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РОЗВИТОК АДМІНІСТРАТИВНОЇ ЮСТИЦІЇ В УКРАЇНІ ТА НІМЕЧЧИНІ: ПОРІВНЯЛЬНО-ПРАВОВИЙ АСПЕКТ

Анотація. *Розвиток адміністративної юстиції в Україні сприяє вдосконаленню захисту прав і свобод людини та громадянина. У наукових роботах акцентується увага на необхідності врахування у вітчизняній адміністративно-правовій доктрині, державо- та правотворчій практиці, національному законодавстві сучасних європейських та інших зарубіжних принципів, стандартів, що у своїй сукупності та взаємодії створюють міцний фундамент для дієвого захисту прав і свобод, законних інтересів фізичних та юридичних осіб, колективних утворень, держави. Тому основна мета роботи полягає у аналізі розвитку адміністративної юстиції в Україні та Німеччині. Для досягнення поставленої мети використано загальнонаукові принципи, методи та способи пізнання об'єкта дослідження. Логіко-семантичний метод дозволив визначити наукознавче підґрунтя дослідження правових засад організації адміністративного судочинства в Україні. У статті авторами наведено поняття та призначення адміністративної юстиції в Україні та Німеччині в питаннях захисту порушених прав, свободи інтересів людини і громадянина рішеннями, діями та бездіяльністю суб'єктів владних повноважень, новели процесуального законодавства України, які більш ефективно сприяють розгляду адміністративних справ в судовому порядку, розглядаються світові моделі функціонування адміністративної юстиції, аналізується система та структура адміністративних судів Німеччини, їх спеціалізація, особливості розгляду деяких категорій публічно-правових спорів та розмежування юрисдикції адміністративних судів та загальних судів при вирішенні деяких категорій справ. Установлено, що в Німеччині створені інститути Ве-*

ликих Сенатів і Високого Сенату для уникнення ймовірності виникнення судової помилки. В Україні ж сьогодні система адміністративних судів отримала більш досконале процесуальне законодавство, яке дозволяє швидше вирішувати справи незначеної складності.

Ключові слова: адміністративні суди, публічно-правові спори, державна служба, публічний інтерес, адміністративний акт, суб'єкт владних повноважень.

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DEVELOPMENT OF ADMINISTRATIVE JUSTICE IN UKRAINE AND GERMANY: COMPARATIVE LAW ASPECT

Abstract. *The development of administrative justice in Ukraine contributes to the improvement of protection of rights and freedoms of human and citizen. The scientific works emphasize the necessity of consideration of the national administrative and legal doctrine, state and law-making practice, national legislation of modern European and other foreign principles, standards that in their totality and interaction create a solid foundation for the effective protection of rights and freedoms, legal individuals and legal entities, collective entities, the state. Therefore, the main purpose of the paper is to analyse the development of administrative justice in Ukraine and Germany. For this purpose to be achieved, we applied the general scientific principles, methods and means of cognition of the research object. The logical-semantic method allowed to determine the scientific basis for the research of the legal foundations of the organization of administrative justice in Ukraine. The authors describe the concept and purpose of administrative justice in Ukraine and Germany in the matters of protection of violated rights, freedoms and interests of human and citizen by decisions, actions and inaction of the power entities, new procedural legislation of Ukraine, which more effectively facilitate the consideration of administrative proceedings in the court of law, the world models of functioning of administrative justice are considered, the system and structure of the German administrative courts, their specialization, features of consideration of some of the categories of public-law disputes and delimiting of jurisdiction of administrative courts and general courts upon resolving certain*

categories of cases. It was established that in Germany, institutions of the Grand Senate and the High Senate are created to exclude the possibility of a judicial error. As of Ukraine, currently the system of administrative courts has received more advanced procedural legislation allowing to faster resolve cases of minor complexity.

Keywords: administrative courts, public-law disputes, public service, public interest, administrative act, power entity.

INTRODUCTION

Administrative justice exercises judicial control over the activities of power entities regarding the taking of unlawful decisions, the implementation of actions, inaction in the public-law field, which violate the rights, freedoms and interests of the individual and the citizen. Administrative justice provides protection against arbitrariness of public authorities and local self-government, as well as control over the correctness of the exercise of their governmental administrative functions. Administrative justice is one of the most effective mechanisms for protecting human rights and freedoms from unlawful or unjustified harassment by public authority. And the specificity of this mechanism is that the administrative courts restore the violated human and citizen rights in cases where the offender is the corresponding power entity upon the exercise of its governmental administrative functions, and the violated right of an individual is not of private, but of public nature. In Ukraine, administrative courts have been set up in accordance with Presidential Decree No. 1417/2004 dated November 16, 2004¹, which has the task of protecting and restoring the rights, freedoms and interests of an individual against violations on the part of power entities, which was a huge positive step in the development of the statehood and the establishment of Ukraine as a rule of law.

Problems of formation and development of administrative justice are covered in the following scientific works: A. Mihr [1], J. Bader [2], K. Braun, [3], J. Giesinger [4], M. Kaufman [5], R. Schmidt [6] and others. However, the functioning of the institution of administrative justice in Germany and other EU countries remain quite understudied [7–9]. Thus, in particular, I. Melnyk [10] points out that the presence of administrative justice is an indicator of the compliance of the national judicial system with international legal standards for human rights, as well as the affirmation of the principle of legality in the sphere of executive power. Implementation of administrative justice and the establishment of administrative courts in this regard has the purpose of guaranteeing the right of everyone to challenge in court the decisions, actions or inaction of public authorities, local self-government bodies, officials and public figures, which, in turn, shall ensure the implementation of the constitutional principle of responsibility of the state for its activity before the human. Practices of many European countries prove that administrative courts are an accessible and effective tool for protection of human rights,

¹ Law of Ukraine “On the Establishment of Local Administrative Courts”. (2017, December). Retrieved from <https://zakon.rada.gov.ua/laws/show/1417/2004>

freedoms and interests from violations by public authorities and local self-government [11]. At the present stage of state formation, the introduction of administrative justice as a separate jurisdictional activity of specialized courts has become not just a direction for improving the judicial system of Ukraine and a means of unloading general and commercial courts. This measure aims at realizing the objective need for the existence of a special judicial mechanism for resolving legal disputes in the field of public-legal relations [12]. Administrative justice in Germany is a special procedure for resolving public-law disputes of an unconstitutional nature between individuals and public authorities, which is implemented by administrative courts of general and special jurisdiction in a special procedural form, which is an administrative legal proceeding [5]. Unlike in Ukraine, where it is possible to appeal against acts of the authorities in administrative proceedings and to challenge them in court, in Germany an appeal to the administrative court is possible only in the event that the complaint of the individual was rejected by the power entity superior to the one that committed the contested act. Therefore, an action for objection to an administrative act can be filed with the administrative court only after reviewing this act on the basis of an administrative appeal [4].

The purpose of the article is to research the distinctive features of the functioning of the administrative courts in Ukraine after the reform of procedural legislation in the light of the amendments introduced to the Constitution of Ukraine in the part of justice, the functioning of the system of administrative courts in Germany, which may be of considerable practical interest for the domestic legislator upon the development and implementation in the current legislation of Ukraine.

1. MATERIALS AND METHODS

The methodological basis of the research was designed to ensure a comprehensive and complex study of the development tendencies of administrative justice in Ukraine as an urgent issue of modern national legal science and practice, to formulate theoretical approaches that are relevant to contemporary challenges, and to draw conclusions on the necessity of improvement of the current national legislation in the context of new regulation of the procedure of administrative litigation in the manner of the successfully tested and sustainable model of Germany. That is why the methodological basis of the paper was represented not only by the general scientific principles, methods and means of cognition of the object and subject of research, such as systematicity, comprehensiveness, concreteness. In particular, in the context of the stated purpose of the article, both general scientific (dialectical, systemic, logical-semantic, synergistic, analysis and synthesis, formal-logical, legal modelling, instrumental, sociological, statistical, etc.) and special scientific methods were tested (historical law, comparative law, formal law, special law, etc.). The most important in this system is the general scientific dialectical method, which facilitated the consideration and research of the issue in the unity of its content and legal form, as well as the systematic analysis of the legal principles of the organization of administrative

justice in Ukraine and Germany. Moreover, this method facilitated the determination of the status, tendencies and prospects of the development of administrative justice research in the context of sustainable world models.

It is prudent to underline that the greatest attention was also paid to the use of the comparative law method, which enabled a thorough research of the genesis of legal regulation in the field of administrative justice and its practice in the territory of Ukraine and Germany, which in turn became a sound basis for the author's conclusions and further scientific research. With the help of the logical-semantic method, an insight into the conceptual apparatus was furthered, the scientific basis for the research of the legal foundations of the organization of administrative justice in Ukraine was determined. The systematic method proved useful upon analysing the domestic legislation of Ukraine and Germany in the researched field. The formal-logical method was applied to identify the connections and contradictions existing in the theory and practice of the enforcement of procedural law in Ukraine and Germany. The method of analysis and synthesis allowed to explore the theoretical prerequisites for the introduction of an institution of administrative justice as a separate jurisdiction of specialized courts. The use of sociological and statistical methods facilitated the generalization of legal practice, the analysis of empirical information related to the topic of the article.

It became possible to formulate specific positions regarding the state and prospects of the system of national legislation of Ukraine through the method of legal modelling. The special legal method of research was of particular importance for the work on the paper, involving the external processing of regulatory material. The becoming of the domestic model of administrative justice is analysed in its historical retrospective using the historical law method. This method also provided an opportunity to further the insight into the becoming and development of the legal bases for administrative justice reform in the territory of our state and Germany.

It can be stated that the methodological basis of the research is, in a complex combination, represented by scientific concepts and grounded judgments, produced by the realities of the present, and qualitatively formulated by prominent representatives of the doctrine of state and law theory, constitutional, administrative and other branches of law and judicial process. Furthermore, this foundation also has a theory of knowledge of social and legal phenomena as its component. The scientific and theoretical basis of the paper is represented by the scientific development of domestic and foreign specialists in the field of law, the references to which support the chosen research methods.

2. RESULTS AND DISCUSSION

2.1 The system of administrative courts in Ukraine

Ukrainian scientific opinion is the only one in the position that administrative justice is a system of judicial bodies (courts) that control compliance with the law in public administration by resolving in a separate procedural order the public-law disputes arising in connection with applications of individuals or legal entities to executive

authorities, local governments or their officials [13]. Administrative justice is the procedure established by law for the consideration and resolution in the court of law of cases in the field of public administration between citizens or legal entities on the one hand and bodies of executive power and local self-government (officials) – on the other, carried out by courts, either general or specially created for the settlement of legal disputes [14].

In Ukraine, a proper legislative framework for the functioning of administrative justice is established, in particular, in accordance with Art. 125 of the Constitution of Ukraine¹, administrative courts operate in order to protect the rights, freedoms and interests of a person in the field of public-law relations. In accordance with Part 1 of Art. 18 of the Law of Ukraine “On Judiciary and Status of Judges” No. 1402-VIII dated June 2, 2016², courts specialize in civil, criminal, economic, administrative cases, as well as the cases on administrative offenses. Local administrative courts are district administrative courts as well as other courts designated by procedural law. Local administrative courts consider cases of administrative jurisdiction.

The Administrative Court Procedure Code of Ukraine, as amended in 2005, defines the procedural mechanisms of the activity of administrative courts and creates a proper legal basis for the due functioning of administrative justice and delivery of justice in administrative cases, protection of human and citizen rights and freedoms, legal interests of legal entities from violations by power entities [15]. Amending the procedural legislation of Ukraine was another step towards judicial reform. In 2016, the Verkhovna Rada of Ukraine adopted the Laws of Ukraine: “On Amendments to the Constitution of Ukraine (regarding Justice)”³, “On the Judiciary and Status of Judges”⁴, “On the High Council of Justice”⁵, a new wording of the Administrative Court Procedure Code of Ukraine⁶ was adopted in 2017. The constitutive essence of the reform of procedural legislation in Ukraine was to increase the efficiency of the judicial process, to more clearly differentiate the jurisdiction of courts of different specializations, to introduce effective mechanisms for the exercise of procedural rights, etc.

Thus, since December 15, 2017, proceedings in administrative courts have been carried out in accordance with the new wording of the Administrative Court Procedure Code of Ukraine⁷ (hereinafter referred to as "the ACPCU").

¹ Constitution of Ukraine. (2019, February). Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>

² Law of Ukraine “On Judiciary and Status of Judges”. (2019, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1402-19>

³ Law of Ukraine “On Amendments to the Constitution of Ukraine (on Justice)”. (2016, June). Retrieved from <https://zakon.rada.gov.ua/laws/show/1401-19>

⁴ Law of Ukraine “On Judiciary and Status of Judges”. *op. cit.*

⁵ Law of Ukraine “On the High Council of Justice”. (2019, November). Retrieved from <https://zakon.rada.gov.ua/laws/show/1798-19>

⁶ Administrative Procedure Code of Ukraine. (2017, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/2147-19>.

⁷ *Ibidem*

The ACPCU has divided the administrative cases into cases of minor complexity and all others. For the first category, the ACPCU envisages simplified litigation, for the other category of cases, the ACPCU envisages general litigation. The essence of these innovations is that the consideration of cases of minor complexity shall be carried out under a simplified procedure and in a shorter timeframe, furthermore, such cases should be considered by the court of appeal as the final instance. For the Supreme Court to review the case of minor complexity, in accordance with Art. 328 of the ACPCU, the applicants must provide reasoning as to the fundamental significance for the formation of a single law enforcement practice or a considerable public interest or the exceptional personal importance of their case.

According to the ECHR, such restrictions on cassation appeal do not violate the guarantees of the Convention for the Protection of Human Rights and Fundamental Freedoms (decision dated 09.10.2018 on inadmissibility in the case of *Azyukovska v. Ukraine*, application No. 26293/18).

The current ACPCU defines a public-law dispute as a dispute wherein at least one party exercises governmental administrative functions, including the exercise of delegated powers, and the dispute arises in connection with the performance or non-performance by such party of the said functions; or at least one party provides administrative services on the basis of the legislation that authorizes or obliges to provide such services solely the power entity, and the dispute arises in connection with the provision or non-provision of the said services by such party; or at least one party is an electoral or referendum subject and a dispute arises in connection with violation of its rights in such a process by a power entity or another person¹.

Furthermore, the ACPCU has identified the categories of these public-law disputes, the resolution of which falls under the jurisdiction of an administrative court (Part 1, Article 17). The adoption of the ACPCU in the new wording has introduced significant innovations in the consideration of public-law disputes in administrative courts.

The Unified Judicial Information and Telecommunication System became one of such innovations. However, due to the lack of budgetary funding for administrative courts, the start of operation of the UJITS was postponed. A new approach to the application of the institution of proof through the electronic evidence was introduced, where the ACPCU provides the parties to a case with more means to prove their position before the court. An expert's opinion to reinforce the position of one of the parties to the dispute may be concluded to order of the party to a case. An advocacy monopoly was introduced, which was enshrined in the Constitution of Ukraine with a gradual enforcement until 2020, the essence of which lies in the representation of individuals by the advocate in all judicial authorities. The order of removal of judges was also changed to allow for the judge to be dismissed in the event that one of the parties

¹ Administrative Procedure Code of Ukraine. (2017, October). Retrieved from <https://zakon.rada.gov.ua/laws/show/2147-19>.

to an administrative case doubts the impartiality of the judge. The ACPCU regulates the actions of the parties to a case, which the court may qualify as abuse of procedural rights. For such actions, the ACPCU stipulates corresponding measures of procedural coercion in the form of warning, fine, removal from the hall, etc. The current ACPCU also expands the list and requirements for procedural documents, terms and procedure for their submission. Not least important in the ACPCU is the introduction of a dispute resolution institute with the participation of a judge, which should be held prior to the initiation of the case consideration upon the consent of both parties. Deviation from preliminary opinions by the Supreme Court became possible at the stage of cassation review by the Supreme Court of decisions of courts of preceding instance on the issues of application of the rule of law in such legal relations, with consideration of the circumstances of the case, the legal nature of the public-law dispute.

It is also noteworthy that administrative justice in Ukraine is created and operates by the example of the German model, the main provision of which is that the judicial branch in Germany is divided into administrative courts of general and special jurisdiction, which are standalone judicial authorities, independent of public administration or courts of general jurisdiction.

2.2 World models of administrative justice

Ukraine is not the only country in the world where administrative justice operates. Virtually every country in the world has implemented a certain way of organizing judicial control over the activities of public administration through a system of relevant judicial authorities [16–18]. There is a number of countries using the system of courts of general jurisdiction (the UK, the US, Australia, New Zealand, Denmark, Norway, etc.) and a number of countries using the system of courts of specialized jurisdiction (Germany, Italy, Sweden, Greece, etc.).

In the first case, among countries using general courts to control public administration, the following models of administrative justice organization can be distinguished:

- a model of exclusive jurisdiction of the general courts, wherein the existence of both administrative courts and quasi-courts is completely excluded. Judicial control is performed according to the rules of civil procedure (Denmark, Norway, Malta, Morocco, etc.);

- the Anglo-Saxon model, wherein, together with the general courts, the control of public administration is exercised by a variety of specialized quasi-judicial bodies – administrative tribunals (the UK, the US, Australia, New Zealand, India, Canada, Kenya, Belgium, Denmark, Norway, etc.);

- the model of courts of general jurisdiction with specialized administrative litigation (Japanese model). The control over the activity of the executive authority in Japan is exercised by the courts of general jurisdiction, but civil and administrative proceedings are carried out under different procedural rules established under the 1960 Civil Procedure Act and the 1962 Administrative Disputes Act;

– the model of administrative specialization within a single court system, wherein separate chambers in the matters of administrative cases exist within the single judicial system (Spain, Madagascar, Mexico, etc.). This model does not preclude the creation of administrative courts. In Spain, for example, administrative and economic courts exist along with the chambers in the matters of administrative disputes.

In the second case, countries using the system of courts of specialized jurisdiction use the following models of administrative justice:

– the dualistic (French) model. It is based on a specific interpretation of the principle of separation of powers, which prevents courts of general jurisdiction from interfering with the activities of executive bodies. This led to the formation of administrative courts within the public administration itself. Thus, in France, the general court, even upon consideration of a civil or criminal case, removes itself from the resolution of administrative disputes and submits a request to the administrative tribunal;

– the German model of administrative justice functions through the “division” of the judicial branch into separate “embranchments”. In this way, the separation of justice from the public administration is achieved, and the field of public interest becomes subject to special judicial consideration. The administrative courts are completely separated from the general courts and are headed by the High Administrative Court. This model is also adopted by Sweden, Indonesia, and Mozambique;

– the model of a multiplicity of judicial bodies authorized to consider administrative disputes. This model enables the control of both administrative courts and tribunals (quasi-courts) and general courts (Switzerland, Finland, Belgium).

2.3 The administrative justice system in Germany and the specialization of administrative courts

The German model of administrative justice is characterized by the creation of specialized courts for the resolution of public-law disputes in administrative cases arising in the field of public activity of power entities. Administrative courts belong to a single judicial system and are independent in the exercise of their functions of justice both by the power entities and the general courts. The system of administrative courts of general jurisdiction in Germany consists of three levels [1]:

– at the lower level, administrative courts (*das Verwaltungsgericht*) are established in the federal states, where chambers of 3 judges and two “honorary judges” are rendering decisions in the first instance (paragraph 5 of the Administrative Courts Act¹).

– at the middle level, the High Administrative Courts of Land (*das Oberverwaltungsgericht*), operating in each land, are established, which in some lands are referred to simply as administrative chambers. Here, in the second instance, decisions are rendered by chambers consisting essentially of three professional judges.

¹ Law of Germany “On Administrative Courts”. Retrieved from <https://germanlawarchive.iuscomp.org/?p=292>

– at the highest level, in accordance with para. 1 of Art. 95 of the Fundamental Law, the Federal Administrative Court (das Bundesverwaltungsgericht) is established. Senates rendering the decisions in the final instance are composed of five professional judges (paragraph 10 of the Administrative Courts Act¹).

In the Supreme Land Administrative Courts and in the Federal Administrative Court exist the so-called Grand Senates (paragraphs 11, 12 of the Administrative Courts Act). In order to comply with the public interest in accordance with paragraph 35 of the Law on Administrative Courts, the Chief Prosecutor acts at the Federal Administrative Court, and in other courts a so-called public interest representative is appointed. The Administrative Courts Act is a legislative act that regulates the organization and functioning of administrative justice courts in the field of administrative law cases. The administrative courts of Germany settle only public-law disputes, either between public law entities or between citizens and public administration, with a large proportion of these public-law disputes arising from the adoption of the necessary administrative act and, according to the plaintiff, a valid administrative act affecting the plaintiff's rights or freedoms [3].

The Law of the Federal Republic of Germany on Administrative Courts consists of two main parts: the first part covers the matters of judicial system (Gerichtsverfassung), and the second part specifically covers the process (Verfahren). The first part consists of six sections: the first section is devoted to the administrative courts, their hierarchy and structure (Gerichte), the second section – to the judges of the administrative courts (Richter), a separate section covers the categories of honorary judges (Ehrenamtliche Richter), another one – the representatives of public interests (Vertreter des oeffentlichen Interesses), followed by the section on judicial administration (Gerichtsverwaltung), and finally, the section on the procedure for appealing to the administrative court and jurisdiction (Verwaltungsrechtsweg und Zustaendigkeit). The second part consists of only two sections: the procedural requirements of a general nature (Allgemeine Verfahrensvorschriften) and special provisions for claims challenging the administrative acts and the obligation of public administration to adopt the corresponding administrative act (Besondere Vorschriften fuer Anfechtungs- und Verpflichtungsklagen).

The Law of the Federal Republic of Germany "On German Judges" contains basic provisions on the status, training, appointment and exercise of functions of a judge, although many provisions are duplicated in the Law on Administrative Courts itself. The Law of the Federal Republic of Germany on Administrative Courts establishes the basic requirements and general principles for building a system of administrative courts [19; 20]. A number of lands in Germany may agree on the creation of a joint judicial authority or the extension of judicial districts to a specific category of administrative cases. This provision is essential for lands with small territories and populations where

¹ Law of Germany "On Administrative Courts". Retrieved from <https://germanlawarchive.iuscomp.org/?p=292>

there is no need for the existence of all administrative justice bodies stipulated by law. Each court creates a presidium composed of the President of a given court or judge, who performs the functions of a chief justice, and a certain number of professional judges elected from the composition of the court, with that, the exact number of judges in the presidium elected in each court is defined proceeding from the total number of judges working in the given court.

The Law of the Federal Republic of Germany "On the Judicial System" very thoroughly discloses the procedure for election to the presidium, the most important provisions of which are assigned to all judges working in a particular court, the right to elect and be elected, with an exception to this rule only for judges who have worked for over three months in another the Administrative Court. The presidium is elected for four years and is renewed by rotating half of its members every two years. The presidium of the court is the body that handles the organizational tasks that are important for the court, namely: it distributes cases admitted to the court between judges. The final decision on which judicial tasks will be resolved by the presidium of the court is taken solely by the President of the court. One of the duties of the presidium of the court is the division of cases between judges, this function is organizational in nature, but its importance is quite great, since special attention is paid to the proper determination of the specificity of the administrative case in the specialization of each judge.

Furthermore, the presidium resolves the issue of dismissing judges, changing the composition of judges, transferring them from one judicial chamber to another. All decisions of the presidium shall be taken by a simple majority of votes, and, in the event of an equal number of votes, the vote of the President of the presidium shall be decisive. Therefore, the administrative court consists of the president, presiding judges and professional judges, the number of which is determined by the needs of a particular court in each individual case.

Due to the fact that the court structure can be divided into several chambers, each such chamber of the administrative court adopts a decision on the settlement of administrative disputes in the composition of three professional and two honorary judges in circumstances where the case cannot be heard by one judge individually. Honorary judges participate in litigation at almost all stages, but their participation is excluded only in adjudication and rulings beyond oral proceedings.

The case may be heard by the judge individually. First, the case is referred by the presidium to a particular judicial chamber, and then the case is referred to one of its judges under the following circumstances: in the event that the case is not of legal concern and of considerable public interest and in the event that the case is insignificant in complexity. Thus, only administrative cases which, by their very nature and the relevant grounds under the procedural law of Germany do not require the establishment of a panel, are subject to an individual hearing.

The current legislation of the Federal Republic of Germany also regulates circumstances where a case cannot be referred for consideration to a single judge. Thus, a case

cannot be heard by a judge individually in the event that it has already been heard orally, and a decision of an administrative court with a reservation or a decision on the protection of private law has already been adopted in the context of these proceedings. The judge hearing the case individually may independently refer it to the trial chamber if, after hearing the parties, the subject matter of the claim became substantially altered, or new circumstances arose in the case. In this event, the trial chamber will no longer be able to refer the case back to a separate judge for consideration [2].

Structure and organization of the administrative court of the second instance. The only difference between these courts and the administrative courts of the first instance is that in the courts of the second instance not chambers are created, but boards or senates. With regard to the composition of the judicial panel responsible for decision-making, the federal legislation of Germany provides for the presence of three professional judges as the main option, but the legislator allows the Landtags (local representative legislative bodies) of the lands of Germany, at their discretion, to provide alternative compositions of the judicial panels in the amount of five judges, two of which are honorary, or five professional judges and two honorary ones.

The Federal Administrative Court is the highest administrative justice body in Germany, consisting, same as courts of the previous instance, of the president, presiding judges and professional judges. The working bodies of the Federal Administrative Court of Germany are the Chambers, which have the power to adopt decisions of five professional judges. The decisions of this court, outside the oral proceedings, shall be adopted by at least three judges. Administrative justice in Germany has its own specificity, different from that of Ukraine. In particular, it is in the fact that administrative courts have special courts in its composition. Thus, in the Federal Administrative Court, there are two special "disciplinary" senates that hear cases of disciplinary responsibility of federal employees as the second instance. The first instance in this category of cases is the federal disciplinary court (das Bundesdisziplinargericht). In the cities of Munich and Ulm there are disciplinary courts for servicemen (die Truppendienstgerichte), which are empowered to impose disciplinary penalties and administrative penalties on servicemen. Decisions taken by disciplinary tribunals for servicemen may be appealed to the Federal Administrative Court, wherein two special senates review the decisions on cases of army conscripts and retired servicemen (die Wehrdienstsenate) on their administrative claims. In the system of administrative courts of Germany there are also special disciplinary courts that deal with offenses committed by officials of legal entities (for example, medical workers whose actions harmed the rights and legitimate interests of citizens). These courts are called "courts of honour" or "professional courts" (die Berufsgerichte fuer Heilberufe). Their organization is within the competence of the land and is governed by the land legislation in Germany. The administrative cases in such courts are reviewed in a collegial manner [4].

The current legislation of Germany establishes that the administrative procedure for judicial review of relevant administrative cases applies to all public-law disputes

that are not constitutional and legal, except the circumstances where, in accordance with the federal law, the case must be referred to court in another jurisdiction. Public-law disputes in Germany may be brought before a court of another jurisdiction on the basis of land legislation, proceeding from the legal nature of each individual dispute. Thus, property claims arising from the right to demand reparations for damages caused to a private person as a result of the exercise of governmental administrative functions by the power entities are subject to the ordinary proceeding in a court of general jurisdiction [6].

In Ukraine, however, upon resolving land disputes, for example, in the event of local governments adopting a decision to transfer land to property or lease, further contestation of the lawfulness of acquisition of the disputed land by an individual should be resolved in the order of civil jurisdiction, since a dispute on civil law arises, which is not related to the protection of the rights, freedoms or interests of the plaintiff in the field of public-law relations, and although a local government body was exercising a governmental administrative function, it is still connected with the ultimate goal – ownership or use of the land. When local government bodies as power entities exercise governmental administrative functions in the field of land relations and their decisions (for example, regarding the permit for the development of a land management project for land allotment) are not related to obtaining a right of ownership, land lease, etc., i.e. to civil law, then such a land dispute should be resolved in the order of administrative proceedings. In Germany, cases involving the civil service and compensation for property damage regarding the annulment of the unlawful decisions of the authorities are also outside the jurisdiction of the administrative courts. This provision is referred to in German legal doctrine as a general caveat and is crucial for litigation. It establishes that the administrative courts are liable for all cases of a non-constitutional nature unless otherwise determined. This provision is based on the provisions of the Fundamental Law of Germany, the principle of delivering independent justice only through judges, which gives its citizens the opportunity to defend themselves against the unlawful decisions, actions or inaction of the power entities in Germany [2].

It is quite important that the federal legislation of Germany no longer uses a simple enumeration of cases upon determining their jurisdiction, but defines that jurisdiction through common boundaries established by law at the junction of branches of law, which means that a person's legal protection is in no way dependent on the type of activities of the state that caused the violation of its rights, including those foreseen by the Convention. That is, in such circumstances we are referring to the upholding of the principle of continuous legal protection, when the situation of the insecurity of a person from illegal decisions, actions or inaction of the German public authorities is impossible.

Moreover, the aforementioned general caveat serves as a delimitation of jurisdiction between administrative courts on the one hand, and courts of general jurisdiction on the other. However, nowadays there are still some cases where some acts of the au-

thorities may not be appealed to the administrative courts under the rules of administrative justice. Thus, there are two types of similar acts of the power entities: 1) individual law administrative acts; 2) decision (acts) on pardon. Pardon decisions affect the scope of administrative jurisdiction when their subject matter is relations governed by civil service legislation [6].

In Germany, the definition of public-law dispute is absent from the federal legislation, unlike the Administrative Court Procedure Code of Ukraine. On the basis of other provisions of the federal legislation of Germany, it can be concluded that such a dispute occurs when the subject matter or cause is contained directly in the field of public law and there is no reason to consider it as a private law. This raises another question regarding the determination of boundaries between private and public law. Both in Germany and in Ukraine, this matter has no unambiguous solution and is separately dealt with in a court of law every time, proceeding from the circumstances of the case, the subject matter of the dispute and its legal nature. German legal doctrine also leaves the solution of this issue to the discretion of judicial practice.

With regard to public-law relations, from which the aforementioned disputes arise, their main feature is that one of the participants must be in a relationship of subordination to the public authorities. The holders of public authority in Germany are the federation, lands, communities and their associations, as well as various legal entities of public law, performing governmental administrative functions and activities of which are governed by public law and/or which were created by the relevant act of power entity [1]. In Germany, as well as in Ukraine, another interesting issue can be observed, the essence of which lies in the difficulty of determining when a power entity acts as a civil law entity, and by what criteria it is possible to distinguish such a case from a situation of performing governmental administrative functions. As a rule, the German legal opinion proceeds from the fact that in the event of such difficulties in determining the legal nature of the arising relations, it is necessary, first of all, to establish the existence of relations of inequality of the parties to the dispute, their administrative and legal status. With regard for the delimitation of public-law disputes from disputes of a constitutional nature, in Germany this issue is resolved much easier. Constitutional disputes refer to disputes connected with federal or land constitutional law. It should be noted that within the framework of constitutional law only such relations can exist, which occur between the power entities created on the basis of the provisions of the Fundamental Law, but in no case the relations between the citizen and the state.

Types of jurisdiction that occur in the administrative process. With regards to the substantive jurisdiction, as a general rule, all cases within the administrative jurisdiction are considered by the administrative courts of first instance on the merits. Further, in administrative jurisdiction, the administrative case is considered by the administrative courts of the second instance, which have the authority to consider administrative cases in the order of appeal against the decisions of the courts of first instance, or in the order of cassation. Within the framework of substantive jurisdiction, the German ad-

ministrative courts consider two large groups of administrative cases as courts of first instance: cases of illegality (unlawfulness or incompatibility with a supreme legal act) and invalidity in whole or in part of a legislative instrument; cases relating to public buildings.

The first group includes cases, the subject of which is the judicial determination of the legality of the various instructions, rules, governmental regulations of a subordinate nature, adopted on the basis of federal laws. This also includes consideration of the claims of individuals and legal entities concerning the decisions of the power entities, the enforcement of which violated or may violate the rights of these persons. The administrative court of the second instance is obliged to provide an opportunity of expressing their position in the process to every person whose rights were violated upon application of the corresponding act of the power entity [4]. As the acts of the power entities aimed at an unlimited circle of persons are most often considered in such manner, the current federal legislation of Germany obliges the administrative body that adopted such an act to publish the court's decision on rendering the act to be unlawful (invalid) the same way it was promulgated. This is a kind of guarantee that the information on the invalidity of such an act is communicated to all persons whom it may concern and whose rights and interests were violated by this act.

The second group includes administrative cases related to public buildings of considerable public interest. This is a fairly large category of cases, of particular importance here are the cases of construction, operation, modernization of power plants and installations of other technical purposes, stationary plants (for example, waste processing plants), operation of public roads, airports, etc. [4]. The Federal Administrative Court of Germany considers cassation appeals against the decisions of the administrative courts of the first and second instance. In some circumstances, the Federal Antitrust Service (FAC) considers cases as a court of first instance, for example, the consideration of public-law disputes between the federation and lands (or between lands), provided that the public-law dispute is not of constitutional nature.

Apart from the substantive and instance jurisdiction, there is also a territorial jurisdiction to help determine in which particular court can a corresponding administrative claim can be filed. With regard to public-law disputes on public buildings, they are considered by the administrative court of the judicial district wherein the relevant object of immovable property is located. Same rules apply when the subject matter of a dispute is a right relating to a land or property.

In the event that the claim is directed against any federal power entity, then such an administrative case is to be considered in court at the defendant's place of residence. If the claim is aimed at declaring the illegality of a regulatory act, which is not issued at the federal level, then the public-law dispute is to be considered at the place of adoption of the disputed act. Particular mention should be made of the circumstances when an administrative case on provision of asylum is being considered in court, then the dispute should be considered by the court of the judicial district where the person

claimed asylum. The claim may be directed by a private person against the power entity over the resolution of a public-law dispute arising from the relations of the public service or its special types, then such dispute will be considered at the place of residence of the claimant, and in the absence of permanent residence – at the location of the defendant.

If in some circumstances it is difficult to determine which court of administrative jurisdiction should have the competence to resolve the dispute, then the jurisdiction of a particular case is to be determined by the high court.

2.4 Specialized courts in the system of administrative justice in Germany

Comparing to Ukraine, Germany has gone a long way in matters of court specialization. In particular, administrative justice in Germany is characterized by the presence of special courts of administrative justice: financial and social courts. In accordance with the Law of the Federal Republic of Germany "On Financial Courts", there are only two instances in the system of financial courts. Administrative cases are considered by the Land Financing Courts (*die Finanzgerichte*) as a court of first instance. The Senate at the Financial Court of the Land carries out a hearing with three professional judges and two honorary ones. The Senate may refer the case for individual hearing to one of its judges. The second and final instance is the Federal Financial Court (*der Bundesfinanzhof*).

Financial courts are liable to litigate public-law disputes over claims against power entities (e.g. tax disputes or other public-law disputes arising from public financial activities of the state). The Federal Court is a revisionary instance, which considers the appeals against decisions and rulings of the corresponding financial court. The next specialization of courts is social courts (or social security courts). Their organization is regulated by the Law of the Federal Republic of Germany "On Social Courts"¹. They are established to consider public-law disputes related to social insurance, provision of free or preferential health care, payment of unemployment benefits, etc.

The social court system has three levels unlike the financial courts. The first are the social courts (*die Sozialgerichte*). The second level is the social court of the land (*das Landessozialgericht*). Their chambers consider complicated cases as courts of first instance, and are empowered to review decisions of courts of first instance. Social courts of land are organized in 16 subjects of the federation. The third level in the system of courts for social security is the Federal Social Court (*das Bundessozialgericht*), which consists of 14 chambers (on the matters of insurance of the unemployed, on the violation of the insurance rights of individuals, on the social security of victims of war, on the insurance of miners, etc.). Organizationally, the structure of the court includes the Grand Senate. The courts in the social affairs include, in particular, disputes on social security: insurance of the sick, pension, care for the sick, victims of war, etc. [1]. In the

¹ German Law "On Social Courts". Retrieved from https://e-justice.europa.eu/content_specialised_courts-19-de-maximizeMS-en.do?member=1

social court of first instance, the decision is adopted by the chamber of social affairs, consisting of one professional judge and two honorary ones. In the social court of the land, the decision is adopted by a senate consisting of three professional judges and two honorary ones (judges on a public basis). In the Grand Chamber of the Federal Social Court, 12 professional judges and 6 honorary judges adopt decisions.

The judicial system of Germany does not rule out the possibility of a judicial error, even if a similar case was considered by another court. To avoid possible mistakes, an institution of the Grand Senate and the High Senate was established, which is composed of the senates of different courts that ensure the unity of judicial practice in Germany. The Senate acts at the Supreme Courts. The Senate, which adopts a decision different than another Senate or the Grand Senate that has decided on a similar issue, must convene the High Senate. In Germany, such issues are governed by a special law on the unity of enforcement. The Grand Senate decides whether the FAC Senate can move away from a decision by another FAC Senate or the FAC Grand Senate. Transfer of the case to the FAC High Senate is possible only in the event that the Senate, the decision of which the other Senate deems necessary to withdraw, responds to the request of the latter that it continues to maintain its legal position.

Otherwise, the FAC Senate has the right to bring before the FAC High Senate the issue which, in its opinion, is a matter of law that is fundamental to the formation of a uniform law practice and which may further affect the development of law as a whole, or if this issue urgently requires solution for the particular case under consideration, to protect the rights, freedoms and interests of the individual and the citizen. It should be noted that the High Senate decides only on matters of law, that is, the factual side of the case should in any event remain outside the jurisdiction of the court. The decision of the High Senate is binding on the decisions of other FAC senates.

CONCLUSIONS

Thus, the administrative justice of Germany as a standalone, independent judicial branch is characterized by internal specialization (administrative courts of general jurisdiction and special jurisdiction). But as of today, there is a debate on the necessity of reforming the judicial system of Germany, which, in addition to specialization in the fields of justice and the presence of two and three levels, is complicated by the federal form of territorial organization. In particular, an opinion is entertained regarding the practicality of having a two-tier judicial system with regard to the majority of cases of minor complexity and preservation of a three-tier judicial system solely for administrative cases that are fundamental to the formation of a unified law enforcement practice, are of considerable public interest or of exceptional importance to the party involved.

Administrative justice in Germany is the activity of administrative courts of general and special jurisdiction operating within the entire judicial system and administering justice by protecting the subjective rights and legitimate interests of individuals

from unlawful decisions, illegal acts and inaction of the executive authorities and local self-government and their officials.

In Ukraine, in comparison with Germany, before the introduction of amendments to the Constitution of Ukraine in the area of justice, the four-tier judicial system operated, which to some extent caused the devaluation of the court decision as such and caused the desire and habit of individuals and economic entities to demand its review for the sake of the process itself, wasting time on adoption of the decision and its enforcement, which in some way resulted in the loss of the effect of the protection of the infringed law by the judicial system. As of today, the system of administrative courts in Ukraine has received more sophisticated procedural legislation that allows faster resolution of cases of insignificant complexity, which has put into practice new procedural institutes and the procedure for resolving public-law disputes that allow more efficient handling of administrative cases, although not flawless; which introduced so-called cassation filters, the essence of which is to determine the exceptional grounds for cassation appeal in cases where such an appeal is really necessary, which should serve to form an effective judicial system and guarantee the person the right to a final and binding judgment. The introduction of the cassation "filters" defined in the current ACPCU evidences the implementation by Ukraine of the recommendations of the Venice Commission on improving the justice system and the administration of justice by allowing the Supreme Court to consider any case through the use of cassation "filters".

REFERENCES

- [1] Mihr, A. (2017). Regime consolidation through transitional justice in Europe: The cases of Germany, Spain and Turkey. *International Journal of Transitional Justice*, 11(1), 113-131.
- [2] Bader, J. (2002). *Verwaltungsgerichtsordnung*. Heidelberg: SocieWs-Verlag.
- [3] Braun, K. (2018). Marginal justice: The persecution of so-called 'asocials' and the politics of historic justice in the Federal Republic of Germany. *Parliaments, Estates and Representation*, 38(1), 104-120.
- [4] Giesinger, J. (2017). Educational justice, segregated schooling and vocational education. *Theory and Research in Education*, 15(1), 88-102.
- [5] Kaufman, M. (2002). *Untersuchungsgrundsatz und Verwaltungsgerichtsbarkeit*. Tübingen: Mohr Siebeck.
- [6] Schmidt, R. (2003). *Verwaltungsprozeßrecht*. Grasberg bei Bremen: Schmidt.
- [7] Yevsieiev, O., & Tolkachova, I. (2018). Politicization of constitutional relationships in the contemporary period in Ukraine. *Russian Law Journal*, 6(4), 8-36.
- [8] Abdikerimova, A.A. (2016). Contemporary development trends in administrative-legal relations in the system of administrative justice. *International Journal of Environmental and Science Education*, 11(11), 4782-4789.
- [9] Radu, L. (2017). Corruption in the European Union and the responsibility of European institutions. *Transylvanian Review of Administrative Sciences*, 2017(50E), 164-176.
- [10] Melnyk, I. (2009). Stages of formation of administrative justice in Ukraine. *Bulletin of the Supreme Administrative Court of Ukraine*, 3, 77-82.

- [11] Bachmann, K., & Lyubashenko, I. (2017). The puzzle of transitional justice in Ukraine. *International Journal of Transitional Justice*, 11(2), 297-314.
- [12] Drozd, O. Y. (2017). Civil service pattern in Germany and Ukraine: A comparative aspect. *Journal of Advanced Research in Law and Economics*, 8(5), 1503-1507.
- [13] Dmytrenko, E., Kharchenko, V., Shcherbakovskiy, M., Ozerskyi, I., & Popovich, E. (2019). Mechanism of public procurements in the healthcare sphere in the European Union and Ukraine: financial and legal aspect. *Georgian Medical News*, (291), 130-136.
- [14] Solomakha, A. G. (2018). Current status and prospects of implementation of European public administration principles in Ukraine. *European Research Studies Journal*, 21, 453-459.
- [15] Franke, J., & Simonson, J. (2018). Social justice beliefs regarding old-age provisions in Germany: A latent profile analysis. *Social Justice Research*, 31(2), 182-205.
- [16] DeHart, D., & Shapiro, C. (2017). Integrated administrative data & criminal justice research. *American Journal of Criminal Justice*, 42(2), 255-274.
- [17] Thomas, R., & Tomlinson, J. (2017). Mapping current issues in administrative justice: Austerity and the 'more bureaucratic rationality' approach. *Journal of Social Welfare and Family Law*, 39(3), 380-399.
- [18] Nason, S. (2017). Administrative justice in Wales: A new egalitarianism? *Journal of Social Welfare and Family Law*, 39(1), 115-135.
- [19] Labouysse, D. (2016). Collegiality and quality in administrative justice. *Revue Francaise d'Administration Publique*, 159(3), 751-762.
- [20] Berthier, L. (2016). Quality and evaluation of administrative court judges. *Revue Francaise d'Administration Publique*, 159(3), 739-750.

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