

# GUARANTEES OF LEGALITY OF PUBLIC ADMINISTRATION ACTIVITY: FROM CONCEPT TO PRACTICAL IMPLEMENTATION

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**Abstract.** The purpose of the article is an attempt to consider guarantees of the legality of public administration through rethinking the existing system of appeal, taking into account the novelties of domestic science and practice, and the preconditions for the formation of administrative procedural law, in which the central place belongs to the category of “dispute in public relations”. The analysis of subsystems of dispute resolution through administrative proceedings and pre-trial appeals from the standpoint of efficiency and the dialectical connection is carried out. It is stated that to ensure the effectiveness of the generally accepted system of dispute resolution as a guarantee of legality, the activities of public administration entities today are the priority of absolutely all legal countries. Significant obstacles on gradual and systematic activities such as those caused by an acute exacerbation of social tension in society, external aggression, especially the development of legal doctrine and legislation that includes an ambiguous position. Today, most scholars agree that the issues of guarantees of the legality of public administration are directly related to the ability to present a model for appealing decisions, actions, inactions and determine its levels. Scientific support of the processes of formation of a legal and socially-oriented state is closely connected with the need to strengthen the methodological armament of legal science, its departure from outdated scientific dogmas, and the search for forms of manifestation and enforcement. The solution of the goal set in the publication is achieved using the cognitive potential of the system of philosophical, general scientific, and special methods. Analysis and synthesis allowed to determine the features of the concepts of “appeal” and “dispute” within the administrative appeal. Methods of review of grammar and interpretation of the law helped identify gaps and other shortcomings of legislation problems introducing mediation in the judicial administrative process as of alternative that will act as a separate stage of proceedings litigation, making suggestions for improvement. Practical implications. The formulated proposals for the development of legal support for appealing decisions, actions, the inaction of public administration, along with the functioning of administrative proceedings as a procedural form of administrative justice, acts as a guarantor of public administration in the relationship between citizen and state and is an integral part of this model.

**Key words:** guarantees of legality, public administration, the dispute in the field of public law relations, appeals, administrative proceedings, administrative process, mediation.

**JEL Classification:** K10, K40, K41

## 1. Introduction

Formation of the socially-oriented state that declares a person's life, honor, dignity, and health of the highest value, pointing it in the Basic Law, means that ensuring the welfare and opportunities to meet the needs of every single individual cause creation and functioning of all entities, which have recently been called public administration. Legal guarantees concerning the activities of public administration are the necessary

means (methods, measures, conditions) for its effective, proper implementation.

Characterizing any phenomenon, it is logical to address the lexical meaning of the constituent concepts that make it up. Thus, the word “guarantee” is understood in the following ways: guarantee something, provide whatever; an obligation provided by law or a certain agreement, under which a legal or natural person is liable to the relevant persons in case of non-fulfillment

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of its obligations. Guarantees of legality: due to the laws of social development system of conditions and means that ensure the process of legality and thus form such an order of social relations, which contributes to the country's movement towards democracy and the rule of law (Zaichuk, 2013).

Public administration today will be defined as a system of organizational and structural entities that has legally acquired the power to exercise public authority through the implementation of applicable regulations and other actions in the public interest, which are recognized by the state and provided by law, i.e. have legal registration and established forms of legal implementation. Their satisfaction is a guarantee of the harmonious existence and integrated development of the state and civil society, systematically structured by the citizens of local self-government. Public administration as a legal category has two dimensions: functional and organizational-structural. The functional approach is the activity of relevant structural entities to perform functions aimed at realizing the public interest. The sphere of responsibility of public administration is objectified by the institution of appealing against decisions, actions, or inaction of its subjects in court and administratively (Halunko, 2020).

The essence, content, and significance of appeal and dispute, both in the praxeological and in the axiological sense, were developed by such scholars as V. B. Averianov, Yu. P. Bytiak, O. F. Andriiko, T. O. Kolomoiets, D. V. Luchenko, O. P. Riabchenko, O. V. Konstantyi, etc. Although the study of the concept of dispute in public relations has received much attention from the scientific community, in particular, formulated a doctrinal vector of intensification of scientific research in this area, there is a deep rethinking of existing views on the essence and content of such a concept and recognition of its independent nature along with related legal categories.

## **2. The relationship between the concepts of appeal and dispute in administrative law**

The main issues addressed in the plane of the task are the study of the essence, content, and delimitation of the concepts of "administrative legal dispute" and "public-legal dispute". This issue is raised, in particular, in a comprehensive study "Institute of Appeal in Administrative Law" by D. V. Luchenko, which substantiates the position on the use of the term "administrative legal dispute" as a type of public law. Denoting the concept of "administrative legal dispute" relations that develop in the process of pre-trial and judicial appeal, the scientist concludes its main feature, which is the material precondition of the appeal. In the context of the latter category, it is determined that for the resolution of administrative legal disputes there are the administrative procedure and judicial procedure, which

determine the existence of appropriate procedural forms of administrative complaints and administrative claims (Luchenko, 2017).

This logically determines the existence of a procedural form of consideration of administrative complaints (administrative appeal), a claim procedural form (court appeal), a procedural form of indirect appeal (appeal to the authorities empowered to initiate an appeal against a decision, action, or inaction of a public authority) (Luchenko, 2017). However, the question of the relationship between the categories of "appeal" and "dispute" within the administrative appeal was left out of consideration, because under the chosen approach these categories will coincide and cannot be assessed as derivative of each other (accordingly, the question of expediency and the validity of their simultaneous use in the simultaneous impossibility of choosing one of them as a generalization).

The procedure for filing a complaint to enterprises, institutions, organizations of all forms of ownership is regulated by the Basic Law of Ukraine "On Citizens' Appeals", in the text of which there is no term "dispute".

Referring to the dictionary and reference literature, an appeal is a notice of review to state bodies and local governments, associations of citizens about the illegality or unfoundedness of decisions, actions (inaction) of officials (Great Encyclopedic Legal Dictionary, 2012). The Code of Administrative Procedure of Ukraine (hereafter referred to as the CAP of Ukraine) article 12 "Forms and administrative justice", in particular the fourth part, states that cases in dispute following the claim and reduced the proceedings dealt against decisions, actions, and omissions (Code of Administrative Procedure of Ukraine, 2005) respective subobjects. Thus, the approach to the derivative nature of the dispute (statement of the material basis of the appeal) may be correct when it comes to the appeal as an institution to protect the rights, freedoms, and legitimate interests of individuals, rights, and interests of legal entities in a material, static sense.

However, from the standpoint of the dynamics of the dispute, the appeal can be both a prerequisite for the dispute and its procedural component. The steps towards the allocation of administrative procedural law in a separate area are significant for this statement, in which the "dispute" will occupy a central place, and the process of its resolution by administrative courts will be characterized as an administrative process. Given this situation, which determines the relationship between the concepts of "appeal" and "dispute", an updated line of research will be formed in connection with the obvious need to substantiate these concepts as an independent. By the way, in the science of administrative law, they are considered (Loshytskyi, 2015).

It is clear that in the future the subject area of the dispute and appeal will coincide. Under such conditions, to characterize the appeal as a system, it will be possible

to select its levels, and in such a system, the dispute will be one of them.

This statement is mediated by the development of the institute of administrative justice in Ukraine. In most works of domestic and foreign scholars, the issue of unification of administrative appeal procedures is considered through the prism of their autonomy.

The so-called “separation” of judicial and extrajudicial appeals, as noted by D. V. Luchenko, is explained by the provisions of the Constitution of Ukraine, which separately enshrines the right to appeal to public authorities, local self-government bodies and officials of these bodies (Article 40 of the Constitution of Ukraine), which includes the right to complain and the right to appeal in court against decisions, actions or omissions of public authorities, local self-government bodies and officials (Article 55 of the Constitution of Ukraine). This distinction is explained by legal and ideological reasons, namely the need (given the Soviet past) to establish the constitutional level of the possibility of judicial review of administrative acts (Luchenko, 2012).

Agreeing with the above statement about the need to consider the appeal in the dialectical relationship of its internal elements (which still need to be determined), it is worth noting that despite this desire, scholars still oppose the methods of appeal (pre-trial and judicial), especially when it comes to determining its effectiveness. Moreover, all attempts to unify procedures (methods, forms) are reduced to the characteristics of the proceedings within a certain group of relations (procedural, tort, judicial).

### **3. Prerequisites for the formation of the appeal system in the context of the category “dispute in the field of public relations”**

Given the peculiarities of legal support, the polycentric nature of the subject of administrative law does not allow to unify such proceedings, and even more, to outline the place of proceedings for disputes in the field of public relations among them. Additional complexity in determining the nature and content of the appeal in administrative law is introduced, in particular, by the new, so-called “alternative”, form (method) of protection – mediation.

An attempt to comprehensively characterize the appeal in administrative law was made by D. V. Luchenko, who determined that the use of the appeal mechanism indicated the emergence of a dispute over substantive law. The administrative and legal dispute is a material precondition for an appeal (Luchenko, 2017). It should be noted that the use of the term “dispute” as a material precondition for an appeal logically leads to reflections on the procedural component of such activities. It is known that to resolve a dispute that has arisen

between entities whose legal status is not equal, there must be a third party – the court, mediator, another entity endowed with sufficient authority to resolve it. Otherwise, to characterize the relationship that arises in the appeal process as controversial, is unlikely to succeed, at least given the inequality of the parties, which is constantly emphasized in scientific journalistic sources.

O. V. Konstantyi (2015) points out that filing a procedural (judicial) complaint is a way to exercise the dispositive right of a party to initiate an appellate and cassation review of court decisions in administrative, commercial, criminal, and civil proceedings. The scientist emphasizes that the current model of administrative proceedings in Ukraine, even though in the early 2000s during the development of the draft Code, designed to implement it, is not a complaint procedure, which provided for in the provisions of subsection “B” of Section III (Chapter 29 – 32) of the Civil Procedure Code of Ukraine of 1963, and is a claim. This approach of the legislator is quite justified, because the administrative claim, unlike the complaint, allows it to claim not only the invalidation of the contested decision, action, or inaction of the subject of power but also compensation for material damage. Therefore, according to the scientist, it is a more effective procedural means of protecting subjective rights and freedoms or interests in the field of public relations, in particular in litigation based on adversarial and binding court decisions. Instead, to effectively resolve disputes, it is now appropriate to create a slightly different organizational structure in the institutional environment within the existing units.

Thus, in the scientific literature, there are a large number of proposals for the creation of “quasi-jurisdictional” bodies, but in conditions of a state budget deficit, these transformations are extremely costly. Thus, the issue of the organizational component of the conceptual (even doctrinal) vision of dispute resolution as a component of the procedural part of the pre-trial appeal can be achieved through a “one-tier system”. This means a system that would ensure that complaints are dealt with on an equal footing. This can be achieved by establishing an equal set of procedural rights and responsibilities of the parties to the case with the participation of the staff (structural unit) of the central executive body or the highest body in the institutional system that would decide on the dispute. The decision of the staff would be appealed in the procedure of litigation in administrative courts. This would provide opportunities for effective internal control over the legality of regional or local units, timely correction of mistakes made in the process of administrative rule-making, communicate the position of the executive branch, adjust their activities based on service guidelines and significantly increase public confidence in the institution.

This direction of reformatting the activities of units authorized to consider complaints (other appeals, objections, etc.) should solve the problem of excessive delay and abuse of the right to appeal, which is emphasized in almost every scientific work of domestic scientists in the context of this issue.

Currently, the grievance system is two-tier, and the main feature of its operation is the lack of existing regulations to take into account the materials of the complaint by a lower-body in the central executive body and, in particular, the procedure for participation in such a complaint (authorized unit) of the central executive body at the level of the complainant.

It is also worth paying attention to certain categories of cases for which a special procedure has been established. Thus, paragraph 56.23 of Article 56 of the Tax Code of Ukraine establishes the procedure for appealing the decision to refuse to register a tax invoice/calculation of adjustments in the Unified Register of Tax Invoices, and subparagraphs 56.23.1 – 56.23.4 determine the features of such complaints by the central executive body implementing the state tax and state customs policy (Tax Code of Ukraine, 2010).

There are many similar examples in the practice of legislative regulation of such special procedures. Accordingly, the existence of such special procedures for reviewing complaints makes it possible to raise the issue of resolving the issue of mandatory pre-trial dispute resolution. However, in this case, the procedure for filing a complaint to the central executive body (its staff) will lose its signs of independence, as it will be dialectically (normatively) related to the resolution of the dispute through administrative proceedings. Only disputes that would be resolved by the staff of the central executive body were recognized as a pre-trial procedure for reviewing a complaint against decisions, actions (inaction) of a regional and/or its local structural unit.

#### 4. Conclusions

Despite the presence in regulations-instructions on the possibility of mandatory pre-trial settlement of disputes, in particular, Article 124 of the Constitution

of Ukraine, Article 17 of the CAP of Ukraine “Basic provisions of pre-trial settlement of disputes” and other articles in public law, such provisions are difficult to implement, since, taking into account the provisions of the second part of Article 19 of the Constitution of Ukraine, public authorities and local self-government bodies, their officials are obliged to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine (Constitution of Ukraine, 1996).

This provision of the Constitution of Ukraine allows for the introduction of mediation in public law relations only in part and if the scope of discretionary powers of the subjects exercising power management functions is clearly defined. Much attention is paid to the issue of mediation in the administrative process. In particular, one of the progressive provisions is the approach based on which a judge of an administrative court can act as a mediator.

Without aiming at a thorough study of mediation in judicial administrative proceedings, it should be noted that this alternative method will be a separate stage of the proceedings on the judicial settlement of the dispute. Since, first, the judge (court) implements (performs) the function of justice in the procedural form determined by the CAP of Ukraine, other regulations, therefore, it seems unclear what exactly is the alternative (what are the means of resolving the dispute). Pre-trial the provisions of the Draft Law of Ukraine “On Mediation”, registered in 2015, will duplicate the provisions of the above articles of the CAP of Ukraine. If the bill defines a special procedure for consideration of the appeal, there will be a problem of mandatory implementation of the mediator’s decisions.

Thus, Ukraine risks receiving an additional inefficient complaint procedure (appeals, disputes, etc.), which will have little to do with “appeals”. Thus, the first level of appeal can be determined by the criterion of binding execution of the decision (pre-trial settlement of the dispute, under the conditions described above, and mediation as an alternative way of resolving such disputes in the pre-trial procedure). The highest level of appeal is the resolution of disputes in the field of public relations by administrative courts.

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