

SUBJECT OF ADMINISTRATIVE AND LEGAL REGULATION

Nadiia Bortnyk³, Volodymyr Zarosylo⁴

Received: 2021-10-26

Accepted: 2021-12-30

DOI: <http://doi.org/10.46489/gpj.2022-2-1-3>

Abstract. In the article, from the standpoint of an integrative understanding of law and system-activity methodology, debatable issues of the subject of administrative-legal regulation are considered. The complication of social relations has led to a reduction in the range of social relations that require an imperative type of legal regulation, i.e., the influence of administrative and legal means. This process is objective. It is noted that the functional characteristics of the subject of legal regulation are due to characteristics as a criterion for systematization of the legal array and the separation of one legal entity from another, one group of rules from another; the variety of definitions; the purpose and objectives of a particular branch of law, which differ depending on the type or type (substantive and procedural, private and public); factors that characterize the new paradigms of world order, trends in social development: integration, decentralization, regionalization, diversification, etc.

The subject of administrative and legal regulation is ambiguous and can be differentiated in terms of rule-making and law enforcement. Suppose the definition of the subject of administrative and legal regulation is formulated in order to show the mechanism of influence of law on public relations. In that case, the definition should indicate that the subject of administrative and legal regulation is a model of public relations. In this case, the model of public relations is a subjective factor in determining the subject of legal regulation, and the subject of legal regulation is a set of models of public relations that can be subject to administrative and legal regulation and enshrined in the system of legal norms.

Keywords: law, integrative understanding of law, legal regulation, branch of law, administrative law, administrative-legal regulation.

³ Nadiia Bortnyk, Doctor of Science in Law, Professor, Lviv Polytechnic National University, Head of the Department of Administrative and Information Law of the Educational-Scientific Institute of Law and Psychology, ORCID: <https://orcid.org/0000-0003-1794-2793>

⁴ Volodymyr Zarosylo, Doctor of Science in Law, Professor, Interregional Academy of Personnel Management, Head of the Department of Law Enforcement and Anti-corruption Activities Prince Vladimir The Great Educational and Scientific Institute of Law, ORCID: <https://orcid.org/0000-0001-6538-7515>

INTRODUCTION

Formulation of the problem

Radical economic transformations in Ukraine, in connection with the implementation of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, and on the other hand have led to serious changes in the governance of the state and its bodies in all spheres of social life, in the field of economic management, socio-cultural construction and administrative and political activities. Carrying out reforms changes the very subject of administrative and legal regulation, and the range of social relations governed by administrative law. Changes in legislation, socio-economic transformations, reforming the system of executive bodies lead to a permanent expansion of the range of public relations governed by administrative law. Therefore, scientific controversy over the essence of administrative law in the new conditions, changing its subject, method and system is quite active.

Analysis of the problem research

Important for the study of the subject of administrative and legal regulation were the works of legal scholars: V. B. Averyanov, S. S. Alekseeva, O. F. Andriyko, G. V. Atamanchuk, V. M. Bevzenko, A. I. Berlach, Y. P. Bytyak, V. T. Belous, I. L. Borodin, O. P. Vikhrov, P. V. Dikhtievsky, Z. S. Gladun, I. S. Gritsenko, E. V. Dodin, R. A. Kalyuzhny, L. E. Kisil, S. V. Kivalov, A. A. Kozlovsky, M. I. Kozyubra, T. O. Kolomoyets, V. K. Kolpakov, O. V. Kuzmenko, V. I. Kurilo, E. V. Kurinny, R. S. Melnyk, V. Ya. Nastyuk, N. R. Nyzhnyk, N. M. Onishchenko, O. I. Ostapenko, A. O. Selivanov, M. M. Tishchenko, O. I. Kharitonova, V. V. Tsvetkova, Y. M. Shevchenko, Y. S. Shemchushenko and others. These scholars have made a significant contribution to the study of the subject of administrative and legal regulation. But the reform of public administration in Ukraine presupposes the conduct of theoretical and legal studies of public relations, the development of which requires the application of the administrative method of regulation.

The purpose of the article is to study the subject of administrative and legal regulation.

RESULTS

The definition of the subject of legal regulation should be carried out taking into account different approaches and grounds for its understanding. The main circumstance that requires priority consideration is the functional purpose of the definition of the subject of legal regulation, which can be done: to show the empirical basis of legal regulation, its foundation, the basis of social relations, which form such an empirical basis and provide an objective view of the subject of legal regulation; in order to show the mechanism of influence of law on public relations, the relationship of law with what and whom they affect, ie consolidate the rights and responsibilities of the subjects of the model of public relations; in order to show the scope, scale of legal regulation, which are represented by the socio-legal environment, a holistic system of social relations; in order to show the internal organization and complexity of social relations, which are subject to regulation in terms of typical and specific characteristics.

The functional characteristic of the subject of legal regulation is conditioned by: the characteristic as a criterion of systematization of the legal array and separation of one legal formation from another, one group of norms from another; variety of definitions; the purpose and objectives of a particular branch of law, which differ depending on the type or type (substantive and procedural, private and public); factors that characterize the new paradigms of world order, trends in social development: integration, decentralization, regionalization, diversification, etc. The subject of legal regulation gives rise to the emergence and development of these processes, so they are interdependent.

If the definition is formulated in order to serve as a basis for determining the subject of specific branches of law, the subject of legal regulation is defined as a criterion of sectoral characteristics, the institutionalization of the entire legal array.

Modern administrative law has become the successor of administrative law, which was formed under the influence of the legal doctrine of the command-administrative system of management of socio-economic processes in all spheres of life in Ukraine. This could not but affect the interpretation of the main characteristics of this branch of law,

which is developing quite dynamically, as all Ukrainian law, adapting the requirements of European Union law in the context of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community. Their Member States, on the other hand (Pro ratyfikatsiiu Uhody pro asotsiatsiiu mizh Ukrainoiu..., 2014).

In jurisprudence, disputes concerning the definition of the boundaries of administrative and legal regulation of public relations do not cease. The traditional understanding of the subject of administrative law as a set of social relations arising in the process of public administration, supplemented by new approaches based on the desire to preserve the former power of this branch of law, but the sphere of public relations has changed so much that it led to a significant transformation. objective formation of competitive branches of law, which in value and importance are in equal proportions for the regulation of social processes together with administrative law.

Despite the fact that the main criteria for distinguishing branches of law have been criticized, scholars have not yet been able to propose new criteria that are more than reasonable. The subject and method of legal regulation determine the features of the legal regime.

M. M. Ternushchak notes that the study of the subject of legal regulation of administrative law as public relations, implemented in connection with the activities of public administration, ie in the context of the management concept was relevant until the update of administrative legislation. We are talking about administrative proceedings and administrative services (Ternushchak, 2017, 139).

V. K. Kolpakov expressed a very controversial point of view. He draws attention to the widening, and at the same time to the reduction of the subject of administrative and legal regulation (Pytannia administratyvnoho prava, 2018). Widening is due, in his opinion, the emergence of new regulations governing public relations in the field of public administration (administrative contracts). The question of the sectoral affiliation of the relations arising in connection with the provision of administrative services provided by public authorities remains open.

S. V. Petkov supports the widening of the substantive component of the subject of administrative law (Pietkov, 2016). He believes that administrative law regulates all public relations that arise in the field of public administration.

O. R. Radyshevska, noting the promotion of the function of legal support, human rights functions and public service component of administrative law, defines the subject of administrative law as public relations arising in connection with the establishment and functioning of public administration, establishing a mechanism of control over administrative acts and administrative procedures for law enforcement, protection and restoration of violated rights.

According to the scientist, the new paradigm is the transition from the understanding of administrative law exclusively as the right of «command and order» to the law as a system of norms designed to guarantee and protect the rights of individuals. Therefore, it is logical that administrative law today (with public administration as a subject of legal regulation) and administrative law in the perspective of 20-30 years (with modified global public administration) are different branches of law, with different subject of legal regulation (Radyshevska, 2020, 126).

In the work of a number of scientists (these views are reflected in the legislation) there is a mixture of categories «leadership» and «management», the actual identification of the processes of functioning of social and production systems and the actions of management systems.

Many researchers in determining the subject of administrative law traditionally use the categories of «executive power», «public administration», «administrative relations», the semantic meaning of which is quite wide. The current legislation does not contain definitions of the considered definitions.

Interesting interpretations of public (municipal) governance are contained in the draft Strategy for Public Administration Reform until 2025 (Onovlennia stratehii reformuvannia derzhavnoho upravlinnia do 2025 roku, 2019). State and municipal administration are understood as the activities of public authorities to exercise their powers in the field of socio-economic development of

Ukraine. Management relations are universal. Absolutely all public authorities take part in public administration.

Without proper management, it is impossible to achieve tactical and strategic goals. The state apparatus is created to carry out management activities. With each new stage of development of society, this activity becomes more complex and diverse. Public administration is beginning to specialize in certain areas of state and public life. The need for further optimization leads to the emergence of the theory of separation of powers. Thanks to its legislative recognition, public administration reaches a fundamentally new level of quality.

The complication of social ties required even greater legal specialization. The answer to this objectively formed need is to change the boundaries of administrative and legal regulation. Many social relations, which changed their nature in connection with the transition to a market economy, demanded influence through the rules of other branches of law.

For example, the relations arising from the implementation of public and private financial and economic activities have become the sphere of influence of the imperative method of financial law. At the same time, some of them have not lost their managerial character, but the new content turned out to be incompatible with the imperative method of administrative law.

The transition from an administrative-command management system to a market one has led to the fact that some branches of law, such as: civil law, criminal law, have maintained and strengthened their leading positions; financial law, environmental law from outsiders have become industries whose importance is due to the need to create appropriate living conditions for society; administrative law has lost its former power, as objectively reduced the scope of application of methods of administrative and legal regulation.

In the scientific literature there is an opinion that administrative law acts as a structural link of many branches of law due to the fact that management precedes all other activities. So far, such a conclusion is premature.

At the same time, S. G. Stetsenko notes that in contrast to the exact sciences, where the

degree of objectivity of certain facts does not require additional explanations, the humanities (and lawyers in particular) need to agree. This applies to the subject of administrative law (Stetsenko, 2019).

Administrative law has its own subject, but its volume has been significantly reduced and is represented today by such blocks as: civil service, internal organization of executive bodies, police law, administrative contracts.

According to the authors of the textbook «Administrative Law of Ukraine» the subject of administrative law includes groups of homogeneous social relations that are formed: in the course of public administration of economic, socio-cultural and administrative-political spheres, implementation of executive powers delegated by the state to local governments, public organizations and some other non-governmental institutions; in the course of activity of bodies of executive power and local self-government, their officials, concerning maintenance of realization and protection in an administrative order of the rights and freedoms of citizens, legal entities of various administrative services; in the process of internal organization and activity of the apparatus of all state bodies, enterprises, institutions, organizations, which is connected with: passing of civil service or service in local self-government bodies; in connection with the exercise of the jurisdiction of administrative courts and the restoration of violated rights of citizens and other subjects of administrative law; during the application of measures of administrative coercion, including administrative liability of individuals and legal entities (Administrativne pravo Ukrainy (zahalna chastyna), 2019, 37-38).

Lack of understanding of the boundaries of administrative and legal regulation of public relations has a negative impact on lawmaking and law enforcement. The legislator, being in the power of traditions, does not take into account the new nature of social relations, which require legal regulation through the rules not of administrative but of other branches of law.

How else to explain why for many years the legal conflict between the law «On the National Bank of Ukraine» and Article 166-5 «Violation of banking legislation, legislation in the field of state regulation of non-banking financial services, currency legislation,

legislation governing the transfer of funds in Ukraine, regulations of the National Bank of Ukraine or the implementation of risky transactions that threaten the interests of depositors or other creditors of the bank» Code of Ukraine on Administrative Offenses (Kovaliv, 2018).

The following points are not taken into account: The National Bank of Ukraine is the only governing body of the banking system of Ukraine, which has a special financial and legal status (Kovaliv, 2018). The National Bank cannot be considered as an executive body. This contradicts its legal nature, goals and objectives. Public management of the banking system is an important area of public financial activity carried out by the National Bank of Ukraine on behalf of the state; banking relations are a kind of financial relations, in nature they require the influence of financial law.

An integrative understanding of law forces us to rethink the range of sources and forms of administrative law. In fact, the controversy on this issue is a continuation of the general theoretical discussion. The sources of administrative law are what the rules of administrative law. Accordingly, we can identify such sources as: direct expression of the will of the Ukrainian people; law-making activity of authorized subjects; agreement of authorized entities; identical and repeated actions of subjects.

Forms of expression of administrative law are the principles of law, regulations, regulations, customs of law. Considering the relationship between them, it is necessary to emphasize the fundamental importance of the principles of law. Principles of law are real means of legal regulation of public relations, important and primary elements of a single multilevel system and evolving forms of national and international law. Principles of law are a fundamental form of expression of administrative law, can be classified into general, special and principles of individual institutions of administrative law. When considering the forms of expression of law, it should be borne in mind that the name of the legal act is not always a reflection of industry affiliation. We are talking about regulations.

Regulations – are normative acts of public administration structurally include: regulations of public authorities, regulations for the

performance of state functions, regulations for the provision of administrative services.

Many legal entities operate on the basis of regulations. It has regulations, for example, the Verkhovna Rada of Ukraine, the Accounting Chamber of Ukraine (Pro rehlament Verkhovnoi Rady Ukrainy, 2010; Rehlament Rakhunkovoi palaty Ukrainy, 2018). Regulations are acts adopted by the subject of law, which contain the algorithm for carrying out activities. Sectoral affiliation of norms is determined by the nature of activity, ie the subject and method of legal regulation. It is hardly possible to refute the conclusion that the Rules of Procedure of the Verkhovna Rada are a form of expression of constitutional law, and the Rules of Procedure of the Accounting Chamber of Ukraine – financial law. The apparatus of the state, consisting of state bodies, is designed to ensure the performance of state functions.

Each state body is created to carry out certain state activities. The Instruction on the Organization of Internal Control in the System of the Ministry of Justice of Ukraine defines the administrative regulations as a mandatory procedure for actions (decisions) of the central executive body, its structural subdivisions and officials, aimed at exercising their powers in the performance of state functions (Pro zatverdzhennia Instruksii z orhanizatsii vnutrishnoho kontroliu v systemi Ministerstva yustytysii Ukrainy, 2014).

The subject of legal regulation is ambiguous and can be differentiated in relation to the field of rule-making and law enforcement. Rule-making is part of the process of legal regulation, during which the state creates regulations. The subject of legal regulation in the field of rule-making are public relations, the authorization or creation of which is aimed at this process: public relations, formed during the formation of law (the state only fixes in the adopted regulations these public relations, authorizing them); social relations, covering the creation, structure, powers, interaction of public authorities with each other and with the population.

Administrative contractual legal regulation is in constant dynamics and interacts with other means and institutions of the legal system and the legal system of society. This revealed some trends in the development, transformation and modernization of this level

of regulatory activity. One of such tendencies, in our opinion, is the expansion of the subjective composition of administrative-contractual regulation, namely the increase of public-law entities that use contractual tools. Or, as some authors note, we are talking about expanding the scope of contractual regulation, the penetration of private instruments in the field of public law.

The next trend can be called increasing the complexity of the legal regulation of public relations by administrative agreements, increasing the imperative principles in administrative-contractual legal regulation. This is typical not so much for the public law sphere, where mandatory rules are quite natural, especially when it comes to establishing rules for concluding contracts, for example in relation to public procurement specific contractual and regulatory tool.

CONCLUSIONS

The complication of social relations, due to the transition to a market system of management, has led to a reduction in the range of social relations that require legal order through the influence of the rules of administrative law. This process is objective. The subject of administrative law is universal, recurring, strong-willed, stable social relations,

which constitute a holistic open dynamic system, which must meet the legal system and which are actively influenced by the social management and regulatory systems of the state.

If the definition of the subject of legal regulation is formulated in order to show the mechanism of influence of law on public relations, then the definition should indicate that the subject of administrative and legal regulation is a model of public relations. In this case, the model of social relations is a subjective factor in determining the subject of legal regulation, and the subject of legal regulation is a set of models of social relations that can be subject to administrative and legal regulation and enshrined in the system of legal norms.

Modern science develops and functions in a special historical epoch, when there is a search for new ways of civilizational development, their understanding requires a new assessment of the development of man-made civilization, many values of which are related to the attitude to nature, man and focused on the ideals of consumption, which requires the creation of effective legal tools to manage social processes that are subject to administrative regulation.

References

Administratyvne pravo Ukrainy (zahalna chastyna) (2019). Lviv: NU «Lvivska politehnika».

Kovaliv M. V., Yesimov S. S., Prots I. M., Lozynskyi Yu. R. 2018. Pravove rehulivannia finansovoho kontroliu v Ukraini. Lviv: Lvivskyi derzhavnyi universytet vnutrishnikh sprav.

Onovlennia stratehii reformuvannia derzhavnoho upravlinnia do 2025 roku (2019). <https://par.in.ua/en/contents/onovlennia-statehii-reformuvannia-derzhavnoho-upravlinnia-do-2025-roku>

Pietkov S. (2016). Predmet administratyvnoho prava – konstanta v protsesi transformatsii suspilno-politychnykh vidnosyn. Publichne pravo. 1 (21). 35-42.

Pro ratyfikatsiiu Uhody pro asotsiatsiiu mizh Ukrainoiu, z odniiei storony, ta Yevropeiskym Soiuzom, Yevropeiskym spivtovarystvom z atomnoi enerhii i yikhnyimy derzhavamy-chlenamy, z inshoi storony. (2014). Zakon Ukrainy vid 16.09.2014 r. # 1678-VII. Vidomosti Verkhovnoi Rady Ukrainy. 2014. 40, 2021.

Pro rehlament Verkhovnoi Rady Ukrainy (2010). Zakon Ukrainy vid 10.02.2010 r. no1861-Kh. URL. <https://zakon.rada.gov.ua/laws/card/1861-17>

Pro zatverdzhennia Instruksii z orhanizatsii vnutrishnoho kontroliu v systemi Ministerstva yustyttsii Ukrainy (2014). Nakaz Ministerstva yustyttsii Ukrainy vid 06.11.2014 r. no 1864/5. URL. https://minjust.gov.ua/m/str_50246

Pytannia administratyvnoho prava. (2018). Kharkiv: OOO "Oberih".

Radyshevska O. R. (2020). Do pytannia pro predmet administratyvnoho prava u vitchyzniani ta yevropeiskykh pravovykh doktrynakh v umovakh transformatsiinykh zmin. Prykarpatskyi yurydychnyi visnyk, 1 (30), 122-128.

Rehlament Rakhunkovoi palaty Ukrainy (2018). Zatverdzheno rishenniam Rakhunkovoi palaty Ukrainy vid 28.08.2018 r. no 22-7. URL.

https://rp.gov.ua/upload-files/About/RegulatoryDoc/arp_1.pdf

Stetsenko S. (2019). Predmet administratyvnoho prava yak «vichnozelenyi» siuzhet administratyvnoho prava. Pravo Ukrainy. 5, 29-45.

Ternushchak M. M. (2017). Pro predmet administratyvnoho prava u konteksti upravlinskoj kontseptsii v administrativistyti. Pravo i suspilstvo. 5, 136-139.