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ABOUT THE ESSENCE AND CONCEPT OF EXECUTIVE POWER

Vladimir MARCHENKO,

PhD, Associate Professor of the Department of State and legal disciplines and International Law Faculty of the Kharkiv National Pedagogical University named by G.S. Skovoroda

Summary

The specificity of the models of the executive power in the modern countries largely depends on the government, while the classification of the last one determines the place and the role of the state's head and the government in the political system, the state mechanism. However, in any form of the government the executive power usually plays an important role in the state mechanism. In the article the author analyzes the essence and features of executive power in modern countries from the point of view of the conception of the division of power; the concept of the executive power is defined.

Key words: executive power, the mechanism of executive power, power division.

Анотация

Специфика моделей исполнительной власти в современных странах в значительной мере зависит от формы правления, поскольку классификация последней определяет место и роль главы государства и правительства в политической системе, государственном механизме. Тем не менее, при какой-либо форме правления исполнительная власть, как правило, играет важную роль в государственном механизме. В статье анализируется сущность и признаки исполнительной власти в современных странах с точки зрения концепции разделения власти; определено понятие исполнительной власти.

Ключевые слова: исполнительная власть, механизм исполнительной власти, разделение власти.

The executive power is the most visible institution of the political system of society, whose activity is directly related to daily life of the citizens. "It not only implements political decisions in life, but also often initiates and organizes the adoption of them, gaining a dominant role in society. Party-political struggle in society takes place mostly around the obtaining of the executive power or the determining influence on it. The degree of the democracy of society is determined by the effectiveness of this power and how society controls it" – O.V. Khomenko notes rightly [1, p. 84]. As it is emphasized in the monograph of the German constitutionalist Carl Verlag, the activity of the executive power was an object of the rapt attention of society, that caused the need for the continuous control of its activity, including the constitutional control [2]. So the problems of the executive power are being traditionally studied by scientists-jurists, but it should be noted that the fragmentary elucidation of them doesn't help to determine the patterns of the functioning of higher bodies of the state executive power and to reveal the main trends of the development

of legal support, the creating of them and their activity.

However, the study of the formation and the development of the higher bodies of the executive power would be incomplete without the clarifying of the essence of the concept "the executive power". As this concept usually is not fixed in constitutions, the logic of the scientific search causes the need to turn to theoretical sources.

Some experts on a state noted that the executive branch was one of the branches of the single government, the functioning of which was possible only under the conditions of the realization of the principle of the separation of powers [3, p. 243]. In other words, the talking about the existence of the executive power until the rise and the implementation of such separation is not warranted. Of course, we can talk, in our opinion, about the legislative, executive and judicial power (functions) of the monarch, using in the description of the government in classical monarchies conceptual apparatus of the theory of the separation of power. But the existence of such functions does not mean the actual, real existence of the legislative,



judicial and executive branches of the government that would have their own specific features, the original scope of the activity, the special mechanism of the formation and the functioning. That is why the most correct point of view is that the concept of the executive power in the proper sense of this term could be used only in conditions of the realization of the constitutional principle of the separation of the power. Thus, the executive power is one of three traditional branches of the state government. It is independent from the other branches of the power executing its statutory powers within the competence, determined by the Constitution and laws. The executive power includes a number of authorities for the control of the other branches of the government, and therefore, is a part of the system of containments and oppositions [4]. The Spanish scientist V.F. Komella rightly notes in his work on the development of the constitutionalism in Europe that the solution of the question on the role and the status of the executive power is the criterion according to which it is possible to judge the model of the constitutional development of a state [5].

The authorities that represent the content of the executive power, the content of the activity of its organs determine the legality of its decisions and actions arising directly from its destination. But the issue of the destination of the executive power is being solved ambiguously in the jurisprudence. The first position lies in the fact that the mission of the executive power is to implement the laws of the parliament. It is often affirmed in the legal scientific literature that the legislative branch of the government is directing and controlling and the executive one is observant and sublegislative. Yu.O. Tyhomirov notes that "it is necessary to break the old tradition decisively and to make the executive organs implement the laws mainly. This is the content of their work, expressed in the name and the destination of these organs. Now the situation is almost the same as in previous years, when the government was being developed according to the formula "discretion and expediency". Meanwhile the activity on the basis of and for the implementation of the law is not only a formal guideline, but also the most important factor of the optimization of the management activity" [6, p. 85].

V.V. Lazarev notes that "the executive power has a secondary, derivative nature. All the actions of the executive organs are based on the law, they should not contradict it and should be directed to the implementation of the law. That is why it was called "executive power" [7, p. 13–15]. Destination of this power lies in the fulfillment of the administrative organizational activity, directed to the execution of the legal acts, adopted or directly by the people, or by its representative bodies. That is what represents the essence of the activity of the executive branch of the power and the nature of its authorities, determines the conformity of all the decisions of this government to the law [8, p. 18–20].

That is why acting beyond the authorities and ignoring the laws the executive power loses its legitimate essence. We consider the fundamental difference of the executive power from the other branches of the government on the subject and scope of the activity in the fact that its main task is the organization of the fulfillment of acts of the legislature and the other regulations, therefore this power is called executive" [9, p. 123].

Thus, most researchers insist on that the main thing in the work of the executive organs is the execution of the laws, the implementing them in practice, and its task is to manage social and economic processes on the basis and within the limits, set by the law.

According to the conception of the separation of the power the executive one is the power of the fulfilment and implementation of the laws by any legal means. It is emphasized in the legal literature that the executive power had the prerogative to carry out the laws, passed by the parliament, and other solutions [10, s. 125]. However, neither in the past nor even now this branch is not confined to carry out the laws. First, because of the need to ensure the realization of the law of the executive branch it is necessary to solve many current problems and issues on the ensuring the life of society and the state. The competence of this power covers almost all the spheres of life – economy, science, education, culture, health, social protection, national security, public order, defense and external relations. B.S. Ebzeyev believes that the feature of the executive power is that it is being carried out in accordance

with the laws, remaining within the laws largely autonomous in the solving of the problems, posed to the country [11, p. 34]. Secondly, the executive power has a number of the authorities that are not related to the task of the execution of the laws, passed by the parliament or people. The history of the constitutional law in Europe shows it [12, p. 9].

The state experts considered quite rightly, in our opinion, the statut about the destination of the executive power that had been lied in the implementing of the decisions, taken directly by the people or their representative bodies; the implementing of the will of society, expressed in the laws; the working out and realization of the programs of social development; the ensuring of the compliance with the legal regulations (actions of the executive power should be based on the laws and directed to their execution); the rulemaking activity (the promulgation of decrees and orders); the organization, implementation and management of the internal and external affairs of the state; the management of the sectors of economic; the control of the bodies and institutions that had been provided daily life of people and communities; the ensuring of the public order, stability and security in society; the protection of human rights [13, p. 18].

In accordance with the facts noted above we can make the following conclusions: the destination of the executive power can not be reduced to the simple execution of the laws, since the state management, planning and control of social and economic development of the state has a creative character demanding not only to observe the law, but also to develop the normative-legal base admitting the needs of social practice and adjusting the public relations. The modern stage of the development of the civilization, especially in democratic countries, allows to consider the executive power as one of the three branches of the government, that organizes and directs internal and external state policy, ensures the implementation of the people's will, embodied in the laws, protects the rights of a man and citizen. As the Dzh.A. Bermann notes that just this feature of the executive power was developed in the modern constitutions of Europe [14, p. 442].

The special position of the executive power in the state mechanism makes



it the most effective regulator of social relations that are changing dynamically. In addition, the nature of the executive power isn't secondary. Thus, the expert on the administrative law V.B. Averyanov believes that the functions and the authorities of the executive power can be delegated even to social organizations by the state [15, p. 113–116]. It is impossible to agree with this fact because the conditions, under which the state organs acts, including the executive organs and the social organizations, are fundamentally different. All the organs of the legal state must act in accordance with their clearly outlined in the legislation tasks and functions. They cannot act beyond their competence, defined in the legislation (for example, part 2 art. 6 of the Constitution of Ukraine declares that the organs of the legislative, executive and judicial power execute their authorities within the limits, appointed by the Constitution, and in accordance with the laws of Ukraine [16]). At the same time, the other subjects of civil society, including the social organizations, have more freedom in their work (except the limitations, appointed by the art. 37 of the Constitution of Ukraine). Thus, the delegation of the functions and authorities of the executive power to the social organizations would mean the leaving of the executive branch of the power of the legal field and the establishing of the tyranny in state life. The political scientist R.S. Martynyuk believes that the government is a secondary organ in the system of the separation of the power [19, p. 11]. We consider that it would be wrong to think that the executive power is secondary, because the nature of the functions it fulfils shows its possibility to change radically socio-economic processes in the state, to manage them. This fact found confirmation in practice of different countries many times.

The volume and nature of the executive power requires some resources. They are: a) accumulation and use of the significant resources – legal, social, financial, economic, technical, informational, organizational, ideological, human; b) the presence of the most extensive system of various state organs with the numerous staff of the state workers.

The basic structure of the executive power is its system. The term “system” comes from the Greek “système”, which

means “the whole, composed of parts” [18, p. 409]. The philosophy understands the system as a set of elements that are in relationships and connections with each other and forms a certain integrity, unity [19, p. 427]. The systematic of the organization and functioning of the executive power acts as the condition and factor that contributes to the fulfilment of its social mission. Thus, the executive power is being materialized in the activity of the special subjects that create a system of its bodies, which operate at central and local levels and represent the mechanism of the studied power.

However, it must be noted that there are many definitions of the concept “the executive power” in science today which contradict each other. This is not curiously, because in the Soviet science the Leninist theory about the unification in the councils of the legislative and executive power was dominant [20, p. 72], contributing to the impressment of the concept “the executive power” from scientific use for more than 70 years. During the period after the collapse of the Soviet Union there were many attempts to define the essence of this concept. But the common concept (definition) does not exist. Thus, Russian political scientist V. F. Halipov defines the executive power as “a system of the organs of the state government, that operates on the basis of the Constitution and the principle of the separation of the legislative, executive and judicial power. The executive power fulfils its authorities independently and has no right to go beyond their limits” [21, p. 64]. This definition can be interpreted too broadly, because these signs cover all the state organs.

Political analyst I.D. Korotets means that the executive power is “one of the main kinds of the state power that ensure the realization of the laws and other legal acts, adopted by the legislature, throughout the country. This does not mean that the executive power is subordinate to the legislature. They are independent and simultaneously interconnected with each other. The specificity of the status of the executive power and its organs in the state lies in the fact that it is directly in the middle of the people's interests, therefore it is bound to react upon people's needs and interests widely, quickly” [22]. In the definition the author rightly refers the executive power to the kinds of the

government and emphasizes the lawful nature of its activities, but he presents the others features, needed to understand the essence of the concept, in a metaphorical form: “in the middle of the people's interests”, etc., that makes it impossible to interpret it clearly and unambiguously.

The main elements of the mechanism of the executive power are mostly the head of the state and government, character of interaction of which with each other and with the parliament determines the characteristics of the form of the government of a country [23, p. 34–35]. In addition, its mechanism includes the central organs (ministries, departments) and local organs. The central organs ensure the development and implementation of national programs, implementation of the state programmes, the execution of the laws, the control the subordinated organs of the executive power. The ministries and central departments can have local and/or regional offices to fulfil these tasks. In some countries the number of the ministries and other central organs of the state executive power is limited by the law. But in most countries the issue is solved according to the immediate needs of the management and often the political situation. The tasks of the local organs of the executive power include the ensuring of the fulfilment of the national programs locally, the problem solving locally and the supervision over the legality of the decisions of the local governments [13, p. 21].

In addition, there is a definition of the executive power as a set of the authorities of the management of the state affairs, including the authority of the normative-legal regulation, the authority of the external political representation, the authority of the carrying out of various kinds of the administrative control, and sometimes legislative authorities (in condition of the delegated or emergency legislature), and the system of the state bodies, that execute the authorities, listed above [24, p. 57–58]. Such a definition of the executive power, presented in so respectable Russian edition as “Big Law Dictionary”, is contradictory, because it is impossible, in our view, to reduce the definition of the executive power to the set of the authorities, since they are secondary. The destination, the purpose of the activity of the executive power, for the implementation of which these authorities



are necessary, are primary. However, this point of view is common not only in national scientific sources, but also in the foreign literature.

Famous Oxford Dictionary of Law defines the concept of the executive power through the disclosure of the set of the authorities: "Administrative authorities are discretionary authorities of the executive nature, that are provided by the law in such a way, that the legislature passes the right to promulgate its normative acts of the regulation to the governmental ministers, public and local powers and other institutions and officials with the aim to obtain detailed, concrete results of the implementation of the policy, that are widely understood in general terms" [25].

M. Drago, a famous French scientist, believes that "... the administration can not be equated with the state. The goals of the administration are never primary, they are secondary and always lie in the fulfilment of the tasks, assigned to it by the main state organs. Thus, the administration always appears as a set of means, that allows to implement the solution of the political power". Of course, these two powers exist and operate only in the organic unity, but they are two specific parts of the government [26, p. 5]. A similar point of view is in the monograph of the English authors "Backgrounds of the origin and results of the new constitutional system of the government", devoted to the constitutional development of Spain, where the distribution of the competence between the administration and the state is identified as a key issue of the development of the democracy state [27, p. 34].

In the practice of the government the political and administrative functions are differentiated as, for example, in the system of the executive power of the Federal Republic of Germany. The book "The state and administrative government of Germany. In the collection of the terms on the law and the governance, published in Munich in 1994, in the paragraph 3.2.1. "The status of the executive power" is determined: "According to the Constitution the executive power covers the realization of the legal norms, that is the implementation of the law and the management (the administrative function), on the other hand, the managing power (function of governor).

This part of the executive branch consists of the political activity, (the managing and forming activity" [28, p. 18].

The Ukrainian constitutionalists O.F. Frytskyi believes that "the executive power is an independent form of the state power of Ukraine, it has unique functions, implemented by a system of the organs of the executive power on the basis of the certain legal mechanism of the realization of the laws and the other legal acts with the help of the state government to implement the rights and freedoms of men and citizens" [29]. The Russian researcher N.G. Horshkova defines the executive power as a separate and independent branch of the state power, that has the universal, objective and organizing nature, that is expressed by the system of the state organs of the executive power, the main purpose of which lies in the execution and the implementation of the laws by the certain methods, provided by the law [30, p. 4]. The Ukrainian scholar I.I. Dahova considers the executive power as one of the branches of the state power, the main purpose of which is to organize the implementation of the laws and the other legal acts, to realize external and internal policy, to protect human rights with the help of the system of specifically created and provided with the appropriate competence organs, built on the principle of vertical subordination [31, p. 6].

We can't agree with this definition. Firstly, the term "branch", which is metaphorical, illustrative, can be used to describe certain trends and phenomenas, but cannot be the essential feature of the concept (as V.P. Yermolin rightly notes, "... there are no "branches of the powers" and their authorities in the Constitution of Ukraine" [32, p. 17]). The definition of the executive power as a kind of the government is more exact ("The state power in Ukraine is being realized on the principle of the division of the power for legislative, executive and judicial" (Part 1 Article 6 of the Constitution of Ukraine) [16].

Secondly, the implementation of the laws cannot act as a necessary and sufficient feature of the executive branch, as in Ukraine, as in other democracies all the state organs without exception must execute the laws. The fact in particular is fixed in Part 2 Art. 19 of the Constitution of Ukraine, that proclaims that the organs

of the state power and local governments. their officers are obliged to act only on the basis, within the authorities and uthe the method, appropriated by the Constitution and the laws of Ukraine, and also in Part 2 Art. 6 of the Constitution, which states: "The organs of the legislative, executive and judicial power implement their authorities within the limits, set by the Constitution and in accordance with the laws of Ukraine" [16].

Thirdly, the definitions, given above, don't take into account that the executive power within the limits, defined by the Constitution and the laws, has the right to determine the rules of behavior (norms of the law) which are mandatory not only for the subjects, subordinated to the certain organ of the executive power, but and for the other members of public relations. It is necessary to agree with S.H. Pylypenko, who notes that the executive power has always legally imperious character [33, s. 117].

Fourthly, we consider the definition of the protection of the human rights and freedoms as the destination of the executive power [31, p. 6] inaccurate, because not only physical but also legal individuals – firms, institutions, organizations of all the types of the property, political parties, trade unions, local communities, in short – all the participants of public relations have rights, freedoms and interests.

In the literature there are statements that the feature of the executive power is the use of the compulsion to fulfill its authorities. Therefore, I.I. Dahova believes that such a right derives from the main purpose of the executive power – the ensuring of the implementation of the Constitution and the laws, regulations throughout the state [31, p. 22]. We consider the position, given above, inaccurate. As the leading expert in the field of the administrative law A.T. Komzyuk notes on the basis of the analysis of the theoretical and normative sources that the governmental compulsion is a method of state influence on the minds and behavior of people who make illegal actions. This institute is manifested in the application of the established by the legal norms moral, material, physical and other measures, aimed at the preventing of the offence, the punishment and the upbringing of offenders, and applies regardless of the



will and desire of the legal subjects [34, p. 38]. These are the compulsion (judicial form), the basis of the application of which can be only socially dangerous act, that is a crime, and administrative (non-judicial) compulsion, that is the use of the influence, provided by the administrative-law principle, by the relevant subjects to persons, who are not subordinated to them, regardless of the will and desire of the person. This administrative compulsion is used in the state administration for the protection of public relations [34, s. 40–45].

Thus, the organs of the executive power may apply measures of administrative compulsion. Only the organs of the executive power which have a right granted by legislative acts (state inspections, paramilitary police formations – police, security, border and internal troops, etc.) can implement these measures. Therefore, the implementation of the compulsion is not a feature of the executive power in general.

These are the essential features of the executive power: a) it is a kind of the state power that is being carried out by the special system of the state organs, the legal status of which is defined by law; b) the destination of the executive power is the management of public relations in order to preserve national sovereignty, economic and political independence of the state, the implementation of the external and internal policy, the fulfilment of the Constitution and the laws, the protection of the human rights, freedoms and interests; c) the executive power within the limits, set by the Constitution and the laws, is empowered to determine by means of the normative acts the rules of behaviour that are compulsory for the participants of social relations (in Ukraine such normative acts have only sublegislative nature).

Thus, the executive power can be defined as a form of the state power which is being fulfilled by the special system of the state organs, appointed by the Constitution and the laws of Ukraine, through the management of public relations in order to preserve national sovereignty, economic and political independence of the state, to realize the external and internal policy, to implement the Constitution and the laws, to obey the rights, the freedoms and the interests of the participants of social relations.

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ДОКТРИНАЛЬНЫЕ ВОПРОСЫ ФОРМИРОВАНИЯ СТАНДАРТОВ ПРЕДОСТАВЛЕНИЯ АДМИНИСТРАТИВНЫХ УСЛУГ

Яна МИХАЙЛЮК,

аспирант кафедры конституционного,
международного и административного права
Института права имени В.В. Сташиса
Классического частного университета

Summary

The article reviews doctrinal issues on defining standards of providing administrative services, basic principles and requirements which have been developed by the European community. Here we've paid attention to need for their introduction into the Ukrainian legislation, considered balance between principles, requirements and standards of providing of administrative services. The article investigates essence of main groups of standards to be fixed in a single codified normative act governing administrative procedures.

Key words: standards of providing administrative services, standards of good administration, administrative procedure, the European standards of good governance.

Аннотация

Статья посвящена исследованию доктринальных вопросов формирования стандартов предоставления административных услуг, основных принципов и требований, разработанных Европейским Сообществом, обращено внимание на необходимость их внедрения в украинском законодательстве, рассмотрено соотношение принципов, требований и стандартов предоставления административных услуг. В статье также исследовано содержание основных групп стандартов, которые должны быть закреплены в едином кодифицированном нормативном акте, регулирующем административные процедуры.

Ключевые слова: стандарты предоставления административных услуг, стандарты надлежащей администрации, административная процедура, европейские стандарты надлежащего управления.

Постановка проблемы. Сфера предоставления административных услуг населению является очень важной частью деятельности органов исполнительной власти и органов местного самоуправления, поскольку имеет прямое отношение к обеспечению прав и законных интересов граждан в сфере реализации функций исполнительной власти.

В доктрине административного права Украины в последнее десятилетие наблюдается изменение подходов к определению сущности отношений между государством и гражданином. Надлежащее правовое регулирование отношений между государством и частными лицами имеет огромное значение для обеспечения прав и законных интересов физических и юридических лиц.

Актуальность темы исследования. В связи с тем, что правовое регулирование этой сферы правоотношений далеко не совершенно и подлежит реформированию, исследование доктринальных

вопросов формирования стандартов и требований к предоставлению административных услуг имеет важное значение для адаптации украинского законодательства к европейским стандартам надлежащей администрации.

Исследованием института административных услуг, в том числе проблемной правового регулирования процедур предоставления административных услуг населению занимались такие ученые, как: В.Б. Аверьянов, К.К. Афанасьев, И.П. Голосниченко, И.Б. Колиушко, О.В. Кузьменко, Е.В. Куренной, К.В. Николаенко, М.Б. Острах, А.Н. Писаренко, А.А. Пухтецкая, В.П. Тимошук и другие.

Целью данной статьи является исследование доктринальных вопросов формирования стандартов предоставления административных услуг, их значения для обеспечения прав и интересов граждан, а также разработка предложений для усовершенствования законодательства, регулирующего процедуру