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АДМІНІСТРАТИВНЕ І ФІНАНСОВЕ ПРАВО

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SYSTEMATIZATION OF LAW ON ADMINISTRATIVE PROCEDURE: UKRAINIAN PERSPECTIVE

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The Ukrainian parliament has not adopted a codified act on administrative procedure yet, in spite of three attempts starting from 2004. Meanwhile, the very idea of systematization of law on administrative procedure has become very popular in many countries as well as in the European Union as the whole. Numeral soft law documents were adopted by the Council of Europe and the European Union during last fifteen years. They had been designed to improve implementation of law on administrative procedure in European countries and to formulate common contemporary standards for public administration`s activities.

So Ukraine has a rather good possibility to improve its draft Law on administrative procedure using provisions laid down in above mentioned documents (especially – in the Model Rules on European Union administrative procedure prepared by prominent European scholars) and to adopt a high quality legislation in the field.

Keywords: administrative procedure, systematization, codification, consolidation, good administration.

Systematization of law is one of the main objectives of legislative activities of parliaments in the contemporary world. It enhances better functioning of legal systems and thus provides legal certainty for citizens of any country.

In some areas of legal regulation systematization has rather long history and is rooted, for example, in the Roman law. However, some branches of law have been tried to systematize for the first time only in twentieth century and it definitely relates to the law on administrative procedure. We have to remind that first codification of administrative procedure was done by Austrian Parliament in 1925. During next ninety years dozens of countries throughout the world have adopted general laws on administrative procedure, both in civil and common law systems. At the same time many contemporary states, including France and Russian Federation still consider necessity and expediency of such a codification. It means that administrative procedural norms are scattered in sector-specific legislation in these countries.

In Ukraine, despite of three attempts (in 2004, 2008 and 2012), the parliament – Verkhovna Rada has not adopted codified act on administrative procedure yet. Already in June of this year Ministry of Justice organized regular round table, where the draft of the Law on Administrative Procedure (in previous version – Administrative Procedural Code) was discussed by scholars, politicians and public servants. However, its participants have not agreed their views on model of a future legislative act. Of course, it

is understandable for a scientific research but cannot be deemed as a good sign for legislators. As a result, the future of the draft Law on Administrative Procedure in Ukraine is not predictable. At the same time we have a possibility to improve the draft using the newest experiences of foreign countries in analyzed sphere of legal regulation as well as updated practice of its implementation.

Taking into account that Ukrainian politicians declared necessity of approaching of our legislation to *acquis communutaire,* the foundations of the European Union`s law, it will be fruitful to use numeral soft law documents adopted by the European Union and the Council of Europe during last fifteen years, including:

– European Code of Good Administrative Behavior, prepared by the European Ombudsman and adopted by the European Parliament on 06 September 2001 [3],

– Recommendation CM/Rec(2007)7 of the Committee of Ministers of the Council of Europe to member states on good administration adopted on 20 June 2007 [5],

– European Parliament Resolution of 15 January 2013 with recommendations to the Commission on a Law of Administrative Procedure of the European Union (2012/2024(INL)) [4].

All these documents had been designed to improve implementation of law on administrative procedure in European countries and to formulate common contemporary standards for public administration`s activities. To tell the truth, we can already find many of these standards in the Ukrainian legislation, for example in the point 3 article 2 of the Code of Administrative Justice [1]. However, it definitely is not enough for relevant legal regulation of administrative procedure as a whole.

To our understanding, lack of systematization of law on administrative procedure in Ukraine is one of the main reasons that do not allow complying with the rule of law in our country. In the other branches of procedural law, especially dealing with the work of the judiciary we experienced quite a long term history of codification and have at least four codified acts: Civil Process Code, Criminal Process Code, above mentioned Administrative Justice Code and so called Economic Process Code. Besides, the Code on Administrative Transgression of Ukraine partly regulates proceedings not only in courts, but mainly in public administration`s bodies. However, this is an example of partly systematization: even relating to administrative transgressions only, the above mentioned Code does not regulate proceedings in all areas so various sector specific laws and by-laws supplement it. Thus we are convinced that lack of a codified act on administrative procedure makes the whole administrative law one of the weakest branches of Ukrainian law and such a situation must be changed in the nearest future.

The idea of systematization of law on administrative procedure versus existent situation with many scattered sector-specific laws definitely has many advantages. It is necessary to add that adopting of a codified act on administrative procedure can also lead to some shortcomings, but they are not so numeral. So we intend to explain why so many different states (not only in Europe) throughout the world have decided to systematize their law on administrative procedure during last ninety years.

First, such systematization enhances better understanding by citizens of their rights and duties as well as routes of their realization in various legal relations with public administration.

Second, a codified act foresees common legal standards for public administration's activities and private persons are not supposed to check different administrative procedural rules, so additional expenses for legal aid might be avoided.

Third, adopting a general law on administrative procedure allows not to produce numeral «typical» procedural acts. For example, up to today every local self-government

body in Ukraine has its own procedural regulation adopted by local council. Such local regulations mostly duplicate each other and real differences are almost exceptional.

Fourth, systematization of law on administrative procedure in most of cases simplifies the legal system and fills possible gaps in the regulation of public sphere. As a result, such systematization will be useful not only for private persons but also for public servants who execute and enforce the law and are interested in higher quality of legislation.

Fifth, more simple and understandable rules on administrative procedure can reduce quantity of possible conflicts between private persons and public administration's bodies. It means that level of litigation in public sphere can become much lower and thus public resources will be saved.

At the same time, analyzed systematization and adopting of a general law on administrative procedure does not exclude that some sector specific laws will stay in force and moreover have priority over *lex generalis*. This approach is based on necessity of taking into consideration by legislators of some peculiarities in specific areas of law, for example, in tax or competition law. In most of countries it means that a general law on administrative procedure is implemented subsidiarily in these specific areas, whereas some issues are not regulated by sector- specific laws.

Such an approach was also confirmed in the recent publication in the field of administrative procedure – the Model Rules on European Union Administrative Procedure, prepared by the group of prominent scholars upon the initiative of professors Herwig C.H. Hofmann, Jens-Peter Schneider and Jacques Ziller [6] and aimed at possible draft of European Union`s regulation on administrative procedures. At the same time, authors of this publication underlined their awareness of careful drafting of the rules governing the relationship between *lex generalis* and *lex specialis*. So these Model Rules are proposed to apply when no specific procedural rules exist; also specific procedural rules shall be interpreted in coherence with and may be complemented by these Model Rules [6, p. 28].

Also in the introduction to the Model Rules on EU Administrative Procedure the issue of different forms of systematization is analyzed. According to the prevailed position stated in Ukrainians handbooks of theory of state and law, systematization of law can be made in three main forms: codification, consolidation and incorporation. The authors of the above mentioned Model Rules consider that *«codification a droit constant»* (in Ukrainian corresponds to consolidation), a technique which amounts to establishing a legally binding consolidated version of existing legislation would not be well suited to address different challenges that are endemic to the EU system. So they consider that codification of law on administrative procedure is expedient, furthermore call it «innovative codification». Such an innovative codification occurs when a new law establishes one source of existing principles which are usually scattered across different laws and regulations and in the case-law of courts; it may also modify these existing principles and rules, if needed, as well as add new ones. This method allows contradictions in the existing laws to be resolved and gaps to be filled [6, p. 7].

We completely agree with such the view and suppose that innovative codification in the field of administrative procedure is expedient not only for European Union`s law but also for Ukrainian one *de lege ferenda*.

However, the Ukrainian parliament has to choose among possible codification`s models that evidently differ across the national systems. Whilst some codifications, such as the administrative procedure law in Italy, are to large extent built on principles to be fleshed out in a specific policy legislation, other procedural acts regulate the matters they cover in great detail [6, p. 12], for example, in Croatia.

The depth of regulation differs in national laws also with regard to the administrative actions which are codified. Based on above mentioned Austrian law of 1925 the other early national codifications applied only to individual administrative acts, regarding to a particular case or a particular person. This situation has been changed during next decades, starting from the United States Administrative Procedure Act of 1946 that regulates not only issuance of individual administrative acts (in American terminology – adjudication), but besides – issuance of normative or regulatory acts (administrative rulemaking). Today's understanding of administrative procedure and consequently of the depth of regulation is wider in many of contemporary national procedures laws. Generally it is a regulation of any act by an administrative body in the course of its exercising public powers within public administration. In addition to the issuance of individual administrative acts (decisions) also the following activities of public administration`s bodies are included to national codified acts:

– issuing measures of a general nature (in a particular case but not with respect to particular persons);

– concluding public law contracts;

– executing so-called non-regulatory administrative acts (opinions, certification, communication);

– disposing of complaints [7, p. 60].

Significantly wider approach to the depth of regulation was also confirmed and even developed in the Model Rules on EU Administrative Procedures. According to the definition that was done in this document, «Administrative procedure» means the process by which a public authority prepares and formulates «administrative action» that results in:

a) legally binding non-legislative act of general application (in Ukrainian terminology – normative act (by-law) issued by public administration);

b) a decision – administrative action addressed to one or more individualized public or private persons which is adopted unilaterally by public administration's body, to determine one or more concrete cases with legally binding effect (individual administrative act);

c) a public contract (in French and Ukrainian terminology – administrative agreement);

d) mutual assistance within public administration;

e) information management activities [7, p. 29].

Including of the latest two issues to the definition of administrative action means that prominent European scholars decided to unite in the Model Rules of EU Administrative Procedure legal regulation of not only legally binding external actions of public administration but also its internal activities. However, these five directions of administrative action were written in five separate books. Such a separation is based on the position that neither the European Parliament nor national legislators are supposed to include obligatorily norms from all the five books to their respected codified acts on administrative procedure. Nowadays some national procedure acts, for example in the Federal Republic of Germany regulate issuance of individual administrative acts and public contracts, so at least two books of the Model Rules can be used nowadays for its improvement. But regarding internal actions of public administrations national legislators mostly choose to regulate it in separate laws or even by-laws.

Another issue connected to the depth of any codification relates to the stages of administrative procedure that are covered by a general law on administrative procedure. An issuance of administrative decision is, of course, the principal stage of administrative procedure that can be divided into phases similarly to any judicial process, including:

– commencement of administrative proceeding by the public administration's body on request of private persons or *ex officio;*

– collection and evaluation of relevant evidence and documents;

– hearing of a case if necessary;

– *stricto sensu* issuance of administrative decision and notification of all interested parties;

– rectification or withdrawal of administrative decision if needed.

After that any administrative decision (that are beneficial or have an adverse effect for private person`s interests) can be appealed either within a system of public administration or to the competent court. In most of national procedure laws only administrative review is included to a general codified act on administrative procedure whereas judicial review is regulated by a special process law. However some European countries, for example, Germany located procedural norms on administrative appeal (obligatory stage before the judicial appeal according to the national legislation) to the law on administrative courts. Connecting this issue to the Ukrainian legislation, we have to remind that administrative appeal is not obligatory stage before judicial appeal in our country and thus is not used very often by lawyers and their clients, so administrative courts in Ukraine deal with much more conflicts in public sphere than their counterparts in the other countries. To our mind, such a legal regulation in Ukraine needs to be changed and legal experience of states with codified acts on administrative procedure can be useful here too.

The final stage of any administrative procedure is execution or enforcement of an administrative decision. This stage is definitely obligatory – otherwise an issuance of an administrative decision has no sense. In spite of procedural character of norms on administrative execution, national general procedure laws regulate this issue only partly or not at all, leaving this sphere to special laws. This approach is also rooted in the Austrian experience of 1925 when separate *Verwaltungsvollstreckungsgesets* was adopted besides of *Allgemeines Verwaltugsverfahrengesets*. It is necessary to add that modern Model Rules on EU Administrative Procedure do not cover both stages: administrative appeal and administrative execution (enforcement) and concentrate mostly on procedure of issuance of administrative decision. We cannot conclude from this fact that both final stages of administrative procedure are less important from the point of view of the authors of the Model Rules. Simply they chose to limit the scope of research and of the final document which anyway consists of six books.

Taking into account limited scope of this article, we are obliged at least to outline main ideas of contemporary codified laws on administrative procedure. Based on fundamental value of the rule of law, popular in recent years idea of good administration is deemed the core principle of administrative procedure. Good administration cannot be defined in one, even long and complicated sentence. It can be achieved when public administration's activities are in line with general legal principles (lawfulness, non-discrimination and equal treatment, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy, transparency) and special rules governing administrative decisions (right of private persons to be heard, to have access to one's file, duty of public administration to state reasons and others). On the other hand, in the Article 41 of the Charter of Fundamental Rights of the European Union one can also find right to good administration [2] that mostly corresponds to this set of sub-principles.

At the same time, good administration is rather complex idea that is not just concerned with legal arrangements but also with the quality of organization and management within public administration. In the above mentioned Recommendation of the Committee of Ministers of the Council of Europe good administration is considered as an aspect of good governance that must meet the requirements of effectiveness, efficiency and relevance to the needs of society; it must maintain, uphold and safeguard

public property and other public interests; it must comply with the budgetary requirements; it must preclude all forms of corruption [5].

To sum up, we completely agree with the view that rules on administrative procedure need to be designed to equally maximize the twin objectives of public law: to ensure that the instruments in question foster the effective discharge of public duties and, at the same time, that the rights of individuals are protected [5, p. 4]. We do consider that this is true for both kinds of laws regulating administrative procedure: a codified general laws and sector-specific legislative acts. To our mind, national jurisdictions that have not adopted a general administrative procedure law yet (including Ukraine), possess a rather good possibility to adopt a high quality legislation in the analyzed area. They can use provisions laid down in the Model Rules on EU administrative procedure as a type of «stand by codification» or as a «boilerplate» to be supplemented with sector-specific norms in policy-specific legal acts [6, p. 21].

Of course, scientific research in the field of systematization of administrative procedure can be and must be continued. However, we do not suppose that attempts to invent the ideal model of a codified procedure act need to last for decades. Legal system of Ukraine as well as of the European Union has reached a point where codification of law on administrative procedure is not only possible but necessary for their future development as regulatory systems [6, p. 6]. So our country has no right to waste time and we do hope that Ukrainian parliament will adopt a general law on administrative procedure in the nearest future, inspired by ideas of the Model Rules and of soft law acts of the Council of Europe and the European Union that have been outlined in this article.

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СИСТЕМАТИЗАЦІЯ ЗАКОНОДАВСТВА ПРО АДМІНІСТРАТИВНУ ПРОЦЕДУРУ: УКРАЇНСЬКА ПЕРСПЕКТИВА

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Доцільність систематизації різних галузей законодавства не є новою ідеєю в сучасній теорії права та у правових системах сучасності. Однак історія систематизації законодавства про адміністративну процедуру не налічує навіть сотні років, адже цей процес розпочався в Австрії у 1925 році. Не зважаючи на розроблений уже достатньо давно проект Закону про адміністративну процедуру (первинна назва – Адміністративно-процедурний кодекс) та кілька спроб його розгляду у Верховній Раді, в Україні до цього часу адміністративно-процедурне законодавство залишається несистематизованим і розпорошеним по численних законах і, що гірше – підзаконних нормативно-правових актах.

Останніми роками ідея систематизації законодавства про адміністративну процедуру отримала новий поштовх. З кожним роком усе нові держави як Європи, так і усього світу приймають загальні закони (кодекси) про адміністративну процедуру, а в правовій доктрині держав-членів Європейського Союзу активно обговорюють доцільність ухвалення законодавчого акта, в якому були б викладені єдині стандарти діяльності публічної адміністрації цього міждержавного утворення. З цією метою група провідних науковців, які представляли різні держави-члени ЄС, розробила Модельні правила про адміністративну процедуру Європейського Союзу.

Автори названих Модельних правил вказують, що лише «інноваційна кодифікація» законодавства про адміністративну процедуру відповідатиме сучасним потребам розвитку правової системи Європейського Союзу. Кодифікація вважатиметься інноваційною, якщо новим законом буде впроваджене єдине джерело існуючих принципів, котрі звичайно розпорошені в різних законах, правилах та судових прецендентах; цей закон

може також модифікувати існуючі принципи та правила і, якщо необхідно, додавати нові. Метод інноваційної кодифікації дасть змогу усувати колізії в існуючих законах та заповнювати прогалини.

Проаналізовано запроваджені в різних країнах світу моделі кодифікації законодавства про адміністративну процедуру, що характеризують обсяг його правового регулювання. Зокрема, висвітлено законодавчі підходи щодо форм (інструментів) діяльності публічної адміністрації, а також стадій та етапів адміністративної процедури, які регульовані кодифікаційними актами держав із тривалим досвідом імплементації цього законодавства. Акцентовано, що зміст законодавства про адміністративну процедуру має ґрунтуватися на загальновизнаних принципах верховенства права та доброго адміністрування, із наступною конкретизацією у відповідних субпринципах функціонування публічної адміністрації.

Підсумовуючи, новітні європейські розробки у галузі адміністративно-процедурного права можуть і мають бути використані при удосконаленні проекту Закону про адміністративну процедуру, прийняття якого Верховна Рада України не повинна у черговий раз затягувати.

Ключові слова: адміністративна процедура, систематизація, кодифікація, консолідація, добре адміністрування.