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THE QUALITY OF LAW: PROPER APPROACH TO DEVELOPMENT OF ADMINISTRATIVE SERVICES

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SUMMARY

The article deals with the problem of approach to development of institute of administrative services in Ukraine. It reveals issues that were not researched in works of scholars and practitioners, such as peculiarities of improving certain procedural issues of provision of administrative services during ongoing simultaneous reforms in Ukraine. The article examines the problems of reforming state administration of Ukraine, particularly in the context of administrative procedure and administrative services, and determines their interconnection. The author approves the necessity of adopting the law on administrative procedure and proposes minimum provisions to be included in the law in respect of administrative services.

Key words: administrative law, administrative procedure, administrative services, state administration, civil service, quality of law.

ЯКІСТЬ ЗАКОНУ: НАЛЕЖНИЙ ПІДХІД ДО РОЗВИТКУ АДМІНІСТРАТИВНИХ ПОСЛУГ

Михайло ЛИТВИН,

аспірант відділу проблем державного управління та адміністративного права Інституту держави і права імені В.М. Корецького Національної академії наук України

АНОТАЦІЯ

У статті досліджується проблема підходу до розвитку інституту адміністративних послуг в Україні. Розкриваються питання, які не розглядаються в працях науковців і практиків, як-от особливості вдосконалення окремих процедурних питань надання адміністративних послуг під час продовжуваних синхронних реформ в Україні. Досліджується проблема реформування державного управління в Україні, зокрема в контексті адміністративної процедури й адміністративних послуг, та визначається їх взаємозв'язок. Автор доводить необхідність ухвалення закону про адміністративну процедуру та пропонує мінімальні положення щодо адміністративних послуг, що повинні бути включені до цього закону.

Ключові слова: адміністративне право, адміністративна процедура, адміністративні послуги, державне управління, державна служба, якість закону.

REZUMAT

Articolul examinează problema abordării dezvoltării instituției serviciilor administrative din Ucraina. Acesta a dezvoltat o serie de probleme care nu sunt abordate în scrierile savanților și practicienilor, cum ar fi îmbunătățirea caracteristicilor anumitor aspecte procedurale ale serviciilor administrative la reformele sincrone în curs de desfășurare în Ucraina. Problema reformei administrației publice din Ucraina, în special în contextul procedurilor administrative și al serviciilor administrative, este investigată și se determină interdependența acestora. Autorul dovedește necesitatea adoptării legii privind procedura administrativă și propune dispozițiile minime privind serviciile administrative care ar trebui incluse în prezenta lege.

Cuvinte cheie: drept administrativ, procedură administrativă, servicii administrative, administrație publică, serviciu public, calitatea dreptului.

Statement of the problem. The current phase of development of human-centric democracy in Ukraine can be characterized by sharp necessity of simultaneous reforming different areas. One of the areas is administrative services. The main aims of its development are improving the procedure of provision of administrative services and bringing them nearer to local community level. The latter tightly connects development of administrative services with decentralization of power in Ukraine. Therefore, complexity of previously mentioned reforming processes is obvious. While the current phase of domestic legislation development results in increasing amount of legal acts of different levels that are aimed at regulating certain issues of administrative services, the complexity of whole situation is naturally growing, as well as the risk of failure to comply with requirements on the quality of law. Thus, the ap-

proach to developing administrative services in Ukraine has to be adjusted.

The relevance of the research topic is confirmed with absence of the law on the administrative procedure and continuing increase of the amount of various legal acts aimed at regulation of its certain issues, which proves significant lack of effect.

Status of research. Scientific analysis of the problems of organizational and legal support for the application in Ukraine of sanitary and phytosanitary measures is carried out by many domestic scientists. Among them it is necessary to name V. Averiiianov, O. Andriiko, Y. Bytiak, I. Borodin, I. Holosnichenko, Y. Dodin, O. Ivashchenko, R. Kaliuzhnyi, V. Kolkpakov, T. Kolomoiiets, A. Komziuk, I. Koliushko, O. Kuzmenko, I. Lazarev, D. Lukiiianets, O. Mykolenko, N. Myronenko,

W. Perepeliuk, V. Polishchuk, B. Savchenko, M. Tyshchenko and others.

The object and purpose of the article are stipulating of necessity of adjusting approach to the development of administrative services and determining possible way of such adjustment with focus on the quality of law.

Presentation of the main material. The Administrative Law of Ukraine is complex area of law that consists of sub-areas and institutes. In the context of research of administrative services and their legal regulation, it seems sound to determine the place of this body of rules within the structure of Administrative Law of Ukraine. In order to achieve this objective it is rational to turn to the General Theory of Law, according to which an area of law is a sole body of rules that regulate qualitatively similar social relations by means of certain methods. A sub-area of law is a unit of interconnected institutes formed within certain area of law. At the same time, an institute of law is a sole body of rules that regulate certain type of social relations [1, p. 149–150]. One of features of an institute of law is regulating not the entirety of such social relations but certain typical specificities of their kind, or executing specific tasks within the scope of regulating these relations. It seems reasonable to define administrative services as institute of administrative extrajudicial procedure (hereinafter, Administrative Procedure), which is sub-area of the Administrative Law of Ukraine. Nevertheless, the Administrative Procedure fails to comply with another feature of a sub-area of law (more formal one) – presence of specialized legal act, which would regulate respective social relations.

It seems fair enough to refer to development of institute of administrative services in Ukraine as building a house from roof to basement. After adopting a couple of concepts and strategies in the area, Ukrainian Parliament has adopted the Law of Ukraine “On Administrative Services”, in which basic principles of provision of administrative services are slightly covered by transferring them from mentioned concepts and strategies. It became a starting point for virtually unstoppable flow of various legal acts of different levels aimed at regulation of different specific issues of provision of certain administrative services. At the same time, another important thesis from previously mentioned concepts and strategies has resulted only in continuous discussion on necessity of adoption of legal act aimed at general regulation of Administrative Procedure and several attempts to pass respective draft laws, which have taken place during almost past twenty years – the importance of adoption of the legal act was for the first time enshrined in the Edict of the President of Ukraine “On Measures to Implement the Concept of Administrative Reform in Ukraine” № 810/90 as of 22 July 1998 [2].

In this context, attention should be paid to one of the latest document issued by the Cabinet of Ministers of Ukraine in respect of Reforming State Administration – the Ordinance № 474 as of 24 June 2016 “Certain Issues of Reforming State Administration of Ukraine”, which approved the Strategy of State Administration Reform in Ukraine for the years 2016–2020 (hereinafter, the Strategy). According to the Strategy, adopting the law on Administrative Procedure is one of priorities of administrative services development. The law is expected to facilitate legal certainty and to guarantee respect of rights of citizens and legal entities in cases where public authorities determine their rights and obligations (obviously, almost every single case, which falls within the scope of Administrative Procedure) [3].

Basic principles and rules of carrying out administrative procedures are to be enshrined in the law. Such principles are: legality (adoption of decisions in compliance with laws and by-laws implementing thereof), fact finding, the right to be heard, the right to receive clear and reasoned decision in written form,

non-judicial appeal, resumption of procedure in certain cases and judicial appeal. According to the Strategy, these principles are essential for due functioning of modern state administration system, based on the rule of law.

The Strategy also stresses the importance of requirements on the quality of administrative services. In this context, attention is paid to necessity of customer orientation. For the purposes of this research, such customers will be referred to as requesting persons (according to Article 1 of the Law of Ukraine “On Administrative Services”, natural persons or legal entities applying for administrative service) [4]. Declared orientation positively correlates with requirements on quality administration ISO 9001, which is referred to in the Practice Direction “Action of Centres for Provision of Administrative Services and Evaluating the Quality of Provision of Administrative Services”, drafted within the framework of International Technical Assistance Project “Partnership for Development of Cities (PROMIS)”, which is being conducted by the Federation of Canadian Municipalities [5]. Therefore, Ukrainian civil society participates actively in development of the institute of administrative services in cooperation with municipalities, public authorities and international organizations.

According to the Strategy, the law on Administrative Procedure should provide uniform principles and rules of handling administrative cases and possibility of special regulation as regards certain fields of administration and certain types of procedures. The next step after adopting the law is harmonization of sectoral legal acts. The licensing and authorization system are also to be integrated and adapted to basic principles and rules of carrying out the Administrative Procedure.

Further development of centres for provision of administrative services and increase of amount of administrative services, provided by them, are subjects to special attention, according to the Strategy. This objectives touche other specific directions of reforming the Administrative Procedure.

The most rapid improvements are to take place in electronic services. The Conception of Electronic Services System Development in Ukraine (the Conception), approved by the Cabinet of Ministers of Ukraine with its Ordinance no. 918-p as of 16 November 2016, stresses main problems of electronic (including administrative) services in Ukraine:

- unformedness of legislative base that regulates the field;
- absence of uniform requirements on implementing electronic services;
- misregulating the issue of electronic identification and authentication of requesting persons;
- absence of multi-authority electronic cooperation during provision of administrative services;
- complexity and overregulation of procedures for provision of administrative services;
- uncertainty about the format of electronic documents, which requesting persons are to file in order to receive administrative services;
- absence of uniform information and telecommunications infrastructure, which would ensure the provision of electronic services in compliance with requirements;
- lack of credibility of electronic cooperation between providers of administrative services and requesting persons;
- low level of readiness of civil servants, officials of local self-government, natural persons and legal entities for implementation of electronic services [6].

According to the UN E-government Survey 2016, Ukraine took 62 place out of 193 countries, which is obviously not a desirable result, especially taking into account digital globalization of processes and focus of Ukrainian state policy on European integration [7].

The Strategy and Conception provide potentially effective interconnected novelties:

– reforming civil service, particularly through establishing the institute of state experts in every field of state policy, including Administrative Procedure and administrative services. The specificity of forming the institute is higher (in comparison to other civil servants of the same level) requirements on skills and competencies of candidates and special competition to fill the vacancies of state experts. The salary of these specialists is also higher than usual salary of same level civil servants. Moreover, they have duties to receive a feedback on certain sector of state policy, identify issues to be addressed and strategy of such addressing, including drafting respective legislative proposals;

– establishing information and telecommunications infrastructure for public authorities, which will ensure effective information exchange during carrying out administrative procedures;

– step-by-step development of electronic platform for convenient applying for and receiving services, based on specific issues within the field;

– optimizing the Administrative Procedure system through minimizing administrative burden on requesting persons.

And despite all that, there is still no progress in establishment of general legislative base for Administrative Procedure, as instead Ukrainian Parliament continues its previous strategy that is confirmed by such activities as registration of draft law “On Amending the Law of Ukraine “On Administrative Services”” № 6388, initiated by the Ministry of Economic Development and Trade of Ukraine (hereinafter, the draft law) [8].

The draft law prescribes (inter alia) to adapt the silence procedure, which is being used within the authorization system in the field of economic activity, to provision of administrative services, and for this purpose defines it as declarative principle.

Although the authorization system in the field of economic activity and provision of administrative services are both comprise the Administrative Procedure, in order to simultaneously execute these two principles, which are the same by their legal nature, they are have to be first enshrined in different laws that takes time (according to the portal of Ukrainian Parliament, the draft law was submitted to its relevant committee for review on 11 July 2017 and is still pending) and therefore slows down the development of whole state administration system.

Moreover, the draft law does not contain any mechanisms of implementation of declarative principle – it only mentions a possibility to use the principle in occasions stipulated in the law.

Unfortunately, the draft law also does not stipulate such occasions, which is more likely to deepen the problem of legal regulation of administrative services, than to bring certainty as declared in respective explanatory note. Hence, the risk of failure to comply with requirements on the quality of law, which were referred to by the European Court of Human Rights in its judgments in cases *Koretskyy and Others v. Ukraine*, *Mikhailuk and Petrov v. Ukraine* is there [9; 10].

The European Court of Human Rights has defined in its numerous judgements, that the law should be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.

Thus, for domestic law to meet these requirements, it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, the Convention). In matters affecting fundamental rights, it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise. The level of precision

required of domestic legislation – which cannot in any case provide for every eventuality – depends to a considerable degree on the content of certain legal instrument, the field it is designed to cover and the number and status of those to whom it is addressed.

The Convention itself is about High Contracting Parties respecting and enabling effective execution of fundamental rights and freedoms. To that end, it is obvious that every area where public authorities are entitled to use their discretion within the procedure of realization of certain rights of citizens and legal entities, should be regulated appropriately hence respective laws have to comply with previously mentioned requirements on their quality. It becomes obvious during analysing any administrative procedure and considering every certain stage of it. At the point where you reach a non-judicial appeal stage, these standards in connection with provisions of Article 19 of the Constitution of Ukraine are seemed as efficient mechanism for minimizing appeals. Considering this, one should agree that applying requirements on the quality of law is relevant not only for legal rules providing sanctions for certain breaches, but also for rules providing natural persons and legal entities with certain rights and stipulating respective procedures of ensuring execution of this rights to be realized by competent public authorities. From this very perspective, compliance with requirements on the quality of law is crucial in the context of further appropriate development of administrative services in Ukraine. The Convention has to be flexible and cover every new trend of legal relations – it is one of the main circumstances ensuring the effectiveness of such powerful legal instrument.

Therefore, the absence of basic principles of Administrative Procedure and precise rules of conduct of public authorities during the procedure fails to comply with requirements on the quality of law. For instance, currently there are no uniform requirements on quality of administrative services, which is obviously connected with conduct of providers of the services. Instead, according to Article 7 of the Law of Ukraine “On Administrative Services” providers of administrative services may adopt acts determining their own requirements on the quality of provision of services, and their discretion in this matter is limited by minimum respective requirements, stipulated in the Law [4].

Under Article 3 of the Constitution of Ukraine, an individual, his life and health, honour and dignity, inviolability and security shall be recognised in Ukraine as the highest social value. In addition, human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State. The State shall be responsible to the individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the State.

Article 8 of the Constitution of Ukraine stipulates the obligation of the State to recognize the rule of law and ensure it effectiveness. The Constitution of Ukraine shall be regarded as superior law. Laws and other regulatory legal acts shall be adopted on the basis of the Constitution of Ukraine and shall conform to it. Norms of the Constitution of Ukraine shall be the norms of direct effect.

Article 9 of the Constitution of Ukraine provides that international treaties in force, consented by the Verkhovna Rada of Ukraine as binding, shall be an integral part of the national legislation of Ukraine [11]. Ukraine has become a member of the Council of Europe in 1995. The Convention was ratified by Ukraine in 1997 and therefore is binding and is integral part of the national legislation of Ukraine. According to Article 19 of the Convention, in order to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto, there shall be set up a European Court of Human Rights. Article 32 of the Convention defines the jurisdiction of the Court, which shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto [12].

According to Article 19 of the Constitution of Ukraine, the legal order in Ukraine shall be based on the principles according to which no one shall be forced to do what is not stipulated by law, and the public authorities and bodies of local self-government and their officials shall be obliged to act only on the grounds, within the powers, and in the way determined by the Constitution and the laws of Ukraine [11].

Therefore, while there are no basic principles of Administrative Procedure, there are actually no uniform requirements on conduct of public authorities and their officials during carrying out the procedure. Natural persons and legal entities are put into circumstances where in order to properly execute their rights, they may have to search for and analyse different legal acts, which can contain contradictory provisions on the same social relations and, therefore, may be interpreted in different manner by competent public authorities. Such situation leads to minimizing efficiency of administrative appeal and lowering level of trust between parties of Administrative Procedure.

Usually the misunderstanding is to be resolved by a court of law and therefore Administrative Procedure, which should be fast and clear, becomes complex and continuous. It seems necessary to prevent such occasions where natural persons and legal entities will face the issue of solving conflicts of certain legal acts and/or their certain rules. Thus, it is crucial to stop going down the rabbit hole and adopt the law on Administrative Procedure that will stipulate basic principles of the procedure and contain clear rules of conduct of its parties.

Conclusion. Taking into account the key features of the development of administrative services, one cannot deny the necessity of adjusting approach to it through shifting priority towards adopting the law on Administrative Procedure and further harmonization of respective legislation. The law shall simplify the system of provision of administrative services and guarantee that every requesting person is able to find all relevant provisions of the law, which are easy to interpret. To achieve these aims the law shall at a minimum:

- 1) stipulate basic principles of Administrative Procedure;
- 2) determine to which procedures the law does not apply and the procedures where deviation from its provisions is allowed (but the list of those procedures should be very short and deviation should be applicable only in cases specified in the law itself);
- 3) contain provisions on automatized decision, which would replace the declarative principle (in case of including the latter in current Law of Ukraine "On Administrative Services"). The automatized decision-making should be electronic and cases of using it are also to be determined in the law – not as a list of administrative services, but as a list of criteria of suitable services (for instance, cases where the discretion of a provider of administrative service is not required);
- 4) rules of conduct for providers of administrative services and requesting persons (including rules on electronic communication);
- 5) provide legal base of using an information telecommunications system, through which providers of administrative services will be able to obtain all documents of requesting persons, which are necessary for provision of administrative services. Hence, in most cases requesting persons will have only to file an application to initiate certain procedure and then receive respective results (inter alia with use of the automatize decision-making);
- 6) optimize a non-judicial appeal procedure.

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