кодекс адміністративного судочинства України; правові відносини; предмет адміністративного права; публічна адміністрація.