

Realization of the rule of law principle in the administrative procedure

Realización del principio del estado de derecho en el procedimiento administrativo

Realização do princípio do Estado de Direito no procedimento administrativo

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Abstract

The rule of law is a fundamental principle of law that is essential for the realization of administrative procedures, in particular in the spirit of a democratic and law-governed state defined by law, and in order to ensure the rule of law and the law, as well as the state's obligation to ensure and protect the rights, freedoms or legitimate interests of a person and citizen. The principles of administrative procedure apply to administrative activities of administrative bodies that do not require the adoption of administrative acts. In this context, it is important to remember that an administrative body in conducting administrative proceedings is guided by the rule of law, according to which a person, his or her rights and freedoms are recognized as the highest values and determine the content and direction of the state's activities. In addition, a very important aspect is that an administrative body carries out administrative proceedings exclusively on the basis, within the limits of its powers and in the manner provided for by national legislation, as well as on the basis of ratified international treaties. Given the importance of these aspects, the article explains such concepts as "administrative procedure" and "the rule of law principle". The authors consider the realization of the rule of law principle in administrative procedures in the unity of three conditions: ensuring digital adaptability; ensuring clarity and consistency of perception of the essence of the rule of law principle; building a society of the rule of law.

Keywords: Administrative activity, administrative body, administrative proceedings, administrative procedure, observance of human rights and freedoms, principle, rule of law.

Resumen

El Estado de derecho es un principio fundamental del derecho que es esencial para la realización de los procedimientos administrativos, en particular en el espíritu de un estado democrático y regido por la ley definido por la ley, y para garantizar el Estado de derecho y la ley, así como la obligación del estado de garantizar y proteger los derechos, libertades o intereses legítimos de una persona y ciudadano. Los principios del procedimiento administrativo se aplican a las actividades administrativas de los órganos administrativos que no requieren la adopción de actos administrativos. En este contexto, es importante recordar que un órgano administrativo en la realización de procedimientos administrativos se guía por el Estado de derecho, según el cual una persona, sus derechos y libertades son reconocidos como los valores más altos y determinan el contenido y la dirección de las actividades del estado. Además, un aspecto muy importante es que un órgano administrativo lleva a cabo procedimientos administrativos exclusivamente sobre la base, dentro de los límites de sus competencias y de acuerdo con lo establecido por la legislación nacional, así como sobre la base de tratados internacionales ratificados. Dada la importancia de estos aspectos, el artículo explica conceptos como "procedimiento administrativo" y "principio del Estado de derecho". Los autores consideran la realización del principio del Estado de derecho en los procedimientos administrativos en la unidad de tres condiciones: garantizar la adaptabilidad digital; garantizar la claridad y consistencia de la percepción de la esencia del principio del Estado de derecho; construir una sociedad del Estado de derecho.

Palabras clave: actividad administrativa, órgano administrativo, procedimientos administrativos, procedimiento administrativo, observancia de los derechos humanos y libertades, principio, Estado de derecho.

Resumo

O estado de direito é um princípio fundamental do direito que é essencial para a realização de procedimentos administrativos, em especial no espírito de um estado democrático e governado por lei definido por lei, e para garantir o estado de direito e a lei, bem como a obrigação do estado de garantir e proteger os direitos, liberdades ou interesses legítimos de uma pessoa e de um cidadão. Os princípios do procedimento administrativo

se aplicam às atividades administrativas dos órgãos administrativos que não exigem a adoção de atos administrativos. Nesse contexto, é importante lembrar que um órgão administrativo, ao conduzir procedimentos administrativos, é orientado pelo estado de direito, segundo o qual uma pessoa, seus direitos e liberdades são reconhecidos como os valores mais altos e determinam o conteúdo e a direção das atividades do Estado. Além disso, um aspecto muito importante é que um órgão administrativo realiza procedimentos administrativos exclusivamente com base, dentro dos limites de seus poderes e na forma prevista pela legislação nacional, bem como com base em tratados internacionais ratificados. Dada a importância desses aspectos, o artigo explica conceitos como "procedimento administrativo" e "princípio do estado de direito". Os autores consideram a realização do princípio do Estado de Direito nos procedimentos administrativos na unidade de três condições: garantir a adaptabilidade digital; garantir a clareza e a consistência da percepção da essência do Estado de Direito; e garantir a coerência e a clareza da percepção da essência do Estado de Direito.

Palavras-chave: Atividade administrativa, órgão administrativo, processo administrativo, procedimento administrativo, observância dos direitos humanos e liberdades, princípio, estado de direito.

INTRODUCTION

Global political, economic, social and legal transformations, that are taking place in the state against the background of numerous reforms in all spheres of the society, directly affect the entire domestic legal system, and its individual branches and institutions. In the last two decades alone, the current legislation has been significantly updated and supplemented.¹ Ensuring an effective legal framework built in accordance with current socio-economic, political, cultural and security realities is impossible without implementing a system of progressive, socially oriented and democratic principles.

This statement is due to the fact that the rights, freedoms and legitimate interests of each person as a subject of legal relations must be effectively protected by national legislation. This is a fundamental component of the normal existence of any person.² In the context of the significant epistemological potential of the studied issues, M. V. Dzhafarova separately emphasizes the constant updating of current legislation, in particular significant changes in which are undergoing numerous legislative and regulatory acts under the influence of the judicial and legal reform which is still ongoing in Ukraine, as well as related processes.³

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- 1 Yevhen Leheza, Oleksandr Shamara, Viktor Chalavan. *Principles of administrative judiciary in Ukraine*. DIXI, vol. 24, num. 1. January-June 2022. P. 1-11.
 - 2 Roman Shapoval, Tetiana Kolomoiets, Oksana Brusakova, Mikayil Garayev. *Definition, signs and types of administrative and procedural guarantees: Established views and the need for their modernization*. DIXI, vol. 23, num. 2. July-December 2021. P. 3.
 - 3 M. V. Dzhafarova. *Directions of improvement of the norms of administrative procedural legislation regulating the institute of procedural representation in administrative proceedings of Ukraine*. LAW AND SOCIETY, num. 2. 2019. P. 115.

In the context of scientific and technological progress and current socio-economic problems of Ukrainian society, this problem arises in the light of the latest challenges, in particular, the creation of previously unknown digital opportunities, the formation of the Internet society, which should also be reflected in the administrative and legal doctrine.

PURPOSE AND OBJECTIVES

The purpose of the article is to formulate a vision of the rule of law principle in administrative procedure. To achieve this goal, it is necessary to solve the following tasks: i) to clarify the essence of administrative procedure by analyzing the positions of scholars and national legislation; ii) to analyze in detail the essence of the principles of law as such; iii) to consider the approaches of national researchers to understanding the system of principles of administrative procedure; and iv) to clarify the essence of the rule of law principle as the leading principle of administrative procedure in Ukraine by analyzing three conditions for its observance.

FINDINGS AND DISCUSSIONS

1. Legal Understanding of the Concept of “Administrative Procedure”

M. V. Dzhafarova understands administrative procedural law as one of the independent procedural branches of law, which is a properly regulated set of administrative procedural norms (rules) enshrined in administrative procedural legislation which regulate social relations between the Court and participants to the Court proceedings in the field of administrative justice with a view to effective protection of the rights, freedoms and interests of individuals, rights and interests of legal entities from violations by public authorities.⁴

At the same time, as noted by O. M. Bandurka, the development, adoption, execution, appeal of administrative procedural acts, appeal of individual administrative acts of executive authorities and local self-government bodies, officials of these bodies for the realization of the rights, freedoms and interests of individuals and legal

4 M. V. Dzhafarova. *On the issue of defining the modern system and functions of administrative procedural law as an independent branch of law*. SCIENTIFIC BULLETIN OF UZHGOROD NATIONAL UNIVERSITY, num. 54. 2019. P. 128.

entities are ensured by certain organizational and managerial actions and in accordance with the procedure established by laws or by-laws. Such actions are defined as “legal procedures” and represent a set of actions or operations by which a process or stage is implemented, expressing the content of the relevant technology.⁵

According to the Law of Ukraine “On Administrative Procedure”, which was signed by the President of Ukraine on June 13, 2022 and will come into force on December 15, 2023, the administrative procedure is a procedure for consideration and resolution of a case determined by law.⁶ With the adoption of this legal act, for the first time, clear procedures were laid down in the relations between citizens and public administration, and the terms “administrative body”, “administrative procedure”, “administrative act”, and “procedural decision” were legally enshrined, which is intended to bring Ukraine closer to the standards of the European Union.

Considering the essence of administrative procedures in the field of education, O. Bezpalova, V. Abroskin, O. Andriiko, O. Syniavska and S. Yevdokymenko emphasize that joining the European educational area requires an appropriate legal framework designed to ensure a high level of quality of educational services, autonomy of higher education institutions, and implementation of the principles of democratization and decentralization of higher education. Regulation of relations between the state and other subjects of legal relations in the field of higher education should be carried out within the framework of administrative procedures regulated by law.⁷

D. M. Lukianets and O. O. Markova consider administrative procedure as a congruent institution which was formed within the legal framework of European countries and countries of the former Soviet Union, including Ukraine. When studying the formation of administrative procedure in European countries and the United States, scholars note that the evolution of administrative procedure goes through several stages: the first stage is the emergence, the second is the formation, and the third is further development and modernization.⁸

5 O. M. Bandurka. ADMINISTRATIVE PROCESS OF UKRAINE: A MONOGRAPH. KhNUiA, Maidan. (2019). P. 189.

6 Law of Ukraine No. 2073-ix. 2022. On administrative procedure. Available at: <https://zakon.rada.gov.ua/laws/show/2073-20#Text>

7 Olha Bezpalova, Viacheslav Abroskin, Olha Andriiko, Olena Syniavska, Sergiy Yevdokimenko. *The essence and types of administrative procedures in the activities of higher education institutions as subjects of the implementation of the educational function of the state*. JOURNAL OF LEGAL, ETHICAL AND REGULATORY ISSUES, vol. 23, num. 1. 2020.

8 D. M. Luk'yanets, O. O. Markova. *The historical evolution of the administrative procedure (comparative approach)*. INTERNATIONAL JOURNAL OF CRIMINOLOGY AND SOCIOLOGY, vol. 9. 2020. P. 2905-2907.

Obviously, given the cycle of evolution of administrative procedure outlined by researchers, the latter is a rather dynamic category, reflecting the main transformations at the level of society. Thus, in order to abstract from the insignificant, temporary features of administrative procedure and to realize the basic, fundamental foundations of this category, we come to the need to consider the principles of administrative procedure.

2. What is Meant by the Term “Principle of Law”?

Comprehending the main approaches to understanding the principles of law as such, we will focus on the position of M. V. Pientsov, who notes that “principles are such basic ideas of the existence of law which express the most important laws and foundations of this type of state and law, are of the same order as the essence of law and constitute its main features, are characterized by universality, higher imperative and general significance, and meet the objective need to build and strengthen a certain social order”.⁹

Reflecting on the essence of the principles of law, we emphasize the need to consider not only systems of principles, their various sets, which is currently quite common among domestic researchers, but also individual principles, their maximum possible detail in terms of practical implementation and potentially possible problematic aspects.

S. O. Shatrava, analyzing the principles of preventive police activity, emphasizes that “such principles as legality, humanism, social justice, legal equality before the law, democracy, priority of rights, freedoms and interests of a person and citizen are universal and, therefore, mandatory”.¹⁰

K. Herasymiuk, O. V. Martseliak, Yu. N. Kyrychenko, N. V. Zhmur and I. I. Shmalenko identify the main principles of the concept of good governance in public administration: i) the principle of subsidiarity – delegation of certain functions to other partners, which will ensure more efficient use of resource potential, individual property objects; ii) the principle of participation provides for joint management and specifies the problem, in the course of which the partners will consult with each other or act together; iii) the principle of mutual responsibility, regardless of which party, state, business or public association, by mutual agreement, provides services and is

9 M. V. Pientsov. *Principles of judicial proceedings as the most important principles of effective organization of the judiciary in Ukraine and the countries of the CIS*. LAW AND SAFETY, vol. 2, num. 53. 2014. P. 10.

10 S. O. Shatrava, H. R. Parkhanov. *Principles of preventive police activity: Concepts, content and their classification*. LAW AND SAFETY, vol. 3, num. 74. 2019. P. 44.

responsible to the end user and to each other; iv) the principle of mutual control of the state, business and public institutions – full control over each other’s activities in the implementation of joint projects or agreements; and v) the principle of trust – mutual trust and transparency of relations.¹¹

D. Lukianets, O. Markova, T. Hurzhii and A. Petrytskyi propose that the principles of administrative procedure include the principles of validity and certainty, good faith and prudence, proportionality, timeliness and reasonable time, efficiency, presumption of legitimacy of actions and claims of a person, guarantee of the right of a person to participate in administrative proceedings, the principle of tacit consent and guarantees of alternative means of protection.¹²

Without diminishing the importance of the principles given by the researchers, we consider it appropriate to focus on the essence of the rule of law principle which is fundamental in modern administrative law doctrine.

V. Averianov emphasizes that the rule of law principle should be doctrinally interpreted as a combination of requirements that ensure: first, the subordination of the activities of all state institutions without exception to the needs of realization and protection of human rights; second, the priority of these rights over all other values of a democratic, social, and legal state.¹³

In the light of the latest security challenges, V. T. Komziuk, Yu. O. Zahumenna, A. L. Borko and S. Bortnyk also emphasize that any existing and prospective strategy for ensuring national security in Ukraine should be primarily based on the importance of protecting the rights, freedoms and legitimate interests of Ukrainian citizens.¹⁴

The Code of Administrative Procedure of Ukraine in Part 1 of Article 6 proclaims the following understanding of the rule of law: a person, his or her rights and freedoms are the highest values and determine the content and direction of the state’s activities.¹⁵ A similar definition is contained in the previously mentioned Law of Ukraine “On Administrative Procedure”.¹⁶

11 K. Herasymiuk, O. V. Martselyak, Y. N. Kirichenko, N. V. Zhmur, I. I. Shmalenko. *Principles of integrity and good governance in public administration*. INTERNATIONAL JOURNAL OF MANAGEMENT, vol. 4, num. 11. 2020. P. 554.

12 D. Luk'yanets, O. Markova, T. Gurzhii, A. Petritskyi. *Conceptual model of administrative procedure for Ukraine*. ASTRA SALVENSIS, vol. 1. 2022. P. 346.

13 V. Averianov. *The principle of the rule of law in reforming Ukrainian administrative law*. LEGAL PRACTICE, vol. 18, num. 436. 2006.

14 V. T. Komziuk, Y. O. Zahumenna, A. L. Borko, S. Bortnyk. *Promising directions for ensuring national security under martial law*. LEX HUMANA, vol. 1, num. 15. 2023. P. 518.

15 The Code of Administrative Procedure of Ukraine No. 2747-iv. 2005. Available at: <https://zakon.rada.gov.ua/laws/show/2747-15>

16 Law of Ukraine No. 2073-ix. 2022. On administrative procedure. Available at: <https://zakon.rada.gov.ua/laws/show/2073-20#Text>

3. *The Rule of Law as a Basis for the Implementation of Administrative Procedures*

The above provides an opportunity to consider the implementation of the rule of law principle in administrative procedures in the unity of three conditions for its observance, which are caused by current problems of socio-political reality and the state of scientific and technological progress. These conditions include: 1) ensuring digital adaptability; 2) ensuring clarity and consistency of perception of the essence of the rule of law principle; 3) building a society of the rule of law.

1. Ensuring digital adaptability of the rule of law. In this area, Chinese researchers Xu Hanming and Zhang Xinping emphasize that the rule of law is the basis of national governance, and scientific understanding of the rule of law model is a necessary direction for the management of the Internet society, which is a new model of structural forms containing social relations between citizens, legal entities, public authorities, etc., formed and united on the basis of Internet technologies. Thus, according to scholars, the rule of law model for governing the Internet society refers to theories, systems and practices of governance that use the rule of law concept to bring the elements, structures and procedures of Internet governance under the rule of law.¹⁷

O. Salmanova, Ye. Popovych, A. Nikitina and I. Tesliuk, in order to ensure digital adaptability of administrative procedures, emphasize the importance in this context of rational work of personnel and general coordination of all types of administrative activities between all subjects of its implementation without exception, and that legal regulation of the latest digital social relations should be clearly and unambiguously defined in the adopted regulations.

2. Ensuring clarity and consistency in the perception of the essence of the rule of law. The American researcher John Hasnas notes that the category "rule of law" is often used in colloquial speech to refer to most or all of the cluster of liberal values. When this category is used in this way, the obligation to obey the law is often added to the concept of the rule of law. Researchers raise a rather unusual question for the national scientific thought that it is the association of this duty with the concept of the rule of law, when it is used in a narrow, literal sense to denote only one of the liberal values that can lead to corruption and devalue the very essence of this fundamental principle.¹⁸

17 Xu Hanming, Zhang Xinping. *The rule of law model of internet governance*. SOCIAL SCIENCES IN CHINA, vol. 3, num. 40. 2019. P. 135.

18 J. Hasnas. *The corruption of the rule of law*. SOCIAL PHILOSOPHY & POLICY, vol. 2, num. 35. 2018. P. 12.

In this context, let us cite the position of O. Yu. Syniavska and V. O. Ivantsov, who note that the analysis of law enforcement practice regarding the prohibition of receiving gifts by persons authorized to perform the functions of the state or local self-government, and by persons equated to them in connection with the activities of such persons related to the performance of state or local self-government functions often demonstrated a gross violation of the rule of law (in particular, legal certainty and equality before the law as mandatory elements of the rule of law).¹⁹

As a potential way to improve law enforcement activities at the level of perception of the principle under study, we consider it appropriate to cite the position of V. O. Ivantsov, who proposes to consider the principles of administrative law as a criterion for assessing the content of provisions of legal acts, which results in highlighting their shortcomings, as well as the legal grounds for developing amendments and additions to administrative legal acts, which will ensure that administrative and legal regulation is consistent with the fundamentals of the modern understanding of administrative law.²⁰

3. Building a rule of law society. Li Ya-juan considers legal education to be the leading factor in building a rule of law society. The researcher notes that legal education and the rule of law society can interact; both of these areas can be simultaneously promoted and developed at the national level.²¹ In order to build a society of the rule of law, we consider it appropriate to conduct trainings, seminars, workshops among administrative officials on understanding the rule of law, as well as to conduct extensive legal education among the population, which we consider to be integral elements of creative events, performances, concerts, exhibitions dedicated to the creative understanding of the essence of the rule of law.

19 O. Yu. Syniavska, V. O. Ivantsov. LIMITATION OF GETTING GIFTS: PROBLEMS OF CONTENTS OF THE CONCEPT AND TERMINOLOGICAL APPARATUS IN THE CONTEXT OF LAW REALIZATION AND ROLE OF ADMINISTRATIVE LAW PRINCIPLES FOR THEIR DECISION. Volume 2. Baltija Publishin. 2019. P. 303-304.

20 V. O. Ivantsov. *The principles of administrative law as a prism for assessing the content of normative and legal provisions: Opportunities for identifying the problems and solutions.* BULLETIN OF KHARKIV NATIONAL UNIVERSITY OF INTERNAL AFFAIRS, vol. 4, num. 87. 2019. P. 114.

21 Li Ya-juan. *On the relationship of the law-related education and the rule-of-law society.* 2ND INTERNATIONAL CONFERENCE ON ECONOMICS AND SOCIAL SCIENCE (ICSS 2014). Shenzhen, July 29-30. 2014.

CONCLUSIONS

Summarizing the above, we note that the issue of the rule of law principle in administrative procedure cannot be considered separately from scientific and technological progress, as well as leading trends in domestic and foreign administrative and legal doctrine.

With the adoption of the Law of Ukraine “On Administrative Procedure”, for the first time, clear procedures were established in the relations between citizens and public administration, and the terms “administrative body”, “administrative procedure”, “administrative act” and “procedural decision” were legally enshrined, which is intended to bring Ukraine closer to the standards of the European Union. We emphasize the need to consider not only systems of principles, their various sets, which is currently quite common among domestic researchers, but also individual principles, their maximum possible detail in terms of practical implementation and potentially problematic aspects.

The rule of law principle should be considered as fundamental in the modern administrative and legal doctrine, and its essence as the leading principle of administrative procedures in Ukraine is revealed in the unity of three conditions for its observance arising from the current issues of socio-political reality and the state of scientific and technological progress today: ensuring digital adaptability, ensuring clarity and consistency of perception of the essence of the rule of law principle, and building a society under the rule of law.

Further scientific understanding of the essence of the principle of the rule of law and the conditions for its observance, which we have identified, are defined as promising directions for further research. We also emphasize the need to develop methodological recommendations aimed at detailing the essence of the rule of law principle in administrative procedure, monographs, manuals, and interdisciplinary roundtables and conferences.

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