

INTRODUCTION OF PUBLIC ADMINISTRATION IN UKRAINE: MODERN ISSUES & PERSPECTIVES OF CONVERGENCE FOR EUROPEAN AND POST-SOVIET ADMINISTRATIVE TRADITIONS

This article aims to underline the most important features of post-Soviet administrative traditions, defining the legal framework for modern system of executive authorities in Ukraine, as well as to propose possible ways for its transformation according to the conceptual and legal framework for public administration, based on European administrative traditions. The main attention is paid to the issues of scientific substantiation of grounds for review of the values, goals, functions and competence of executive authorities in Ukraine with the purpose to provide further convergence with European public administration framework. Special attention is paid to institutional and functional aspects of public administration, theoretical and practical proposals as to their modernization, new developments in lecturing administrative law in higher educational institutions, based on a new vision of the subject of the fundamental branch of law.

Keywords: administrative tradition, public administration, convergence, European administrative space, administrative law, forms of public administration activity, functions & competence of administrative bodies, administrative legal reform.



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Introduction

Modern political trends and public thought show strong will of the Ukrainian people to be recognized and respected as a sovereign member of the European community, aiming to closer integration with the European Union and other European regional organization, sharing common values and principles of human heritage. These moral, legal, political grounds have much in common in the existing legal framework for executive authorities activities in Ukraine, but still they have strong impact of the post-Soviet administrative tradition. That's why we shall provide further analysis & substantiation to show possible ways for convergence of domestic and European administrative traditions, implementation of public administration as a leading institute of administrative law and a new complex of values, demands, functions and competence scope necessary for efficient performance and coordination with other European public administrations.

Scientific & political issues of public administration introduction in Ukraine had gained special attention in

the domestic constitutional and administrative legal doctrines since the Soviet period. In scientific works of prominent Soviet legal scientists we found although critical, but objectively informative comparative analysis on new types of European administrative proceedings, administrative justice, public service, that due to their fruitful impact nowadays have obtained official, although partial, fixation in the Ukrainian legislation.

We have to recognize, that modern Ukrainian administrative doctrine witnesses a lot of fundamental scientific problems, such as transformation of the branch of administrative law, emergence of new legal institutes, qualitative review of the subject, methods, principles of administrative law, that show general trend to protection of citizens rights, freedoms, legal interests. In this respect public administration has to become the central legal institute of the fundamental branch of administrative law in Ukraine, taking into attention best practices of the Soviet and modern European administrative traditions in state-building, law-drafting, external relations of public administration with respect to the newly codified legal principles of good administration.

This work shall devote special attention to organizational, structural and functional aspects, comparative legal analysis on public administration reform in Eastern-European countries represented by European scientists & leading European regional organizations (Council of Europe, European Union, Organization for Security and Co-operation in Europe), SIGMA and OECD programs results and some others.

Methodological background for this research constitute general principles of scientific research and special ones, among them significant role was devoted to the system-approach, providing understanding of counter-connections between elements of the public administration system, it's structural and functional analysis, that make it possible to show, for example, correlation between goals, as a goal-orienting system, and the legal principles of public administration activity, as a subordinated subsystem, defining the framework for realization of public administration powers within the defined legal competence.

System-approach is commonly used in both national doctrinal and legislative acts, programs in long run, and it gives us grounds to substantiate necessary connections between goals of public administration activities and it's legal framework, including legal principles, legal guarantees, functions & forms of public administration activities, competence of public administration. General goals and principles of public administration activity must be defined as obligatory provisions in the key statutory laws according to constitutional provisions on executive branch bodies. Such an approach shall provide necessary legal background to the long- and short-run development goals and strategies of public administration institute in Ukraine, being and important legal guaranty for providing legal certainty & legality in public administration activities, raising public support to administrative action and administrative reform measures.

The main aim of the provided research had been defined as providing

complex analysis of institutional (organizational) basis for public administrations in the European countries and providing public administration activities, based on modern experience of their codification, primarily in the sphere of external activities of public administration bodies, that had been effectuated in the second part of the XX century in European countries, as well as to provide proposals, recommendations as to further introduction of public administration in Ukraine based on improvement of legal regulation, law-drafting practice, realization of powers by executive authorities and local self-government bodies, primarily in the sphere of counteraction with citizens (administrative procedures), on the basis of administrative traditions convergence. Scientific value of the represented research is substantiated by strong demand of explanation of logical and other legal correlations of the fundamental notions, based on the concepts of good governance, good administration and their impact on institutionalization of public administration in modern European countries and in Ukraine, providing further scientific ground for introduction of public administration in Ukraine.

In this respect, the main goal of the represented article shall be to provide results of a complex legal study on introduction of public administration in Ukraine, paying special attention to the following issues:

1) Legal problems of convergence between post-Soviet and modern European administrative traditions, role of European administrative law principles in remodelling Ukrainian system of executive authorities;

2) Transformation of the institutional framework in the context of modernization of executive authorities in Ukraine.

Introduction of the institute of public administration in Ukraine with respect to the European experience of its organization and functioning is an objective necessity for steady integration into European community and building administrative capacity of public administration, being an ultimate demand of the Madrid criteria, defined in 1995 by the Council of Europe. Complex renewal of legal, social and economic, political grounds for public administration in Ukraine is an objective demand, based on important essential transformations of state legal processes, that had taken place in Ukraine in connection with gaining independence of the state, remodeling into semi-presidential republic with significant Presidential prerogatives, review of the legal nature & founding values in governance, state regulation & control, legal forms of their realization in conditions of the democratic state, introduction of local self-government, review of the functions and corresponding competence fields, review of the domestic approach to differentiation of competence on regional, central and local level, that in common should become in the nearest perspective legal grounds for serious transformation of the executive branch in Ukraine.

Legal problems of convergence between post-Soviet and modern European administrative traditions, the role of European administrative law principles in remodelling Ukrainian system of executive authorities.

Post-Soviet administrative tradition, in fact dominating in Ukraine, represents

a special institutional and functional legal framework for state administration. It inherited a Soviet approach to a very wide interference into different spheres of public and private activities. That is way Ukrainian administrative law is an amalgamation of many different by it's legal nature & normative grounds legal institutes. As for today not only issues of institutional organization of executive authorities and basic forms of their activities form the subject of administrative law, but many other legal institutes (state control & survey, public service, administrative liability (primarily for physical persons), administrative justice, counter-action to corruption, that are taught in European universities as separate courses, sometimes only within specialization in public administration, public service, administrative justice etc.).

Modern branch of administrative law in Ukraine witnesses significant transformations of the subject, principles and methods used for legal regulation in the field. The system of administrative legislation has developed such a new subsystems as: entrepreneurial law, licensing and registration proceedings, public service, administrative justice, administrative responsibility, tax, construction, education & others. The main doctrinal shift from the Soviet administrative tradition to providing realization of the citizen's rights, freedoms and legitimate interests had been proclaimed by the Constitution of Ukraine & found further development in the Ukrainian legislation.

In this respect it is important for implementation of the institute of public administration in Ukraine not only to

analyze and implement national characteristics of this legal institute, but to take into account supra- and infra-national aspects of its activities and institutionalization. Of ultimate importance are current trends of unifying demands to public administration activities, represented in complex researches guided by the Council of Europe on the Model Code of good administration, providing additional legal guaranties and safeguards for citizens in relations with public administration. Implementation of these legal demands to public administration activities is impossible without step-by-step convergence of Ukrainian and European administrative traditions, defining modern standards for public administration.

Although former Ukrainian governments had much contributed to European integration of Ukraine, harmonization of domestic legislation with acquits communitarian, the Copenhagen criteria performance, providing further integration into the European administrative space, but, from scientific point of view, it is still very hard to brake Soviet approach to defining fundamental grounds for public administration, using inadequate methods and sources, oriented on state-centred concept realization, and in this respect counter-acting to further development in the field. In this respect Ukrainian scientists and governmental officials should pay special attention to European experience of administrative convergence as a historical, legal and functional definition, providing answers to difficult questions, not even argued in academic auditoriums.

In general, European administrative traditions had been founded on French

and German legal traditions, sometimes combined, depending on more or less strong impact of these countries in historical retrospective: 1) Dominating French European administrative tradition; 2) Dominating German European administrative tradition; 3) Mixed French-German European administrative tradition; 4) Anglo-sax European administrative tradition, as considered after emergence of the European Union. Modern Ukrainian administrative legal doctrine possesses much ideas and legal principles of German European administrative tradition in its early XX century variant, although partially implements separate achievements of modern European vision. That is why it is very important to provide complex review of the founding grounds for public administration implementation with respect to modern developments in the field, defining common space for public administrations, with the purpose to build administrative capacity of Ukrainian public administration. In our opinion, it is strongly recommended to draft a separate statutory legal act on public administration, defining institutional and functional framework of it's activities, as such examples had been successfully realized in Eastern-European countries.

As to the main legal problems, relating to convergence of post-Soviet and modern European administrative traditions, we would specially underline the following problems:

Doctrinal misunderstandings and lack of scientific research in the field of introduction public administration demands in administrative law of Ukraine, in activities of executive authorities and local self-government bodies, agents of

public administration, balance of public, general & private interests in public legal sphere;

Incapacity to apply methods of state governance in new conditions, particularly in conditions of a single European administrative space, and in this respect strong need in support to development of new methods for public administration co-ordination, re-ordination, subordination, based on European standards of public administration activity;

Lack of politic & legislative support to introduction of public administration in Ukraine, although a lot of politicians use this definition as an effective advertisement, without understanding of its doctrinal & functional interpretation & real legal mechanisms of its implementation;

Strong need in providing modern knowledge and practical tools for modernization of the system of executive authorities of Ukraine, having real modern value, as we witnessed examples of expensive outdated reforms, having no real value for citizens, sometimes even providing excessive burden on them (commercialization of administrative services);

Partial & sometimes confusing implementation of separate European principles, having negative impact on real needs in development of the system of administrative legislation in Ukraine, that shows lack of special education & training for public servants, law-drafting & law-enforcing executive bodies, special motivation of legislative body, notwithstanding with real needs of harmonization in different areas of acquits;

Counter-action to development of modern administrative legal institutes,

such as: public administration liability, public contracts, administrative acts of public administration & their registries. In fact, public sphere is a closed one now; Ukraine needs strong political will to implement these legal institutes as they constitute necessary elements of public administration activity;

Administrative justice has become a suitable mechanism for solving corporate, private business issues, that is not appropriate in European countries, that is why it is necessary to review the subject & institutional jurisdiction of administrative courts in order to provide performance of it's fundamental goals & counter-act to its discrimination as a whole before the public;

Review of information & consulting for citizens performed by public administrative bodies, as good «administration» principles in this aspect have not yet been implemented. For example, administrative decision still enters into legal force on signature date (not on a date of official notification about a negative administrative act/ decision & its appellate review possibilities). Moreover, introduction of state registries needs providing strong legal guaranties for counter-action to their using by private bodies in business matters, personal data protection etc.

Along with that, we should stress the necessity to develop scientific concepts, legislative proposals with respect to modern legal principles, applied in the European Union, and called European administrative law principles, not being equal to the national systems of administrative law principles. Having general nature, they had formed common legal grounds for counteractions between for-

mally independent national public administrations that also need to become part of domestic administrative legal doctrine and legislation.

Complex decision of the above-mentioned issues shall contribute to a rather quick, effective and goal-oriented transformation of the domestic system of executive authorities into modern institute of public administration, having administrative capacity to act at both supra-national (within the European Union) and national levels.

Transformation of the institutional framework in the context of modernization of executive authorities in Ukraine.

Since 1996 the Ukrainian state has been transformed from the federal Soviet model into a unitary presidential one, sharing on the constitutional level common values and principles of human heritage, stipulated in international & European regional legal acts. The last stage of institutional reform started in 2010 with an Enactment of the President of Ukraine «On optimization of the system of central executive authorities» [1], introducing such a new central executive bodies as state agencies, state inspections and state services on the central level, along with significant shifts in ministerial functions & competence, the scope & competence of central executive authorities with a special status. These steps of reform were objectively necessary to provide efficient co-ordination within the system of executive authorities in Ukraine, but still there are, in our opinion, a lot of fruitful proposals, originating from European administrative traditions, that might become necessary conceptual & legislative ground

for step-by-step implementation of public administration values & principles in Ukraine.

As for now, only separate modern principles of public administration have found legal fixation in the Ukrainian legislation. Firstly, because of lack of doctrinal & scientific background for their implementation in modern executive authorities system of Ukraine. Secondly, because of discrepancies in goals and their orientation in the European Union member-states and sovereign post-Soviet states. In our prior publications we had already stressed the position of possible partial introduction into domestic legal system of those public administration activity principles, that don't contradict to long- and short-run development goals & priorities of Ukrainian society & the State. Being a sovereign state, it is impossible to implement here, prior to entering any regional union, legal principles, providing development of such a union, as it is dangerous for domestic priority spheres of industrial & economical development, internal market.

Introducing public administration in post-Soviet countries faces doctrinal misunderstandings and undue realization of administrative law principles, defining the legal framework for public administration. The notion of public administration is not used in the domestic legislation. Ukrainian doctrine nowadays proposes a summarise definition of this notion as a sum of executive authorities and local self-government bodies, performing executive powers. Till this time, Ukrainian legislation has not introduced the third component, the so-called agents of public administration,

appointed on the basis of agreement with public administration body or by law to perform separate administrative actions. Such a new approach to counteraction between public administration bodies & private bodies might play significant role for improvement of current state of rendering administrative services in Ukraine, providing other public services to the population. Using such a type of public administration bodies should result into significant decrease of public expenditures for state bodies, improvement of access to public bodies & the services, information, consulting provided by them due to mobility, suitability, effectiveness, inter-operability, time- & costs-saving character.

It is worth to mention, that modern administrative law doctrine in Ukraine was formed on the pre-dominant Soviet approach to understanding of the essences of state governance and it's principles, so domestic administrative law scientists faced the necessity to review doctrinal grounds with the aim to introduce a new institute of public administration.

The provided reform seemed to have a rather structural character, aiming to shorten the list of existing executive bodies. From the point of view of qualitative characteristics, among the achievements of the performed administrative reform measures should be mentioned: raising legal grounds for executive authorities action on the level of regulation by a separate Law of Ukraine «On the central executive authorities»[2]; a new Law of Ukraine «On the Cabinet of Ministers of Ukraine» [3] introduced differentiation of politic and state service positions, being a new and impor-

tant provision for future development of legal and political liability provisions in domestic legislation; legal status of the ministries of Ukraine was approved by separate President's enactments, providing modernization of organizational structure, competence & powers of the ministry, minister & vice-ministers.

Even the laws «On the Cabinet of Ministers of Ukraine» [3], «On the Central executive authorities» [4], «On administrative services in Ukraine» [5] don't contain conceptual doctrinal & legal grounds for transformation of the mechanism of the state towards modern institute of public administration, common for countries, sharing European administrative traditions, as the defined laws show strong trend to centralization of the state, weakening powers of central executive bodies, providing administrative services on central level etc.

In our opinion, administrative services should be primarily provided on the local level, as this level is directly connected with their customers, i.e. citizens, legal persons etc., but still the notion of budget deconcentration is not used in domestic doctrine and legislation, so local self-government doesn't have necessary resources for performance of such a wide scope of functions. These ideas were developed on the grounds of the Council of Europe recommendations, describing the main ways for providing efficient rendering of administrative services in the member-states of the Council of Europe on the local level. These proposals do show that central level should be used for coordination, and in special cases prescribed by law – for rendering administrative services.

Along with that, till this time administrative reform in Ukraine has not yet decided such important issues as differentiation of functions of central and local level based on the principle of decentralization. It means that regardless of formal fixation of this principle in the Constitution of Ukraine, the system of executive bodies was defined on the basis of another principle of centralization, originating in its essence from the Soviet period and having strong impact on organization of the mechanism of Ukrainian state.

We would propose to pay special attention to modern understanding of the principle of decentralization & practice of its realization. In France this principle becomes doctrinal basis for functional decentralization, being the ground for differentiation of public services. Although these notions are not implemented in the Law of Ukraine «On administrative services» [5] yet, but still we'd propose to define there principles of competence differentiation, as well as demands to the form and the essence of administrative acts, as these legal grounds as necessary for effective protection of citizens rights in counter-action with public administration bodies, including review of administrative action by administrative courts. Of course, every country is free to provide its own institutional grounds for the system of executive authorities, but such grounds, must have not only formal fixation, but practical realization & being obligatory for execution by all public bodies.

In the conclusion it is worth to mention, that although democratic transformation of the system of executive authorities had started a rather long

period ago, the key and strategic principles, goals and competence framework of their legal activity have been enacted in Ukraine in 2010–2011. But these legislative acts are still missing that necessary complex doctrinal understanding of the goal-orienting provisions for implementing modern institute of public administration in Ukraine. The main problem is considered to be lack of complex doctrinal concern on the goals, functions, competence of public administration bodies in modern understanding, including demands of the supra-national context, defining new goals, functions, legal principles for public administration (global administrative law, European administrative law, administrative law of the European Union member-states).

In our opinion, correlation of goals, missions and principles, defining the scope of administrative action must have strong connection with actual problems of the society, provide objective grounds for due realization of public policy, and should be based on the domestic administrative tradition, with respect to international and regional treaties, ratified by the Parliament. In case of substitution of the mentioned goals, mission and principles by the ones, not connected with the society as a social system, it will lead to strong negative impact on such a society and shall disorganize the system, shall protect interests of other «systems», being of different origin, but having nothing in common with traditional Ukrainian society & culture.

As to the analyzed European Union member-countries experience in the field, we should admit, that here was chosen an approach to create a sum-

marise system of principles, some of them don't have direct legal tradition, but have been introduced due to the Treaties and court's practice. That is why it is sometimes difficult to understand their legal nature and significant features, as they are not common in domestic practice. In this respect, it is worth to underline, that legal principles in domestic administrative tradition are realized in legal relations, exist objectively and not tied by formal legal fixation in the legal norm. That's why it is necessary to widen domestic legal doctrine of administrative law with experience of European and other border countries and regional unions (Council of Europe, European Union etc.), providing modern tools for implementation of «good governance» & «good administration» practices in developing countries.

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Пухтецька А. А. Концептуальні підходи до оновлення системи принципів адміністративного права України.

У даній статті підкреслено найважливіші характеристики пострадянської адміністративної традиції, що визначають правове підґрунтя сучасної системи органів виконавчої влади в Україні, а також визначені можливі шляхи її трансформації відповідно до концептуальних та правових засад публічної адміністрації, що ґрунтуються на європейських адміністративних традиціях. Основну увагу приділено питанням наукового обґрунтування концептуальних, доктринальних та законодавчих засад, цінностей, цілей, функцій та компетенції органів виконавчої влади в Україні з метою забезпечення подальшої конвергенції з системою європейських публічних адміністрацій. Спеціальну увагу приділено інституційному аспекту організації публічної адміністрації, теоретичним та практичним пропозиціям з їх модернізації, застосування новітніх досягнень у викладанні адміністративного права у вищих навчальних закладах, що ґрунтуються на новому баченні предмета фундаментальної галузі права.

Ключові слова: адміністративна традиція, публічна адміністрація, конвергенція, Європейський адміністративний простір, адміністративне право, форми діяльності публічної адміністрації, функції та компетенція адміністративних органів, адміністративно-правова реформа.

Пухтецкая А. А. Концептуальные подходы к обновлению системы принципов административного права Украины.

В данной статье подчеркнуты наиболее важные черты постсоветской административной традиции, определяющие правовое поле современной системы органов исполнительной власти в Украине. А также определены возможные пути трансформации их системы в соответствии с концептуальными и правовыми основаниями организации и деятельности публичной администрации. Отдельное внимание уделено институциональному аспекту организации публичной администрации, теоретическим и практическим предложениям по их модернизации, применению новейших достижений в преподавании административного права, основывающихся на новом видении предмета фундаментальной отрасли права.

Ключевые слова: административная традиция, публичная администрация, конвергенция, Европейское административное пространство, административное право, формы деятельности публичной администрации, функция и компетенция административных органов, административно-правовая реформа.

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