INFORMATION ABOUT THE AUTHORS

Mamonova Valentina Vasilevna – Doctor of Public Administration, Professor at the Department of Regional Development and Local Government of Kharkiv Regional Institute of Public Administration of the National Academy of Public Administration under the President of Ukraine;

Kozhurina Vera Nikolayevna – Postgraduate Student at the Department of Regional Development and Local Government of Kharkiv Regional Institute of Public Administration of the National Academy of Public Administration under the President of Ukraine

ИНФОРМАЦИЯ ОБ АВТОРАХ

Мамонова Валентина Васильевна – доктор наук по государственному управлению, профессор кафедры регионального развития и местного самоуправления Харьковского регионального института государственного управления Национальной академии государственного управления при Президенте Украины

Кожурина Вера Николаевна – аспирант кафедры регионального развития и местного самоуправления Харьковского регионального института государственного управления Национальной академии государственного управления при Президенте Украины

gubska@ukr.net

UDC 342.9

PRINCIPLE OF ADMINISTRATIVE PROCEDURE: THE EXPERIENCE OF FRG, POLAND

Elena MARKOVA,
Candidate of Law Science, Associate Professor,
Associate Professor at the Department of Legal Disciplines of Sumy Branch
of Kharkov National University of International Affairs

SUMMARY

The author monitors the legislation in the area of administrative procedures of such European countries as Poland, FGR with the aim of consolidation the principles of the administrative procedure in order to adopt some principles in the legislation of Ukraine, which is now at the formative stage. The author also suggests grouping the principles of administrative procedure into two groups: general and specific. The definition of the concept of "principles of administrative procedure" was also provided by the author.

Key words: principles of administrative law, principles of administrative procedures, good governance.

ПРИНЦИПЫ АДМИНИСТРАТИВНОЙ ПРОЦЕДУРЫ: ОПЫТ ФРГ, ПОЛЬШИ

Елена МАРКОВА,
кандидат юридических наук, доцент,
доцент кафедры юридических дисциплин Сумского филиала
Харьковского национального университета внутренних дел

АННОТАЦИЯ

Автор проводит мониторинг законодательства в сфере административных процедур таких европейских стран как Польша, ФРГ на предмет закрепления принципов административной процедуры с целью реципиирования некоторых принципов в законодательство Украины, которое сейчас находится на стадии формирования. Также автор предлагает сгруппировать принципы административной процедуры в две группы: общее и специальные. В работе дается авторское определение понятия «принципы административной процедуры».

Ключевые слова: принципы административного права, принципы административных процедур, хорошее управление.

Statement of the problem. A significant role in the mechanism of legal regulation of administrative procedures belongs to principles – the key guidelines, which determine the basics of functioning and organization of administrative procedures. They possess a crucial value for an effective systemic regulation of administrative and procedural relations from the viewpoint of methodology, and also for the law enforcement of corresponding legal norms by government authorities in the course of their work [1, p. 256]. The principles serve as a reference point in the formation of a unified legal standard of a model for the relationships between the executive bodies and citizens, creating legal boundaries for the implementation of procedural activities of authorities. Without them, the administrative procedure efficiency would be particularly low, since the very decision-making process would have an uncontrolled by society, confidential and one-sided character.

In relation to the regulation of administrative procedure the goal of principles is to balance restrictions in relationships between the executive authorities and citizens. As was stated by M. Yefremov, the principles of administrative procedures are meant to restrain the limits of discretion of thepublic administration officials on one hand, and on the other hand – to grant private individuals maximum freedom in promoting their rights and interests [2, p. 14]. Moreover, the core of the principles comes down to the protection of human rights and freedoms from arbitrary acts and subjectivity by the authorities.

It must be noted that the principles take on the significance of mandatory requirements and specific rules, obligate the law-enforcement officer to act a certain way, or set certain prohibitions, only when they have been legislated. The quality of laws and the efficiency of legal regulation depend largely on how those principles are defined and disclosed in them [3, p. 87].

In relation to the principles of administrative procedure the legal and administrative study is based on general principles of law and the principles of separate administrative law institutions, such as public administration, proceedings of administrative offences and administrative process.

The relevance of the research topic. In our legal science academics are researching this subject in a fragmented manner. This is due primarily to the absence of legal regulation of administrative procedure and also ofrelevant complex comparative researches on law matters, generalizations of experiences of legislation in European countries in the field of administrative procedures and modern law-making practices. The works of our scientist are mostly devoted to the reviewing of separate principles of administrative procedure. Among the administrativists, who showed interest to that subject, were: V. Averianov, P. Baranchyk, Y. Bytiak, A. Kolodii, A. Pukhtetska, D. Lukianets, V. Tymoshchuk, O. Uvarova, Y. Starylov, K. Davydov, H. Hubernska and others.

V. Averianov made a significant contribution to the establishment and development of administrative procedures in Ukraine.He was among the first to acknowledge the necessity of the legislative regulation of the procedural aspect in the interrelations of management system's bodies, in other words, of executive power, and also local governments with citizens [4, p. 325]. The result of his practice guidelines is the draft of The Administrative and Procedural Codex, which is meant to fill the void of the necessity of production control in an administrative case on the complaint about an individual administrative act [5, p. 157]. The Codex is logically structured, reasonably substantive and complete. The scholar admitted that working on this law draft was difficult due to the lack of knowledge in our legal science of issues of the administrative procedure and due to many matters not being developed in doctrine [6, p. 115].

The object and purpose of the article. In that context, the aim of the article is to analyze the principles of administrative procedure in a comprehensive manner, which is of key importance not only for the Administrative Law, but also for the whole juridical system, law-making practices and law enforcement, because the efficiency of government performance and the secured state of rights and legitimate interests of citizens and legal entities are depending on the degree of certainty and regulation of this issue. With the help of comparative legal approach we will refer to the works of native and foreign scholars and also to the legislation systems of some European Union countries in the fields of administrative procedures with the aim of conducting a complex doctrine and legal surveillance.

Principles in the modern Administrative Law are referred to as: essential regulatory basis (mandatory requirements), which determine the general direction of the legal regulation of administrative relations [7, p. 19], initial justified fundamental principles, according to which the system and the content of this branch of law are established and functioning? [8, p. 29], key ideas, theses, requirements, which characterize the content of the Administrative Law, reflect the pattern of its development and determine the directions of administrative legal regulation of public relations [9, p. 80].

Rulemaking, law-enforcing activity of public administration and administrative proceedings are initially permeated by principles of law. They are of structural nature, setting standards and legal awareness, guiding the law-enforcement process and simultaneously securing its uniformity. Principles of law, as something constant, reflecting an objective pattern of the law regulation development, determine the content of norms of law that operate at the moment and will inevitably appear in the process of its modernization in the future [10, p. 78]. Referring to the scientific developments of our academics, the pluralism of opinion with regard to understanding the principles and a broad approach concerning classification of principles of administrative procedure are evident.

Presentation of the main material. Summarizing their scientific positions, the principles of administrative procedures are referred to as: 1) key ideas which underlie the implementation of procedural activity, are characterized by versatility and determine the direction of activities of public administrations [11, p. 78]; 2) ideas, which set rules for carry out acts, decision-making, conclusion of contracts aimed at the realization of proper rights and obligations in the field of public administration by individuals andthefulfillmentofpublicinterest[12,p.23]; 3) fundamental (main) ideas, requirements, which have been enacted at the legislative level, and which determine and characterize the contents of elements of administrative procedure, reflect the pattern of its establishment and the direction of development [13, p. 25].

In the view of the above, we suggest that in the framework of our study the principles of administrative procedure should be understood as regulatory ideas or basis defining rules of implementation of procedural activities directed to protect and implement the rights, obligations and legitimate interests in relations with administrative authorities by individuals and legal entities.

Regarding the classification of principles of administrative procedure, it is worth noting that scientists apply different criterion, for instance: 1) by the object of juridical regulation E. Dehtiarova distinguishes two groups of principles – organizational and operational [14, p. 423–424]. The first group comprises the principles of competence, of equality of all individuals engaged in the administrative case before the law and the authority that addresses the case, of disposition (non ultrapetita) and publicity, of responsibility of an authority (an official) or individuals engaged in the case, for the validity and legitimacy of actions and decisions. The second group comprises the principles of transparency, formal truth and procedural economy; 2) by belonging to the branch of law scholars distinguish general and specialized (specific to the administrative process) principles [15, p. 32, 150]. O. Lahoda states that general legal principles define fundamental provisions in the context of administrative procedural activities, and specialized ones consolidate the essence of administrative procedural activity itself. Y. Frolov distinguished groups of the main general and specialized principles of administra-

tive procedure [16, p. 428]. In addition he singled out intra-industry or institutional principles, which are distinctive for the particular instance of the law or the legal institution of the administrative area of law [17, p. 135].

When analyzing the doctrine and legislation of the European countries concerning he classification of principles of administrative procedure, the following should be noted: firstly, the legislator emphasizes formulation and substantive content of principles; secondly, the list of principles is determined by historic events and the influence of various concepts, for example, in the US – due process clause, in France – Administrative Court's case-law and the decisions of Consield' Etat, significant impact on the principles of administrative procedure in European counties has had the concept of "good administration", which appeared nearly 2000s and which was meant for the field of public administration; thirdly, European academic project called ReNUAL (Model Rules on EU Administrative Procedure) is the first comprehensive work, in which innovative approach of European doctrine regarding codification of principles of administrative procedure and standards in activities of public administrations for the EU countries were reflected. The Model Regulations on an administrative procedure in EU, developed by ReNEUAL [18], are geared towards transforming constitutional principles and values of the EU in the rules of administrative procedure in the best way, covering the non-normative implementation of law and policy of the EU.

The principles of administrative procedures should be established in such a way that the dual objective of the public law would be balanced: on one side – to effectively enforce the performance of authorities' responsibilities, on the other side – to protect the rights of individuals. Later, taking this work into account, methodological recommendations for countries that want to join the European administrative space (EAS) and the recommendations in policy documents for European Union candidate countries have been established. Modern principles of administrative procedures are the product of several decades of development of European legal systems that was happening simultaneously with the economic growth of countries.

Taking into account existing fundamental researches, carried out by the representatives of administrative science, jurisprudence, international doctrine and experience of European legislative work, the principles of administrative procedure should be viewed through the prism of principles of law, principles of administrative process and principles of "good administration".

The principles of administrative procedure and their peculiarities must be grouped for the thorough examination. The activity of administrative bodies in the process of administrative procedure affects the human and civil rights and freedoms, therefore in a State governed by the rule of law it must subject to the general constitutional principles, that were enshrined in the Constitution, are specified and developed in laws and regulations, and to the special principles, that will reflect functional, organizational peculiarities of the procedural activity of authorities, that were embodied in the law.

So, we will distinguish two groups of administrative procedure:

Group 1 – the general principles of administrative procedure, based on the principles of law and having constitutional grounds.

Group 2 – specialized principles of administrative procedure, based on the principles of administrative process and the principles of "good administration".

The general principles are of fundamental importance to the establishment and regulation of basics of procedural activity in a State in general and within public administration in particular. They are crucial for the administrative procedure and are based on the principles of law and the Constitution. Among them are: of the rule of law, of legitimacy, of justice (reasonableness, fairness), of proportionality, of equality, of transparency, of priority of human rights and freedoms.

This list is considered to be the key one for the administrative procedure, providing the appropriate basis for its functioning.

In order to single out specialized principles of administrative procedure we have to analyze the principles of administrative process, and the legislation of the European countries concerning consolidation of principles of administrative procedure and principles of "good administration".

Specialized principles determine the essence of procedural activities, detailing and specifying the content of general principles, which determine and regulate all of the administrative legal relations in a State. However, it should be stressed that by their nature the general principles can be both reflected and not reflected in legislation, but specialized principles must been shrined in legislative acts, without which systemic lawmaking and law enforcement in this field of regulation will be considerably complicated [19, p. 172]. Therefore, specialized principles should be formulated in such away, so that the system of monitoring and securing the rights of the participants of administrative procedure would be reflected in them.

The principles of administrative process that are present in the administrative procedure based on analogy with the Codex of Administrative Proceedings (objectivity, State language, openness, reasonable timeframe for consideration of the case, formality etc.) are valid for administrative procedures with certain refinements. Thus, the principle of openness means openness of court proceedings for any third party, even if juridical decision will not affect their legal status. Obviously, the openness of court proceedings is not absolute; it is confined in instances of considerations of cases connected with secret protected by law (state, trade, medical etc.) and in cases when it is necessary for the security of rights and legal interests of its participants. Administrative procedures are originally more "closed"; as a general rule only individuals, who have legal interest in the settlement of the case, participate in them. The exception are procedures for the public hearing, they can be attended by anyone [20, p. 110].

Analyzing the legislation of European countries in the area of administrative procedures: Kodeks postępowania administracyjnego, Verwaltungsverfahrensgesetz (VwVfG), with a view to the consolidation of the principles, we conclude that the legislator uses an unified approach to the set of principles, which is given a separate chapter with a detailed description of the contents without classification and allocation for any criteria, trying to simplify them as much as possible for understanding and implementation. Speaking about the European legal traditions of administrative procedures and the principles, it is nec-

essary to point out the German legal tradition, which is derived from judicial practice and the Constitution. J. Deppe notes, "in Germany the principles were derived by lawyers and legal scholars from the Constitution. They are more important than any law, and often resolve a case when private and public interests come into conflict" [21]. At the legislative level, the principles are enshrined in Verwaltungsverfahrensgesetz (VwVfG) in the second part, titled – "General Provisions on the Administrative Procedure" Art. 9–30.The principles apply both to the organization and the direct implementation of the procedure [22]. It is beyond the framework of our study to consider all the principles of the administrative procedure, so we will pay attention mainly to those principles that can be naturalized in our legislation.

The fundamental principle of the administrative procedure in Germany is the principle of the prohibition of formalism – abuse of formal requirements, enshrined in Art. 10 The administrative procedure should not be linked to specific forms, unless there is special legislation governing the form of the procedure. This guideline provides flexibility and makes the procedure more understandable to citizens. Only in exceptional cases when the law requires it, administrative investigation is conducted. Absolute form over content is not allowed. It is forbidden for an administrative authority or official to burden citizens (organizations) with duties or refuse to grant them any right only to satisfy formal requirements, including internal organizational rules, if an administrative case can be considered without observing them (of course, except expressly provided by law). Refusal to satisfy the application (as an option – implementation of another baffling act) is unacceptable in view of only formal flaws of the administrative procedure. The procedure should be simple, fast and affordable, it is the main axiom.

The principle of legitimate expectations is enshrined in Art. 20. The point of the principle is the person whose rights are affected by the decision should not suffer from a sudden change in the opinion or policy of the state authority, the rights of the person should be compensated by providing the opportunity to set out the position at the proceedings, and such decisions must be justified on the record. A consequence of the violation of this principle is the repeal of the unlawful favorable act of Part 2 of § 48, as well as the recall of a legitimate positive act of Part 2, 3 of § 49 of FGR in 1976. The principle of investigation is enshrined in Art. 24, but in translated versions it is called the principle of officiality. The Authority investigates the merits of the case on its own initiative, establishes the facts "ex officio". It determines the method and extent of the study. The authority takes into account all circumstances that are relevant to the individual case, including circumstances favorable to the parties involved. He may not refuse to accept applications or statements within his competence on the grounds that he considers the application or petition to be inappropriate or groundless. The principle of confidentiality (Art. 30), those involved have the right to ensure that their secrets, in particular, related to their personal life, as well as industrial and commercial secrets, are improperly not disclosed by the authority.

It should be mentioned that the procedural law of Germany is not limited to the establishment of objective rules and principles, enough attention is focused on the procedural rights of participants, fixed through the principles. The most important procedural right of a participant is the right to be heard. He should be given the opportunity to express his views on important decision-making facts. Since the correct determination of the facts is crucial for the correct outcome of the case, the authority should not base its decision on circumstances that it cannot justify and reason. The legislator made thoroughly the formulation and consolidation of the principles of the administrative procedure, by providing for negative consequences for participants in the procedure in case of violation. Therefore, there is a need for some of the principles, such as the prohibition of formalism, the protection of legitimate expectations, and officiality, to be naturalized in our legislation, since these principles will strengthen the responsibility of authority through officials with regard to the implementation of their office.

Positive experience of enshrining principles can be borrowed in the Polish Code of Administrative Procedure of 1960 [23]. According to the provisions of this Code, making an administrative decision public administration authorities must be guided by all the rules of procedure, including the provisions that enshrines the general principles in the second section of Art. 6–16 of the Code of Administrative Procedures [24].

The jurisprudence states that "general principles determine the desired course of action of the authority, conducting the proceedings, and should be used in combination with other provisions of the Code that give them a specific form" [25]. Considering the latest changes in 2017, which not only expand some principles, but also introduce new liberal procedural institutions, such as mediation, we will focus on these principles.

The rule of law is a fundamental principle of the procedure. Public administration authorities act on the basis of legal provisions (Article 6). During the proceedings, authorities of public administration are required to take all actions necessary for clarifying the actual situation and resolving the issue, taking into account the public interests and legitimate interests of citizens (7a). During the proceedings, authorities of public administration cooperate with each other in so far necessary for clarifying the circumstances of the case, in order to ensure social interests, legitimate public interests and the effectiveness of the proceedings, by measures appropriate to the type, circumstances and complexity of the case (7b). The principle of confidence building (Section 1, Article 8). Authorities of public administration conduct proceedings in such a way to build trust with its participants in public authority, guided by the principles of proportionality, neutrality and equal treatment. From the time the amendments of 2017 entered into force, the principle of confidence-building also is to inform the sides about factual and legal circumstances that may affect the determination of its rights and obligations [26]. Principle of the peaceful resolution (Section 1, Article 13). Prior to the entry into force of the Law of 2017, article 13, section 1, of the Administrative Procedure Code provided for the possibility of dismissal of the case by settling it by the authority conducting the administrative proceedings, on the assumption that the sides expressed their desire. Since June 1, 2017, the provisions of Article 13 have been substantially amended. First of all, it should be pointed outthat the duty of the authorities was replaced by the obligation. The authority of public administration is obliged to elucidate the possibilities and benefits of a peace-

ful settlement by means of mediation and settlement agreement at some stage. The principles of permanence of final management decisions is enshrined in part 1 of Article 16. Decisions that have not been appealed are considered final. The abolition or amendment of such decisions, invalidating them and reopening of the case may take place only in situations provided for by the code or special laws. Decisions may be appealed before the administrative courts on account of their illegality [27].

From the foregoing, it should be mentioned that the principles of the administrative procedure, enshrined in Polish law, meet current trends in the administrative law development towards the democratization of relations between authorities and citizens by means of introduction of mediation institutions.

Having analysed the administrative procedures legislation of countries such as Poland, the Federal Republic of Germany, we can draw interim conclusions: the principles of the administrative procedure are developed and set forth in the legislation of Poland and the Federal Republic of Germany in the most detail.

With reference to other European countries that adopted the Administrative Procedure Laws much later, especially the countries of Eastern Europe, as well as Ukraine, which has taken an active part in the development of procedural legislation, it should be mentioned that the concept of good governance is the basis for the principles of administrative procedure. Under conditions of European integration currently prevailing, an important component of the reformation of administrative law of Ukraine is its coherence with the applicable rules of administrative law that exist in the administrative law of European countries. The principles of administrative procedures must meet modern international requirements for the organization and implementation of administrative and procedural activities. V. Averianov repeatedly emphasized that Ukrainian legislation on administrative procedures should be permeated by European principles of administrative law, although some of the principles on the form resemble the rights and obligations of participants in the procedure, yet their practical significance is still obvious [28].

Ultimately, there is a process of Europeanization and internationalization of administrative law, administrative procedures and their principles to date. As rightly pointed out in the research literature, the experience of the vast majority of European countries is based on the "legalization" of the principles of procedures by relevant laws. In general, legislative framework is the most preferable from the point of view of the interests of citizens, who more often than not are able to understand the nuances of judicial practice. It is feasible not only to legislate the principles, but also to make the content as specific as possible, and the more specific they will be reflected, the higher the probability of the practical application.

The lack of a specific law is a gap that distorts the very concept of administrative procedures and retains the isolation of Ukrainian administrative law, creating a vacuum in regulation.

After analyzing the issue of the principles of the administrative procedure in an integrated manner, carrying out a comparative legal analysis of European legislation, we consider it necessary to take an advantage of the positive experience of the aforementioned countries and adopt some principles for our legislation, taking into account our legal system, the legal awareness of our citizens and public authorities represented by officials and officers, as well as the legal ideology of the society.

Conclusions. Summing up the established approaches, the classifications and content of the principles of administrative procedures that govern the administrative and procedural activities, it should be pointed out that the system of principles of the administrative procedure divides into: general and specific. The general principles of the administrative procedure include: the rule of law, legitimacy, justice (reasonableness, integrity), proportionality (adequacy), equality, transparency, and the first priority of human rights and freedoms. Specific principles include: 1) the principle of the prohibition of formalism; 2) of the peaceful resolution, 3) the principle of legality and justifiability of the decision, 4) a reasonable time, 5) a presumption of credibility; 6) principle of guarantees for the protection; 7) the principle of collaboration and cooperation, 8) principle of officiality, 9) the principle of prohibition of rights abuse – concerning citizens and of powers abuse – concerning authorities, 10) the principle of granting right to be heard. The list of principles of the administrative procedure will be able to provide a balanced basis in the relationship between government and citizens in the process of implementing of authority's powers, and citizens' rights and interests.

The principles of administrative procedures are the most stable and universal element in the area of interaction between public authorities and private individuals. The characteristic of each of these principles is their interconnectedness. Therefore, most of the acts on Administrative Procedure under study are not limited to the formulation and consolidation of any one of the principles, but represent a whole interconnected system of principles. Thus, observance of one principle contributes to the implementation of the rest, as well as a violation of any of the principles automatically leads to the non-observance of others.

Legislative regulation of the principles of administrative procedures is an important guarantee that excludes the possibility of their unlawful revision as a result of the adoption of departmental instruments, and in case of failure to comply with the proclaimed principles by the authorities, a person gets the opportunity to appeal against the unjust actions of public administration officials to the higher authority or to a court.

As already mentioned, Ukraine is a member of the Council of Europe, and a range of the principles covered here have the status of pan-European standards. Therefore, during the adoption of indigenous normative act to regulate administrative procedures, our country should take into account the pattern existing in European legislation, including the principles on which, on the one hand, the work of public authorities are "built", and which, on the other hand, contribute to the realization of the legal status of citizens and their associations.

The principles governing administrative procedures serve as a kind of "guidelines" for the activities of large number of legal entities and only in collaboration they can fully implement their functions and purpose. It is precisely determine the effectiveness and viability of the law governing administrative procedures, how these principles will be implemented in practice.

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INFORMATION ABOUT THE AUTHOR

Markova Elena Olegovna – Candidate of Law Science, Associate Professor, Associate Professor at the Department of Legal Disciplines of Sumy Branch of Kharkov National University of International Affairs

ИНФОРМАЦИЯ ОБ АВТОРЕ

Маркова Елена Олеговна – кандидат юридических наук, доцент, доцент кафедры юридических дисциплин Сумского филиала Харьковского национального университета внутренних дел

Helena.sherstuk@gmail.com