UDC 342.9
DOI https://doi.org/10.32782/2307-3322/2020.60.25

THE STUDIES OF ADMINISTRATIVE PROCEDURE (EUROPEAN APPROACH)

ВЧЕННЯ ПРО АДМІНІСТРАТИВНУ ПРОЦЕДУРУ (ЄВРОПЕЙСЬКИЙ ПІДХІД)

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

The article is devoted to the consideration and analysis of the concepts of the European doctrine, which influenced the development of both the legislation on administrative procedure and the doctrine.

In the study, the author uses an integrative approach, which is aimed at a comprehensive study of this issue on the example of different European countries as a whole, and in particular: France and Germany.

The author takes two concepts as a basis: the concept of an administrative act and the concept of "good governance". At different stages of the evolution of the administrative procedure (emergence and development) these concepts played an important role. At the stage of the emergence of the administrative procedure, the concept of an administrative act was fundamental, since the activities of government bodies were objectified in acts, therefore, scientists focused more on the study of acts, their types, rather than on the procedure for their adoption. At the stage of formation, significant changes are taking place in the conceptual approach and in the views regarding the expansion of powers of government bodies, which resulted in the need for their procedural regulation and monitoring of their implementation with the aim of inadmissibility of arbitrariness and subjectivity in relation to citizens by the authorities. Therefore, the concept of "discretionary authority" prevails in the administrative procedure exercise at the stage.

At the stage of development of the administrative procedure, the concept of "good governance" was prevailing, which was created for the public administration sphere as a system of values based on the principles of the rule of law, democracy and human rights.

It includes a set of procedural rules, which are standards in the administrative activities of bodies.

Key words: administrative procedure, European doctrine, concept.

Стаття присвячена розгляду й аналізу концепцій європейської доктрини, які вплинули на розвиток як законодавства про адміністративну процедуру, так і на доктрину. Автор використовує інтегративний підхід, який спрямований на комплексне вивчення даного питання на прикладі різних європейських країн загалом і Франції та Федеративної Республіки Німеччина зокрема. За основу автор бере декілька концепцій: концепцію адміністративного акта, концепцію «дискреційних повноважень» і концепцію «доброго урядування». На різних етапах еволюції адміністративної процедури концепції відігравали важливу роль. На етапі виникнення адміністративної процедури концепція адміністративного акта була основоположною, оскільки діяльність органів державного управління об'єктивізовувалася в актах, як наслідок, учені більше фокусувалися на дослідженні актів, їх видів, а не на процедурі їх ухвалення. На етапі становлення відбуваються істотні зміни в концептуальному підході та в поглядах вчених, які повязані з розширенням повноважень органів державної влади, у результаті чого виникла необхідність в їх процедурному врегулюванні та контролі за їх реалізацією з метою неприпустимості прояву свавілля і суб'єктивізму щодо громадян із боку органів.

Тому на цьому етапі у вченнях про адміністративну процедуру превалює концепція «дискреційних повноважень», яка була створена для сфери публічного управління як система цінностей, заснованих на принципах верховенства закону, демократії та прав людини. Вона включає в себе набір процедурних правил, які є стандартами в адміністративній діяльності органів.

Ключові слова: адміністративна процедура, європейська доктрина, концепція.

Problem statement. The rapid development of the studies on the administrative procedure is connected with a continuous process of law formation and the European integration process. The scientific interest in the study of administrative procedures is due to various factors: the lack of an appropriate legal regulation mechanism; changes in the model of relations between executive authorities and citizens, appeal to the legislative and doctrinal experience of European countries in order to enrich administrative law with modern, democratic institutions through their reciprocation, as well as conducting administrative reforms. Over the past 20 years, the most of administrative and legal institutions have been completely updated, thanks to the intensive process of modernization, which was carried out through reforms and improving the enforcement of public administration in the setting of a new paradigm of relations between bodies and citizens.

Today, one of the most pressing issues both among scientists and the legislator remains the issue related to the development of the doctrinal-legislative concept of the administrative procedure. In the studies about it, a confrontation of two processes is traced: tradition and modernization, which is an indicator of continuous development and an attempt by scientists to find a mutually acceptable scientific justification for the institution of the administrative procedure.

State of the study. Among European and American scientists, we note: I. Koprić, Willemien Ouden en, Ymre E. Schuurmans, T. Barkhuysen, H. Pünder, J. Barnes, McCubbins, Mathew D., Roger G. Noll and Barry R. Weingast, R. Edward, Edward J. Eberle, William F., Marek Wierzbowski, Janis Načisčionis, Hans Christian Roil, Herwig C.H. Hofmann and Jens-Peter Schneider, Mihaela V. Cărăuşan, Jens-Peter Schneider,

Jacques Ziller, D.J. Galligan, Edward Rubin, David Fontana, G. Marcou, M. Shapiro, Юрген Шварце, John M. Rogers, B. Schwartz, E. Chemerinsky, J. H. Grey et al. Their work is valuable from the point of view of the approach used by scientists in the study of the administrative procedure (value, functional) devoid of dogmatism, tradition.

The purpose of the article – is to conduct a study of existing concepts of European doctrine that influenced the formation and development of the administrative procedure in European countries.

Presenting main material. In European countries, the doctrine and the process of law-making in the field of administrative procedure are developing in a balanced manner, not lagging behind or ahead of each other. Analysis and generalization of the studies of the international doctrine, existing foreign legislation on administrative procedure and foreign experience in the functioning of the institution of administrative procedures are necessary conditions for the development of modern studies on the administrative procedure and the mechanism of legal regulation.

The European doctrine in the field of procedural law is quite extensive and has a long path, its sources are case law created by the European Court of Justice and written law in the form of primary and secondary law [1, p. 86].

In the European Union, rules regarding administrative procedures are scattered throughout legislation and a huge number of court decisions. There are several general documents of application, such as the TFEU Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the EU, the European Code of Good Administrative Conduct, which laid the foundations for the functioning of the administrative procedure for European countries [2, p. 73].

Analyzing them with a view to consolidating the provisions on the administrative procedure, we note that the main attention was paid to the principles of the procedure as fundamental principles. The formation of the principles of administrative procedure is the result of a long process related to administrative justice. After the Second World War in Europe, the principles of procedural law were enshrined in the Declaration, which established new approaches in relations between the state and the citizen through the declaration of human rights and the creation of constitutional courts [3, p. 29].

The procedural rights of citizens were enshrined as principles of an administrative procedure in international human rights documents, including the Charter of Fundamental Rights of the European Union, as well as in national constitutions, acts on administrative procedures. In the USA, the principles of administrative procedure provided a connection between the US Constitution, the US Administrative Procedure Act and the State Acts on Administrative Procedures, and in the European Union they brought together the primary (main) EU legislation (Treaty on the European Union), the Treaty on the Functioning of the European Union, Charter of Fundamental Rights of the European Union and secondary by-laws (provisions and directives). Therefore, the principles not only strengthened the constitutionality of the procedures, but also served as the general rules applied at all stages of the procedure [4, p. 19]. Judicial practice also played an impending role in the determination and content of each principle of administrative procedure. Under EU law, the administrative procedure was considered solely through the prism of principles.

For European scholars legislation and court decisions had an essential role in the formation of doctrinal concepts, which became the basis for the development of the teachings on administrative procedure in the European scientific community. After analyzing their works, we came to the conclusion that their teachings are based on three concepts: the concept of "administrative act", "discretionary power" and "good governance". In the European doctrine (France, Germany), which reflected the actions of an administrative body affecting the legal rights and interests of a person, an administrative act served as the main concept of administrative law in the 19–20 century. The concept was originally developed by French scholars, but was later borrowed by German lawyers and developed as a German concept since 1826. The concept played an important role in French administrative law and has become the subject of much debate among French lawyers regarding the criteria for distinguishing political acts from administrative ones. According to French administrative law, the concept of an administrative act is given on the basis of two approaches that are used to determine the scope of application of administrative law: the organic approach of Maurice Haouriou and the functional approach of Leon Dugois [5, p. 375].

According to Maurice Horiou, the key concept of administrative law is the concept of public authority ("puissance publique"). State bodies make and ensure the implementation of unilateral decisions in the exercise of their powers ("acts in an administrative order"). For Leon Dugua, on the contrary, the key concept of administrative law is the concept of "public service". In France, an act is concidered administrative if it reflects one of the prerogatives of public authorities (prerogatives de puissance publique) or if it is adopted for the organization or execution of a public service. There are two types of administrative acts: unilateral administrative acts and contracts, for example, building permits, public service contracts, service contracts, public procurement contracts, immigration permits, decisions affecting the career of public servants and decisions related to pensions. The "Administrative Act" (Verwaltungsakt) is the main concept of German administrative law [6, p. 125].

In Germany, the administrative procedure is applied to the so-called administrative decisions affecting the individual rights of citizens. The concept was legislatively enshrined in article 129 (1) of the Basic Law and several sections of the Administrative Courts Act of 1960, and later found its continuation in Sec. 35. of The Administrative Procedure Act of 1976. This Law regulates the adoption of administrative acts and the conclusion of public law contracts. The law on the administrative procedure of Germany regulates

the publication of individual administrative acts. In accordance with it, "an administrative act is an order, decision or other unilateral and imperious action that is performed by competent institutions in order to regulate individual relations in the field of public law and which are directed outward". The law determines the methods for publishing issued acts and ensuring their validity, the conditions for their validity, methods for correcting errors in administrative proceedings, the procedure for withdrawing an administrative act with errors and introducing the amended act into force. The concept of an administrative act was fundamental, since the activities of government bodies were objectified in the acts, therefore, scientists focused more on the study of acts, their types, and not on the procedure for their adoption.

However, in the middle of the 20th century, significant changes in the conceptual approach and views were taking place. Scientists were coming to the conclusion that: firstly, the actions of bodies that are aimed at the development and adoption of administrative acts are procedural and must comply with procedural requirements, and secondly, the powers of government bodies have expanded to such extend that there is a need for their procedural regulation and control for their implementation with the aim of inadmissibility of the manifestation of arbitrariness and subjectivity in relation to citizens by the authorities. At this stage, the concept of "discretionary authority" prevails in the exercises on administrative procedure, that was named "abuse of authority" – ditournement de pouvoir in France, according to which the Council of State could repeal and invalidate administrative acts.

There are two approaches to discretionary powers in European law: narrow (identification of powers with the choice of the method of settlement) and broad (which includes freedom to make decisions at different stages of application of the law). A narrow approach is reflected in the Recommendation of the Committee of Ministers of the Council of Europe of March 11, 1980, in which discretionary powers are defined as powers that provide the administrative authority with a certain degree of freedom in relation to the decision made, allowing a choice between several legally acceptable decisions that are considered the most suitable [7, p. 38].

A broad approach to determining discretion prevails (is given) in decisions of the Court of Justice of the European Union and the European Court of Human Rights: in cases provided by law, the body is given the right to choose whether to make a decision, either intentionally or unintentionally.

European scholars considered the concept of discretion from the dynamic side (associated with the decision-making process, i.e. an ordered sequence of actions) and static (covering the analysis of the sources of discretion at different stages of the application of the law, in terms of scope and typology of discretion). To illustrate, in the Polish theory of law, a distinction is made between "manifest freedoms" and "hidden freedoms", which comprise the content of discretionary powers. Scientists have proven that because of freedom, which is the content element of discretionary powers, there is always the risk that discretionary powers will be used arbitrarily. Dicey equated discretion with arbitrariness [8, p.73]. The main issue in the implementation of discretionary powers is the problem of ensuring a balance between discretion and fairness. Firstly, there is justice in the material sense, when it is necessary to make decisions on the equitable distribution of the benefits or burdens of society. Secondly, justice in the procedural sense. It is about the fairness of the procedures by which important decisions are made that affect private and public interests. Finally, there is the question of formal justice, when discretionary decisions can be unfair due to the use by authorities of their powers in a subjective way, which contradicts not only justice, but also legality – legal grounds. In this regard, there was a need to develop a procedural mechanism that regulates discretion, creating a reasonable and legal framework for it.

For a long period of time all unlawful decisions in European administrative law taken by authorities regarding citizens were subject to judicial review in order to protect the rights and interests of citizens from public arbitrariness. In this case, it involves the existence of a post-control mechanism, when a decision has already been made and measures need to be taken.

Therefore, European scientists began to reflect on the question of how to improve the quality of decisions and prevent abuse of authority at the decision-making stages, thus preventing violations. So the concept of "good (or proper) management" appeared. In European countries, the doctrine of administrative procedure is closely related to this concept, which was created for the public administration as a system of values based on the principles of the rule of law, democracy and human rights. It includes a set of procedural rules, which are standards in the administrative activities of bodies. As E. Schmidt-Aßmann notes, "good governance" is a set of general procedural standards applicable both for the activities of the EU supranational administration and for national European law and order [9, p. 62]. Hans Peter Nehel was one of the first in European research literature to emphasize: the principles of "good governance" are primarily of a procedural nature; the material and legal beginning is secondary in this case [10, p. 15].

The concept of "good governance" has improved the quality of administrative activities of bodies and relations between citizens and bodies. It has a balanced approach to protecting public interests, respecting the rights and interests of citizens in relations with bodies, which helps to increase the level of social trust in executive bodies; political stability and economic development and social welfare.

This concept provides both legality and quality of administrative decisions; and also protects the rights of citizens and promotes the participation of citizens. Administrative procedure is a means of ensuring the principles of good governance and is an essential part of the quality of public administration, which removes administrative barriers in order to increase

the effectiveness of public policy implementation. An example for established modern standards of public administration is the Charter of Fundamental Rights of the European Union, which establishes the right to "good governance". The Code of Good Administrative Behavior operates in Europe.

A significant contribution to the doctrine of administrative procedure was made by the research project of European scientists (ReNEUAL) Model Rules on EU Administrative Procedure by Herwig S.H. Hofmann, Jens-Peter Schneider and Jacques Ziller. The project aims to find a solution to modern problems facing EU legislation and policies in the context of integrated management, as well as to create a legal framework for the implementation of EU legislation through procedural rules that both protect the rights and interests of individuals from arbitrary actions of authorities and exercise control over the actions of organs [11].

The main goal of the ReNEUAL project is to find ways to improve the quality of the legal system and implement the EU legislation as a whole. The rules are designed in such a way as to maximize the dual purpose of administrative law: on the one hand, to ensure the effective fulfillment by authorities of their powers, and on the other hand, to protect the rights of individuals and legal entities.

The authors of ReNEUAL concluded that the Model Rules on the EU Administrative Procedure should be developed in an innovative way through "innovative codification". The essence of this codification is to compile the EU primary and secondary law in the field of administrative procedures into one source; and case law of the Court of Justice of the European Union (CJEU) with the ability to amend existing principles and rules on administrative procedures and add new ones. This method allows to resolve inconsistencies in existing laws and fill in the gaps.

The project consists of six books, each of which is intended for different legal entities as a guide (books II, III and IV are compiled for EU institutions, bodies, departments and agencies, books V and VI are designed for EU authorities and member states).

Conclusions. As can be seen, the European doctrine is consistent in the doctrine of administrative procedure due to the concepts and legislation that are the basis of their teachings on administrative procedure. Taking as a basis the European doctrine of administrative procedure, we will be able to understand the basic concepts that have influenced its development and formation.

REFERENCE:

1. Schwarze J. Judicial Review of European Administrative Procedure. *Law and Contemporary Problems*. 2004. Vol. 68. № 1. P. 85–106.
2. Wierzbowski M. EU member state administrative procedure and impact of international. URL: https://wwwwww.europarl.europa.eu.
3. Balogh-Békesi N. Alapelvek a Modell Szabályok I. Könyvénekált alánosren delkezéseiben. *ProPublico Bono*. Magyar Közigazgatás. 2017. P. 27– 32.
4. Balogh-Békesi N., Pollák K. General principle of administrative procedure in the European Union, in Hungry and in France. *Pro Publico Bono*. Public Administration. 2017. P. 18–39.
5. George A., Bermann E. Introduction to French Law. URL: http://pi.lib.uchicago.edu/1001/cat/bib/8925332.
6. Mahendra P. German Administrative Law in Common Law. URL: https://books.google.com.ua.
7. Szot A. Discretionary powers of the public administration in law application processes and its judicial control. URL: https://www.researchgate.net.
8. Dicey A. The Law of the Constitution. London, 1961. P. 188.
9. Шмидт-Ассман Э. Структуры и функции административных процедур Германии, европейского и международного права [Structures and Functions of Administrative Procedures in German, European and International Law]. *Transforming Administrative Procedure* (*Изменяющаяся административная процедура*) / под ред. Дж. Барнса. Севилья : Global Law Press, 2008. С. 62–63.
10. Неель Н. Хорошее управление как процессуальное право и / или общий принцип (Legal Challenges in EU Administrative Law*)*. Оксфорд, 1999. С. 15.
11. Hofmann H., Schneider J. ReNEUAL Model Rules on EU Administrative Procedure. URL: https://books.google.com.ua.