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O. Muza, Doctor of Legal Sciences, Senior Researcher, Professor Department of Criminal and Administrative Law Academy of Advocacy of Ukraine Kyiv, Ukraine

JUDICIAL LEGISLATION AND ADMINISTRATIVE LEGAL RELATIONS: SEARCH OF INTERCONNECTION

Abstract. *The article is dedicated to research of the impact of the court decisions on the process of applying the norms of administrative legislation. The author emphasised the importance of determining the newest system of administrative law sources with the aim to formulate the role of court decisions for the dynamics of administrative-legal relations. It is analysed the correlation of such concepts as ''law enforcement", ''court decision" and ''judicial legislation". It is established that complexity of the interconnection between judicial legislation and administrative-legal relations consists in the special impact of the acts of judicial bodies on the public administration functioning. The legal nature of public dispute touches upon the public order in the state, the necessity for proportional correlation of public and private interests, public administration functioning, etc. It is concluded that the efficiency of connection between judicial legislation and administrative legal relations depends on such a phenomenon as a judicial error since under such conditions the relevant impact can have a destructive nature regarding the field of public administration.*

Key words: *judicial legislation, administrative legal relations, public administration, court decision, administrative courts.*

Introduction

Modern legal practice of Ukraine is characterised by the appearance and spread of intersectoral relations in the legal regulation mechanism of social relations. The classical understanding of the branch of law is supplemented by the necessity to distinguish the latter from the branch of legislation and individual sub-branches of law that leads to the allocation of independent groups of legal relations. One of the factors which has an impact on the interdisciplinary nature of the legal system is the judicial practice which by means of certain procedural forms and means solves the

complex current matters of evaluating the problems of development of sectoral legal relations, providing with the help of judicial decisions the evaluation of legal regulation state of homogeneous legal relations. Given this fact, in legal science doctrinal views on judicial practice as a source of law and a factor of necessity to improve sectoral legislation are changing.

The development of administrative law in Ukraine is characterised by a change of theoretical views on the nature and types of administrative relations: reconsideration of general theory of administrative law; slow but gradual administrative law reforming; introduction and development of administrative court procedure; appearance of certain branches of legislation which conceptual origins are based on the subject of administrative law and the like. However, the greatest feature that determines the public power-managerial relations is the impact of judicial practice due to which a particular type of administrative legal relations along with obligatory legal regulation experiences legal changes. It is the beginning of administrative courts functioning in the 2000s that ensured the self-sufficient division of administrative legal relations into material and procedural within the framework of a single subject of administrative law, appeared new opportunities for improvement of the legal regulation mechanisms of the latter, appeared the ability to put into practice the requirements of humanocentrism principle in public administration and protect the rights, freedoms and interests of individuals from possible illegal public power-managerial impact (infringement).

Judicial decisions are not only legal acts by which the court on behalf of the state decides the question of the scope of rights of the parties to the disputed legal relations, but also in their legal positions it is possible to find a continuation of the administrative legal theory. Judicial interpretation of administrative and material norms of law eventually affects the legislative improvement of administrative and legal regulation of social relations.

At the present stage of legal science development, the problems of judicial lawmaking are investigated by V. V. Komarov [1], L. M. Moskvich [2], S. V. Prylutskyi [3], A. O. Selivanov [4], S. V. Shevchuk [5] and the others. It is the idea of creating judicial law in Ukraine that makes it necessary to analyse the interconnection between judicial and extrajudicial instruments of impact on the development of legal relations.

S. V. Shevchuk notes that "judicial practice plays a role of concretisation of laws and in this it complements the legislator, or rather it becomes a source of law in case of a legislator's "inaction" when the normative legal acts contain gaps, their textual presentation is ambiguous and contradictory for understanding as well as raises problems in law enforcement. Judicial practice fills the gaps by using the analogy of right and law, that is, the result of this analogy and the order of judicial motivation has a special weight and importance for the subsequent resolution of similar cases. Of course, a legislator can consolidate the results of judicial practice by legisla-

tive concretisation. But this can take place already post-factum, at the time when the interests of justice require the specification of laws through judicial practice in the process of hearing a particular case" [5].

A. O. Selivanov emphasizes that "the doctrinal concept of judicial law can not yet be considered an internally completed <…> judicial law is one of the branches of public law in which its main subject is judiciary power which functions independently on the constitutional principle of separation of powers, and the existence of constitutional, civil, administrative and other types of legal proceedings are the forms of the state activity (justice implementation)" [4].

T. O. Kolomoyets notes that "in the scientific community, the thesis of the expediency of so-called judicial law which would "absorb" all the procedural judicial components of the elements of the domestic legal system, is increasingly substantiated that, in its turn, would contribute to ceasing any further discussions regarding the understanding of the process content (as general concepts) and its variations and distinguish it from other legal institutions" [6].

N. Ye. Blazhivska notes that "the judicial doctrine, first of all, is intended to fill gaps in the legislation and demonstrate the directions for its improvement, and also supports the understanding of the concept of judicial doctrine as the ratio of the ideological load of the doctrine with the choice of a reasonable response to a reasonable argument in the process of applying the norms of the law in the court" [7].

The Law of Ukraine On Amendments to the Economic Procedural Code of Ukraine, Civil Procedural Code of Ukraine, Code of administrative procedure of Ukraine and other legislative acts of 03.10.17. No. 2147-VIII (hereinafter referred to as Law No. 2147-VIII) [8] the Code of Administrative Procedure of Ukraine (hereinafter – the CAP of Ukraine) [9] is set out in a new version and came into force on December 15th, 2017 together with the beginning of the Supreme Court's functionning. It is the latest provisions of the procedural legislation that establish the necessity for the search of the interconnection between decisions of administrative courts and administrative legal relations with the purpose of harmonisation of their legal regulation.

1. Materials and methods

The scientific methodology is based on the use of general theoretical research methods: with the help of the method of analysis, the study of the legal significance of judicial practice and judicial lawmaking for the regulation of administrative legal relations was conducted; the system method allowed to draw conclusions about the place and role of court decisions in the system of administrative law sources; obtaining the results of scientific research became possible with the help of formal-legal and logical-legal methods which made it possible to come to the conclusion about the interconnection between public-managerial and judicial activities; the use of the terminological approach provided an analysis of the interconnection between the concepts of "law en-

forcement", "judgment" and "judicial lawmaking".

An important role in conducting the research was played by the comparative- legal method, with the help of which it was possible to find differences in understanding the essence of the judgment as a source of law in the continental and Anglo-Saxon legal systems. It is this approach that ensured the development of proposals for determining the place of judicial practice in the field of public-managerial legal relations and the necessity to achieve effective interaction between the bodies of executive and judiciary power. The comparative legal method of research also made it possible to analyse different various sources of theoretical understanding of the purpose and role of law in the regulation of social relations. This made it possible to develop author's statements about the role of the type of legal understanding in order to justify the importance of judicial decisions for the sphere of executive power and administrative legal relations.

One should note that when conducting the study of the interconnection between judicial lawmaking and administrative legal relations, there was a necessity to analyse scientific sources not only on administrative law, but also on theory of law (general theoretical law), theory of legal process and constitutional law and judicial law. Also, one should note the state of scientific research in the field of administrative law has no high degree of coverage of impact of the judicial bodies on the sphere of public-administrative relations.

The article provides an overview of the regulatory provisions of the administrative procedural law after a procedural law reform was passed in 2017.

2. Results and discussion

2.1 Judicial decisions in the system of administrative law sources

For a long time coverage of the issue of administrative law sources in administrative-legal science has been based on the principle of using the achievements of general theoretical law, taking into account the specific features that determine the sources of law in the field of administrative and legal relations. During a rather long transition from the Soviet legal understanding to modern approaches in legal science, scientists considered the issue of administrative law sources which are based on the approaches of the continental system of law. However, the problem of system and determination of the right sources since the early 2000s, the processes that started in the national law system have been exacerbated and especially activated after the legal registration of the Association of Ukraine with the European Union.

In General Theory of Law Textbook edited by M. I. Koziubra there is a definition of "type of legal understanding" in which it is noted that the fundamentally important theoretical category which reflects the possibilities of simultaneous application of systemic, functional, synergetic and hermeneutic approaches in the implementation of the characteristics of law.

According to the authors of the textbook, the typology of legal understanding is based on the legal and ideological

criterion (depending on what is output in understanding of law-superpower-natural, state or real-life) that that made it possible to distinguish such types as natural law, legal-positivist and sociological.

Within the framework of the legal-positivist type, any creative role of a judge is denied, reducing him exceptionally to the "voice of law", that is, formally-dogmatic application. However, the sociological type of legal understanding on the contrary increases the role of the court not so much as the "voice of the law", but as an instrument of lawmaking [10]. That is why the type of legal understanding directly affects the formation of scientific knowledge about the sources of law, their system and purpose.

In academic course of Administrative Law of Ukraine edited by V. B. Averianov, the sources of administrative law include laws, resolutions of the Verkhovna Rada of Ukraine, decrees of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, orders of ministries, central executive authorities, normative legal acts of the Verkhovna Rada and the Council of Ministers of the Autonomic Republic of the Crimea, acts of local state administrations, decisions of local councils (local self-government bodies), acts of governing bodies of state enterprises, institutions, organizations, international agreements (treaties) and international legal acts ratified by the Verkhovna Rada of Ukraine [11]. That is, the classical system of sources of law is given, taking into account the administrative nature of administrative and legal relations. Separately, the textbook presents the thesis of judicial precedents as a source of law and it is stated that the latter can not be recognized as a source of law in the legal system of Ukraine, except for the decisions of the Constitutional Court of Ukraine which "have binding force in the resolution of an unlimited number of individual disputes, that is, have a normative character" [11].

The reference to the phrase "normative character" indicates the possibility of giving the judicial authority the function of norm-setting that is still perceived by the domestic legal science quite critically. Thus, in the system of public power, the legislative function belongs to the Parliament and there is no antithesis, however, if to proceed from the general concept of lawmaking and the appointment of public power, it is unlikely that it can be argued about the "exceptionality" of Parliament as a state institution that develops rules, forms and means of regulating social relations. So, along with this, there do not exist any legal axioms regarding the impossibility of a judicial authority to be a subject of law-making.

Although judicial activity in the framework of lawmaking is limited to procedural norms, however, in the result of this activity, a legal phenomenon appears as a judicial practice in its various forms and dimensions that does not deprive the court decision of being a source of law. M. I. Smokovych notes that "when resolving cases, the court reveals the content of the principles of justice, reasonableness and good faith with the help of the laws of logic and taking into account the content of disputed legal re-

lations. That is, when formulating the criteria on the basis of which the case will be resolved, the court is guided by solely legal arguments, without resorting to considerations of political expediency. Thus, unlike the activities of Parliament, judicial lawmaking is not a political activity" [12].

The authors of General Administrative Law Textbook P. S. Melnyk and V. M. Bevzenko changed classic views on the well-established theory of administrative law of Ukraine, among the sources of administrative law there were called judicial decisions. According to the professors,"…courts and judges are often faced with gaps in the law, the inconsistency of certain provisions of legal acts, that, as a consequence, complicates the implementation of justice. Given this, there is a necessity for judges to develop certain principles (provisions) aimed at eliminating shortcomings that can be found in the existing regulations. Similar principles (provisions) can be applied by other courts (judges) in resolving analogical cases. <…> At the same time, the court (judge) can only specify or supplement legal acts by its(his) decision" [13].

From the given educational and scientific material it should be noted that judicial decisions as sources of administrative law should not be understood as all judicial decisions that can be taken or adopted by the judicial authorities, but only the decision of the Constitutional Court of Ukraine, the Supreme Court and the European Court of Human Rights. At the same time, court decisions should be divided into decisions of national courts and international judicial bodies since their legal nature, particuliarities of applying and execution are different.

2.2 Novelties of the administrative procedural law in the context of judicial lawmaking

The appearance of the concept of judicial lawmaking should be associated with the search of the existing theoretical and applied connection between lawmaking and justice. The legislative process can never fully overcome existing gaps in law. Besides, there arise gaps in legislation during the process of implementing legislative regulations. That is why the courts, along with a legislator, play an important role in filling the relevant gaps and contribute to the solution of controversial issues in law enforcement.

Taking into account the necessity to expand the powers of the court in solving the current problems of law enforcement, the administrative procedural law was updated on October 3rd, 2017. We consider it necessary to cite the following provisions of the Code of Administrative Procedure of Ukraine which increase the importance of judicial decisions as sources of administrative law and the application of administrative law:

1) the introduction of typical and exemplary administrative cases, i.e. the creation of the basis for combining the continental law system with the common law system that makes it possible to apply judicial precedents by all national courts;

2) the possibility of the court to terminate the application of the law or other legal act. If the court comes to the

conclusion that such a law or other legal act is contrary to the Constitution (para. 1 Part 4 Art. 7 of the Code of Administrative Procedure of Ukraine), it changes the established traditions of normativism about the role of the law in the regulation of public relations and gives the court the right not to be limited by the norms of legislative or even other legal acts;

3) procedural regulation of the procedure for derogating from the conclusion on the application of the rule of law in similar legal relations set out in the earlier approved decision of the Supreme Court (Art. 346 of the Code of Administrative Procedure of Ukraine) – ensures an evolutionary way of substantive and procedural law application by the Supreme Court.

In the result of the reform of the procedural legislation of Ukraine, there appeared a provision that changes management practice and makes it conditional by the court decision. It comes to provisions of the Law of Ukraine On Public Service [14] which stipulates the elements of the disciplinary offense of a public servant – a decision that contradicts the conclusions on applying the relevant rule of law set out in the decision of the Supreme Court in respect of which the court issued a separate decision (para.15 Part 1 Art. 65 of this Law).

2.3. Role of judicial decisions in solving administrative law problems

The question arises on how much Law No. 2147-VIII adopted by the Parliament changes the existing scientific views on the role of judicial decisions in solving problems of administrative law? It is important to cite the provisions of Part 5 Art. 346 the Code of Administrative Procedure of Ukraine which stipulates the right of the court to consider the case in a collegium or chamber, in cassation and refer the case to the Grand Chamber of the Supreme Court. If the court comes to the conclusion that the case contains an exceptionally legal problem, then its referring is necessary for ensuring the development of law and the formation of a unified law enforcement practice. It is this procedural rule that provides a possibility to the court to use a lawmaking function to solve the problems of administrative law. An answer to this question also lies in the framework of scientific and practical connection of the concepts of "law enforcement", "court decision'' and "judicial lawmaking".

Law enforcement as a separate independent form of right implementation reflects the content and essence of legal regulation of a certain type of social relations. That is obligatory participation of government authorities in the enforcement process that makes such an activity of legal character an important component of efficiency evaluation of applying the norms of administrative-procedural legislation.

The legal nature of the legal positions of the supreme judicial bodies, contained in the relevant judicial decisions, has a double character. If to take into account the national legal system's belonging to the system of continental law, the judicial conclusions set out regarding the particularities of the interpretation and applying of the relevant provisions of legal acts have an advisory character. If to proceed

from the procedural legislation provisions, the legal conclusions of the Supreme Court are obligatory in respect of applying both judicial practice and management practice of the power subjects. "The lawmaking activity of the higher courts of general jurisdiction is carried out at the stage of cassation reconsideration of court cases. At this stage of court procedure, the sequence of lawmaking actions of the higher courts consists in revealing the gaps in legal regulation, their filling and taking a decision on the case and its official promulgation. These lawmaking actions are united by the purpose of establishment of normative-legal prescriptions set out in precedential lawmaking acts" [15]. "In the normative-legal acts of judicial power (in the form of norms clarification or establishment of generally obligatory procedural rules), the rules of law are not the result of the decision of a particular case, but the consequence of the purposeful lawmaking activity of supreme judicial bodies. A characteristic feature of these rules is that their formulation is carried out either on the basis of the generalisation of the practice of resolving a certain category of disputes or they represent procedural rules for the consideration of disputes, the powers regarding their establishment are stipulated by the law by supreme judicial authorities" [16].

The acts of judicial lawmaking can have different legal nature and are divided into lawmaking acts, interpretative acts, law enforcement acts and organisational-judicial acts.

The normative character of court decisions defines the concept of "judicial lawmaking". A. Steinman distinguishes between the concepts of *"lawmaking"* and "*judicial legislation*", noting that judicial legislation should take place within the constitutional powers of the judiciary and reflect the interpretation of constitutional rules and regulations as well as take into account the rules of *stare decisis* doctrine which obliges lower courts to take into account the judicial reasoning of the Supreme Court [17]. A similar position on the support of judicial legislation expresses M. I. Koziubra who notes that "one of the main reasons for the necessity for judicial legislation is the need to specify the rules of laws and other regulations adopted by the official subjects of law – making or to be exact, their updating, namely, adaptation to specific situations which is the subject of the court's consideration…" [18].

Law enforcement as a result of the appearance of court decisions in which can be traced the elements of legislation (the appearance of legal rules for the regulation of social relations different from those enshrined in legal acts) remains a key category for characteristics of the court decision as a source of law. This can be justified by such a theoretical construction as *ratio decidendi* – "a court decision by itself has no special meaning, in it obligatory aspects are the norm and principle it is based on and the proof of which it serves. That is, the norm which is directly or indirectly interpreted by the judge" [19]. So, one should distinguish between *ratio decidendi* and *obiter dicta* ("said among other things") since the latter is not a part of

ratio decidendi and reflects the individual views of the court on the subject of discussion.

Given that the legal system of Ukraine belongs to the system of continental law, one should note the existence of the jurisprudence constant doctrine, that is, the established judicial practice. What does this mean in the context of our research? Judicial practice can be called "established" if it has been formed for a long time and in the formation of such a judicial practice the courts of lower instances play a role because they consider a number of court cases. And it also gives grounds to claim that legal conclusions of the Supreme Court appear not only on the basis of consideration of a certain precedent, but also as a result of reconsideration of decisions of local and appellate courts.

2.4 Search of interconnection between judicial lawmaking and administrative legal relations

The complexity of the interconnection between judicial legislation and administrative legal relations lies in the special impact of acts of the judiciary on the public administration functioning. The court, determining the features of applying substantive law should take into account the powers of the authority subject and be guided by the provision of Part 2 Art. 19 of the Constitution of Ukraine. The legal nature of a public-law dispute touches upon public order in the state, the necessity for a proportional balance between public and private interests, the functioning of a public administration body and the like. Therefore, the procedural possibilities of the court in solving the problems of law do not give it grounds to go beyond the obligatory prescriptions of organising the public administration in the state. This is one of the main features of administrative court procedure, the court can only solve specific legal problems on the example of a specific public-legal dispute, but it can not directly interfere in public power-managerial activity. Therefore, in the interconnection between judicial legislation and administrative legal relations there are boundaries conditioned by the particularities of the state power organising.

In view the above said, one should agree with the position of R. Kremton who, studying the matter of interconnection between judicial legislation and administration, emphasises that the most optimal form of such an interconnection is a model of judicial control which stipulates external verification of the activity of executive agencies, government bodies for its compliance with legal acts. However, in his opinion, the traditional court decision which is based on the analysis of specific legal facts, does not oblige public servants to take positive measures in the future in order to avoid new legal actions. R. Kremton suggests to the court to act as a public administration, complementing in its decisions the possibility of extension of administrative impact to resolve specific controversial situations [20].

In this context, A. Lehevi calls the court a "state actor" that by his decisions solves a number of matters of constitutional rights and freedoms, property, public formations, etc. The constitution-

al provisions on the power separation do not necessarily indicate the practical ways in which the judiciary participate in the exercise of powers held by other branches of government [21].

Given this, there are controversial matters: 1) does the court, using the possibilities of judicial legislation, solving specific cases and making decisions, determine/reconsider/change the procedure for the implementation of rights, freedoms and interests of individuals in the field of public administration? 2) is the role of the main actor in the field of public administration – the body of public administration – supplemented by the judicial authority thanks to the acts of judicial legislation? The matter is quite polemic, however, this time one should recall the principle of unity of state power and the constitutional boundaries of judicial intervention in the activities of the legislative and executive branches of power.

Conclusions

The matter of the judicial practice importance is actual for the domestic legal science, as it is a system-forming factor for the deepening the general theory of legal process and the possible formation of judicial law. The Ukrainian legal opinion made a way from categorical denial of judicial legislation to recognition of decisions of the supreme judicial bodies as sources of law. The reform of procedural legislation on October 3rd, 2017 introduces a combination of features of continental and common law. The result of this is a change of understanding the court decision as a source of law, that is, the court decision can contain provisions that are obligatory for participants of administrative-legal relations.

In modern administrative law there do not exist yet formed approaches which would have a correct solution of the matter of court decisions implementation in applying an administrative law, development of administrative legal relations, balanced combination of the impact of executive and judicial branches of power on the public administration field. In this perspective, by means of judicial legislation, the court should become an independent arbitrator to solve the problems of the current applying the administrative law. It is in the acts of judicial that the problematic matters of relations between individuals and public administration can be solved, however, for this it is necessary to develop high-quality judicial practice in different categories of public-law disputes in terms of new procedural legislation and determine additional conditions for the legality of the administrative-legal impact of the authority subjects on individuals in administrative-legal relations in the decisions of the Grand Chamber of the Supreme Court, the Cassation Administrative Court of the Supreme Court. So, the effectiveness of the connection between judicial legislation and administrative legal relations also depends on the phenomenon of judicial error, since under such conditions the relevant impact can have a destructive nature on the field of public administration.

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