

Administrative Jurisdiction in Ukraine: Discourse Analysis

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Abstract: The development of administrative jurisdiction is extremely important for the establishment of a democratic society and the protection of human rights. The purpose of this paper was to study the system of administrative courts in Ukraine and other countries and delineate the powers of courts of different jurisdictions, as well as to study the history of the system of administrative courts in different countries and compare the experience of administrative jurisdictions in different countries. The methodological framework comprised discourse analysis as a method of qualitative research of the issues under consideration. This method involves the study of textual sources, mainly when it comes to understanding law and social laws, as well as their history. In the course of the study, the systems of construction of administrative proceedings of the leading European countries are considered, based on which the general systems of organisation of administrative jurisdiction are outlined: 1) French; 2) German; 3) the common law system; 4) different types of mixed systems. As a result of the research it was established that in general the development of administrative jurisdiction in Ukraine from the 19th century to the present has passed 5 stages and each of them was described. It is stated that the current system of administrative jurisdiction in Ukraine is quite progressive and balanced: administrative courts are a separate three-tier system, and a special procedure has been introduced for administrative cases.

Keywords: Administrative law, administrative legal disputes, general judicial system, historical approach, democratic society.

INTRODUCTION

The emergence of administrative jurisdiction is closely linked to the democratic vector of society. After all, the very possibility of protecting citizens from the arbitrariness of state bodies by means of court appeal constitutes a sign of developed democratic institutions of society. Therefore, in the days of ancient Greece, Rome, or medieval monarchies, institutions similar to administrative courts did not exist and could not exist. Certain origins of the establishment of the ideas of administrative jurisdiction in Ukraine can be seen in the provisions of Magdeburg law, which was aimed at protecting citizens from the arbitrariness of the feudal lords. However, the path from realising the possibility of protection from the arbitrariness of power by resorting to the provisions of the law, as opposed to raising an armed uprising, to the establishment of a system of administrative courts was rather long. As mentioned above, the existence of administrative courts is linked to democracy and is incompatible with the realities of absolute monarchy. Therefore, for the first time in the world, administrative jurisdiction as a separate body aimed at protecting citizens from the arbitrariness of state bodies was established in the 18th century in France, in the form of the Council of State. Already in the 19th century, the Council developed the framework for the functioning of a system of separate courts of administrative jurisdiction, which aimed to protect

citizens from the arbitrariness of the authorities. The result of such work was the creation of a model of administrative jurisdictions in the 19th century, which constitute a part of the system of public administration and are not under the control of general courts. The current system of administrative courts in France includes tribunals as courts of first instance, administrative courts of appeal, and the cassation function is performed by the Council of State (Somina 2002; Dinzhos *et al.* 2015a; Adygezalova *et al.* 2018; Bohutskyi 2019; Prentkovskis *et al.* 2009; Pushkina *et al.* 2020; Trusova *et al.* 2019).

The history of the establishment of the system of administrative justice in Germany is primarily associated with the emergence of administrative courts in several German lands in 1863-1878. This laid the foundations of the German model of administrative justice, which is described by the creation of specialised administrative courts, which constitute part of the general judicial system, but are independent in their activities (Reshota 2008; Timkina *et al.* 2019; Trusova *et al.* 2020a; Trusova *et al.* 2020b; Trusova *et al.* 2020c; Barashkin and Samarin 2005). The system of administrative justice in Germany includes three instances: the Administrative Court of Land (court of first instance); Supreme Administrative Court of Land (appellate instance); Federal Administrative Court (Court of Cassation). T.G. Watkin (2018), points out that the system of continental law, built on the French model, has a system of separate judicial administrative courts. In the Italian model, according to the researcher, the function of administrative proceedings

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is performed by ordinary courts. However, in the common law system, the main role in administrative proceedings is played by administrative tribunals as quasi-judicial bodies, the activities of which are controlled by general courts through special procedures (Reshota 2008). Currently, there is no common understanding among scholars of the concept of administrative jurisdiction. For example, V.V. Hordieiev (2011) points out that administrative jurisdiction should be understood as a legal institution that contains a set of legal features (properties) of an administrative case, based on which the law determines the court that has the right and obligation to consider such an administrative case. At the same time, E. Horváth (2019) points out that one of the most important guarantees of legal security of public safety is the existence of administrative jurisdiction. On the example of Hungary, the researcher states that the creation of a special procedure for resolving administrative disputes, separate from both constitutional jurisdiction and civil proceedings, along with the functioning of the system of administrative courts, constitutes one of the main factors stimulating the development of the state (Horváth 2019).

M. O'Brien (2020) notes that administrative jurisdiction is extremely important for the development of a democratic society and the protection of human rights. The development of modern democratic legal science, as the researcher points out, is inseparable from the development of issues of administrative jurisdiction. The scientist sees the further development of administrative jurisdiction in the context of the introduction of mediation mechanisms and further democratisation of administrative procedures. It should be noted that these issues in various respects are of considerable interest to Ukrainian researchers – T. Bilkiewicz (2017), M.V. Verbitska and V.O. Semeniuk (2020), V.A. Somina (2002), V.V. Reshota (2008), N.V. Babiak (2016), N. Chudyk (2019), V.I. Butenko (2008) and others. With that, foreign researchers also pay considerable attention to the specific features of the functioning of administrative court systems in different countries – for example, A. Putrijanti (2020) considers the issue of administrative jurisdiction in Indonesia, J. Turłukowski (2016) – in Poland, L. Potěšil (2019) – in the Czech Republic, N. Hoolo (2019) – in Lesotho, M.A. Restrepo-Medina (2010) – in Colombia, etc. Considering the above, the purpose of this paper is to investigate the system of administrative courts in Ukraine and other countries and delimit the powers of courts of different jurisdictions, as well as to study the

history of the administrative courts in different countries and compare the experience of administrative jurisdictions in different countries. First and foremost, the paper first of all considers the issues of functioning of the system of administrative courts and the existence of separate procedures for resolving administrative disputes both in Ukraine and in other countries.

MATERIALS AND METHODS

The special nature of administrative law determines the role it plays in modern society, controlling the relations between citizen and state. Therefore, for research in this area, as noted by M. Partington (2019), of particular importance is a holistic approach to methodology. According to Semchuk *et al.* (2019), the issue of legal research methodology in Ukraine is currently underdeveloped. Therefore, for the purposes of this paper, several complex methods are used, applied mainly by foreign researchers. These methods allowed to perform the work at a high level and procure a quality result. The basic methodology is discourse analysis as a method of qualitative research of the issues under consideration. This method involves studying the meaning of textual sources, mainly when it comes to understanding law and social laws, as well as their history. Such laws were clarified through textual and contextual consideration. The study used secondary data and data collected from books, journals, and other relevant sources on this issue (Lutfullah 2020; Zhigir 2020; Akbarov *et al.* 2018; Aleksandrova *et al.* 2020; Dinzhos *et al.* 2015b; Dinzhos *et al.* 2015c; Fialko *et al.* 1994; Zykova *et al.* 2021; Gernet *et al.* 2018; Pylypenko 2020a; Trusova 2016; Vinnik 2019; Yuilin *et al.* 2019; Zatsepin *et al.* 2018).

Within the framework of this method of discourse analysis, considerable attention was paid to such important tools as scientific description and comparison of the experience of administrative jurisdiction in different countries through the study of the discourse of these issues. Scientific comparison was used mainly to compare the texts of legislative acts in legal regulation of the main issues of administrative jurisdiction. Also, within the framework of a comprehensive analysis of discourse, a historical approach is applied. The historical approach to legal research remains different from any other approach, as it provides a framework for analysing the development of law as well as the operation of law, both internally and externally (Pathak 2019; Sultanbekov and Nazarova 2019a; Sultanbekov

and Nazarova 2019b). Considering the above, the main attention in the work is paid to the analysis of the discourse, which was carried out by analysing the comparative and historical aspects of the establishment of administrative jurisdiction in Ukraine based on secondary data and scientific literature on the studied issues (Fedyunin *et al.* 2018; Golubina *et al.* 2018; Polovchenko 2020; Pylypenko 2020b; Sultanbekov *et al.* 2020; Tashpulatov *et al.* 2018a; Tashpulatov *et al.* 2018b; Tashpulatov *et al.* 2020; Usenbekov *et al.* 2014).

RESULTS AND DISCUSSION

As T.G. Watkin (2018) notes, administrative law constitutes a branch of public law that governs the relations of public authorities with each other or with citizens. N.B. Pysarenko (2002) points out that the first historical stage of the establishment of administrative justice in the Ukrainian lands covers the second half of the 19th – the first seventeen years of the 20th century. During this period, Ukraine was part of the Russian Empire, where administrative and legal disputes at first instance were resolved by mixed "provincial presences", which included officials and representatives of the nobility, zemstvo, and city government. The second instance was the first department of the Senate, which in fact played the role of the supreme administrative court. However, Jarosław Turłukowski (2016), who investigates the establishment of administrative jurisdiction in Poland, points out that after part of the Kingdom of Poland joined the Russian Empire, the former State Council continued to operate, but among the administrative powers only dispute resolution was mentioned. From 1816 to 1822, administrative jurisdiction was exercised on behalf of the State Council by a delegation of the administration, and the Supreme Administrative Court acted as the second and final instance of administrative court decisions made by the prefectural council and provincial committees. In 1822 the Delegation of the Administration was liquidated, and later the judicial and administrative functions were again performed by the State Council until 1842, when its competence as a body of second instance was transferred to the Administrative Senate (Barabanshchikov *et al.* 2016; Ibragimov *et al.* 2019; Kostruba and Hyliaka 2020; Kostruba and Vasylieva 2020a; Kostruba and Vasylieva 2020b; Makushkin 2019; Mamadaliev *et al.* 2020; Petryshyn and Tatsiy 2019; Polovchenko 2019).

But it should be recalled that after the second and third partition of Poland in 1795, most of Poland and

much of the Ukrainian lands belonged to the Austro-Hungarian Empire, which had a different legal regulation of administrative jurisdiction. Thus, the laws of the Austro-Hungarian Empire, adopted between 1872 and 1883, stipulated the following structure of administrative courts: district departments as the first instance; district administrative courts as the second, but sometimes as the first instance (Bezirksverwaltungsgerichts), and the Supreme Administrative Court (first in Berlin, later in Vienna and Warsaw) (Oberverwaltungsgericht) (Turłukowski 2016). After the declaration of independence of Poland in 1918, this system was slightly modified, but significant changes were introduced only in 1921. Around the same period in the Russian Empire, as indicated by N.B. Pysarenko (2002), the interim government tried to form a system of administrative justice that would really create the conditions for individuals to protect their rights by going to court. According to the Regulations of May 30, 1917, the judiciary for administrative cases belonged to administrative judges, district courts, and the Senate. However, these provisions have not been put into practice. Over several post-revolutionary years of Ukraine's independence (until 1920), the problem of introducing administrative justice did not go unnoticed by government officials who planned to form special administrative courts. Under Soviet rule, the Administrative Code of the Ukrainian SSR was adopted in the late 1920s, which established clear rules for the administrative review and resolution of complaints. However, Soviet scientists later decided that in the USSR there were no prerequisites for the existence of administrative jurisdiction, because the authorities work in the interests of workers and do not violate their rights. Therefore, from the 1940s until Ukraine declared independence, a separate administrative jurisdiction did not actually exist (Pysarenko 2002; Bayanov *et al.* 2019; Ibragimov *et al.* 2014; Kolotyryn *et al.* 2019; Kostruba *et al.* 2020; Kostruba 2017a; Kostruba 2017b; Mansurova *et al.* 2018; Marushchak 2019; Moldagozhieva *et al.* 2017; Perederii 2019; Radyuk *et al.* 2019).

At the same time, in Poland (which then included a large part of the Ukrainian lands), as indicated by Turłukowski (2016), the law of August 3, 1922 on the Supreme Administrative Tribunal established a corresponding higher body for administrative proceedings. In general, the Austrian system was adopted. After the end of World War II and the beginning of the years of socialist change in Poland, administrative jurisdiction was not revived. For the next

thirty-five years, ideas and projects were submitted, but the government saw no point in setting limits for itself. On January 31, 1980, the Code of Administrative Procedure was adopted by the Law on the Supreme Administrative Court. After that, a new era began in the establishment of administrative justice in Poland as a special national system of courts of administrative jurisdiction. In Ukraine, such a process was much slower. Only in 2002 did the Law of Ukraine "On the Judiciary of Ukraine" provide for the establishment of a system of administrative courts for three years. On October 1, 2002, the President of Ukraine signed the Decree on the Establishment of the Supreme Administrative Court of Ukraine, and the adoption of the Code of Administrative Procedure of Ukraine (CASU) on July 6, 2005 was the final stage of establishing administrative jurisdiction in Ukraine (Bilkiewicz 2017). Currently, the system of administrative courts in Ukraine comprises local administrative courts; local general courts as administrative courts and district administrative courts; administrative courts of appeal; Administrative Court of Cassation of the Supreme Court. Justice is administered based on a special law – the Code of Administrative Procedure (Bieliatynskyi *et al.* 2018; Bogaevskaia *et al.* 2020; Kalchenko *et al.* 2018; Kalinsky *et al.* 2019; Kostruba 2020; Krayushkina *et al.* 2019; Magsumov *et al.* 2019a; Magsumov *et al.* 2019b; Natolochnaya *et al.* 2020; Onishchenko and Suniehin 2018).

L. Potěšil (2019), who studied the issue of administrative jurisdiction in the Czech Republic (which in the 18th-19th centuries was also under the rule of the Austro-Hungarian Empire), also points to the importance of historical analysis of these issues. The establishment of administrative jurisdiction in the Czech Republic started in the 19th century and was in line with Austrian law. Thus, the Austrian Act 36/1876 created an administrative court. This act actually lasted until 1952, when the authority to supervise state bodies was transferred to the prosecutor's office. The establishment of the Czech system of administrative courts began in the 1990s. Then, in 1992, the Supreme Administrative Court was established. However, only in 2003 was a modern system of administrative courts of the Czech Republic formed, comprising 8 regional courts (in the form of administrative chambers of such courts acting as courts of first instance) and the Supreme Administrative Court (second and last instance). At the same time, in countries that were not influenced by the legal system of the USSR, the historical process of establishment of administrative

jurisdiction went a little differently. A. Putrijanti (2020), who studies the historical path of the establishment of the administrative courts of Indonesia, points out that the Dutch colonisation had a great influence on the legal system of the country. Currently, the legal system of the state can be called continental. At the same time, it was significantly influenced by both German and French law. However, in matters of administrative justice, the French system was taken as a basis, which was modified for local needs. In particular, the highest administrative authority is the Indonesian Administrative Court (Onishchenko and Bobrovnyk 2019; Ryapukhin *et al.* 2019; Salimyanova *et al.* 2019; Savon *et al.* 2019; Smiyan *et al.* 2020; Starikov *et al.* 2011).

N. Hoolo (2019), describing the system of administrative courts of Lesotho, points out that administrative law in Lesotho, like constitutional law, is mainly based on the principles of English common law, but with a significant influence of South African law. For a long time, under colonialism, the country's legal system combined features of common law and Romano-Germanic principles of law. When the country became independent from Great Britain in 1966, the general legislation of the country remained the same, so constitutional and administrative law is still largely based on the principles of English legal science. Article 118 of the Constitution provides that the judiciary power rests with the courts of Lesotho, which include the Court of Appeal, the Supreme Court, subordinate courts and military tribunals. A special place is occupied by the Judicial Service Commission. That is, as N. Hoolo (2019) points out, Lesotho currently needs to introduce a separate administrative procedure, because the current situation is described by a high degree of uncertainty. Currently, N. Hoolo (2019) considers the activities of the ombudsman and parliamentary oversight as the administrative oversight authorities in Lesotho. M.-A. Restrepo-Medina (2010), who investigates the problem of court overwork in Colombia, points out that the country has a separate system of administrative courts and administrative tribunals, but it is currently inefficient and overworking (especially outside the metropolitan area), therefore alternative dispute resolution needs to be sought after. T.G. Watkin (2018) points out that the system of continental law, which is built on the French model, contains a system of separate judicial administrative courts. In the Italian model, according to the researcher, the function of administrative proceedings is performed by ordinary courts.

That is, as is evident from the examples of various countries – from Germany and France to Colombia and Lesotho – the issue of administrative jurisdiction in different countries is based on the social and historical traditions of each country and is extremely dependent on public discourse. This leads to the existence of a very large number of different systems of administrative proceedings. Despite the significant specifics of administrative jurisdiction in each country, it is still possible to identify common systems of organisation of administrative jurisdiction: French; German; the common law system; different types of mixed systems; A special "model" is the lack of a separate system of administrative courts and a special procedure for considering administrative cases – but in this case, citizens are not deprived of the right to challenge the arbitrariness of the authorities, but only have fewer tools.

CONCLUSIONS

If one compares the history of the development of administrative jurisdiction in different countries, it will be evident that this issue is relatively new in modern legal science. In general, the foundations of this phenomenon were laid in the 19th century, when the rapid development of society and public administration necessitated the establishment of separate bodies to protect citizens from the arbitrariness of state bodies. Moreover, this process took place globally, around the world – from the Russian Empire to the United States, from Colombia to Lesotho. At the same time, despite the presence of global tendencies, there are bright regional features in the establishment of administrative jurisdiction. Ukraine has come a long way in establishing administrative jurisdiction. At the same time, Ukrainian lands were divided between different states for a long time, which has led to the parallel functioning of different systems of administrative jurisdiction:

1) 19th century – early 20th century – in some lands under the rule of the Russian Empire, administrative and legal disputes in the first instance were resolved by mixed provincial presences, and the second and last instance was the Senate. In the Austro-Hungarian Empire, which ruled the rest of the Ukrainian lands, there was the following structure of administrative courts: district departments as the first instance; district administrative courts as the second (but sometimes as the first instance) and the Supreme Administrative Court.

- 2) During several post-revolutionary years of Ukraine's independence (until 1920) – the problem of introducing administrative justice did not go unnoticed by government officials, who planned to form special administrative courts.
- 3) From 1920 to the end of World War II – Ukrainian lands were actually divided between the USSR and Poland, which led to the parallel existence of two systems of administrative jurisdiction. Under Soviet rule, the Administrative Code of the Ukrainian SSR was adopted in the late 1920s, which established clear rules for the administrative review and resolution of complaints. However, Soviet scholars later decided that in the USSR there were no prerequisites for the existence of administrative jurisdiction, because the authorities work in the interests of workers and do not violate their rights. At the same time in Poland (which then included a large part of the Ukrainian lands), the law on the Supreme Administrative Tribunal of August 3, 1922 established a corresponding higher body for administrative proceedings, but otherwise actually operated the Austrian system.
- 4) From the moment of entry of all Ukrainian lands into the USSR in the 1940s until the moment of Ukraine's declaration of independence – a separate administrative jurisdiction did not actually exist.
- 5) After Ukraine gained independence (current stage) – a lot of work was done, which resulted in the adoption of the Code of Administrative Procedure in 2005 and the establishment of a separate three-tier system of administrative courts.

Thus, the modern system of administrative jurisdiction, where: this jurisdiction is separated from both constitutional and civil proceedings; there is a separate three-tier system of administrative courts; there is a separate procedure for consideration of administrative cases – is quite progressive and balanced. By its nature, it can be attributed to mixed systems, but it is precisely the French model that was taken as the basis.

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<https://doi.org/10.31838/ijpr/2021.13.01.056>

Received on 20-11-2020

Accepted on 18-12-2020

Published on 31-12-2020

DOI: <https://doi.org/10.6000/1929-4409.2020.09.360>

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