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NOTES ON GENESIS OF THE DEVELOPMENT OF THE ADMINISTRATIVE PROCEDURAL LAW

НОТАТКИ ЩОДО ГЕНЕЗИ РОЗВИТКУ АДМІНІСТРАТИВНОГО ПРОЦЕДУРНОГО ПРАВА

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The paper presents the results of studies on the genesis of administrative procedural law in Ukraine. We give a list of theoretical generalizations that characterize the processes of emergence, formation and development of administrative procedural law in the national legal system.

Key words: science procedural law, administrative law science, the science of administrative procedural law procedural rules.

У статті наводяться результати досліджень стосовно ґенези розвитку адміністративного процедурного права в Україні. Дається перелік теоретичних узагальнень, які характеризують процеси виникнення, становлення та розвитку адміністративного процедурного права в національні правовій системі.

Ключові слова: науки процесуального права, наука адміністративного права, наука адміністративного процедурного права, процедурні норми.

В статье представлены результаты исследований по вопросам генезиса развития административного процедурного права в Украине. Дается перечень теоретических обобщений, которые характеризуют процессы возникновения, становления и развития административного процедурного права в национальной правовой системе.

Ключевые слова: науки процессуального права, наука административного права, наука административного процедурного права, процедурные нормы.

Administrative procedural law as a set of administrative and procedural norms appears at a relatively late stages of development of society, although rare facts indicate about the existence of certain procedures in the early stages development of mankind too. Modern understanding of administrative law as of a branch of law emerged, only when norms, that fix the rights of the individual, procedures of activity of government bodies and guarantees of protection against administrative arbitrariness, took a sufficient place in the legal system. It is the development of administrative procedural norms in the world led to the transformation of police law into administrative law and to the emergence of institute administrative procedural law within the administrative law.

Characterizing the development of scientific thought on administrative procedure and administrative procedural law, it should be noted, that it is inextricably linked, firstly, with the development of procedural science in general, and secondly, the development of science of administrative law in Ukraine.

It should be noted that the researches of development processes of administrative procedural law have a fragmentary nature. Only a few works of representatives of the theory of state and law and administrative law highlight the problems, associated with the genesis of administrative procedural law in the national legal system. Such scholars, as O.M. Bandurka [1] J.O. Gurdji [2] O.V. Kuzmenko [3] V.M. Protasov [4] V.P. Tymoshchuk [5] M.M. Tishchenko [1] O.V. Fatkhutdinova [6] and other Russian and Ukrainian scientists expressed interesting thoughts on the development and establishment of administrative procedural law in his writings. Unfortunately, these works are not enough to understand all the specifics and magnitude of the development processes of administrative procedural law in our country.

The aim of the article is to highlight the theoretical generalizations, that highlight the complex process of emergence and development of administrative procedural law in the legal system of Ukraine.

We would like to focus on the results of the researches that help to reveal issues, related to the genesis of administrative procedural law in the national legal system.

Firstly, the development and establishment of administrative procedural law is inextricably linked with the development and establishment of administrative law in both countries of the world and the lands of modern Ukraine.

Thus, in ancient times and in the Middle Ages substantial development of administrative law, and especially of administrative procedural law did not occur, due to the fact that the state did not have the need for centralized implementation of police functions, and the development of economy, finance and public administration also did not facilitate that. Although the first stirrings of administrative law can be found even in ancient Greece, Rome and Egypt; they were manifested in managerial relations that have arisen during construction of roads and channels, organizing of forces, protection of the state against the attacks from the outside.

Since the Renaissance, followed by the era of absolutism the complete development of administrative law begins, because in this period the state authorities focuses on domestic public administration and police regulation of social relations. Fixing of administrative procedural norms in the legislation of countries of this period was rather the exception, than the rule.

There have been substantial changes in this direction only in the first half of the nineteenth century under the influence of the French Revolution. Ripe civil society in Europe required, firstly, the organization of administrative governance and of all state powers on the legislative basis, secondly, the establishment of state guarantees and protection of democratic rights and freedoms of citizens in the administrative relations, thirdly, control over the authorities, that includes effective legal mechanisms, institutions and legal means. Under the pressure of civil society in the late nineteenth century formed the continental system of administrative law, that has such characteristics, as clear legal regulation of administrative structures and processes; forming of general principles of public administration; developed conceptual apparatus. In the mid-nineteenth century in European countries administrative courts had been established, activity of which was focused on the prevention and suppression of arbitrariness of government, police and public administration in general. This period (XIX century) should be considered as the period when administrative procedural law arose as an institution of administrative law in Europe.

Secondly, the preconditions of occurrence and development of administrative procedural law include: a) development of economics, finance, management, public administration; b) the need to ensure the realization of the subjective rights and legal responsibilities in the field of public law; c) protection of society from danger (natural disasters, the occurrence of epidemics, offenses, armed conflicts etc.); d) the definition in the legal way of the order of consideration of disputes arising between citizens and governmental public administration bodies; e) ensuring of legality in public administration [7, p. 106].

Thirdly, the administrative procedural law in Ukraine emerged and evolved as an institution of administrative law: first as a part of the pre-revolutionary Russian police law, then as a part of the Soviet administrative law, and today, despite the existing comprehensive researches, in which the expediency to distinguish an independent branch of law in the law system of Ukraine is substantiated – administrative procedural law – as a part of administrative law of Ukraine [8, p. 7-11].

Fourth, stages of development of administrative law in Ukraine include the following: 1) the times of Kievan Rus and Galicia-Volyn principality; 2) Lithuanian-Polish age; 3) Cossack Hetman age; 4) period from the end of the XIX century until 1917; 5) the period of Ukrainian National Republic (1917-1920); 6) Soviet period to 60 years of the twentieth century; 7) Soviet period since the 60s; 8) the period of formation of an independent Ukraine. Only since the Cossack Hetman age we can talk about the first stirrings of origin and emergence of administrative procedural law in Ukraine.

Between the end of the XIX century until 1917 on the territories of Ukraine Code of Laws of the Russian Empire was in force, that although was not an act of systematic norms of administrative procedural law, but included a large proportion of such norms. Also during this period the system of administrative justice was formed in Russia.

At the period of the Ukrainian National Republic (1917-1920) many of Legislative Works, which should regulate in more detail the activities of the bodies of administrative justice, couldn't be implemented [7, p.75-77].

In the Soviet period to 60 years of the twentieth century a lot of attention was paid to the improvement of procedure of appealing of the actions of state bodies and officials, and to the formation and reformation of system of bodies, that may consider complaints of workers. This period was marked by the following:

- citizens' possibility to appeal the actions of officials in the administrative order was provided by the law;
- a special control body (Central Bureau of complaints and claims), the main task of which was to control the correct parsing of complaints in departments and agencies, was established;
- the Administrative Code of the Ukrainian SSR, that was the first codified act in the USSR, which included in a systematic form norms of administrative and administrative procedural law, was adopted.

Soviet period since the 60s was marked by the fact that:

- the procedure of imposition of administrative fines on offenders was improved: a) the possibility to challenge in court the decisions on the imposition of administrative fines was provided, b) a clear list of agencies and officials may impose administrative fines on offenders was established, c) special bodies of administrative jurisdiction – the administrative commissions – were created, d) the mechanisms of enforcement of decisions regard to imposing of an administrative fine on an offender was improved;
- the mechanism of consideration of citizens was improved;
- a procedure of deciding of cases, arising from administrative legal relations, was envisaged in the Civil Procedure Code of the Ukrainian SSR: a) into allegations of irregularities in voter lists and the lists of citizens who have the right to participate in the referendum; b) into allegations of the actions of officials in connection with the imposition of administrative penalties; c) into allegations against decisions, acts or omissions of public authorities, local governments, and officials; d) on the recovery of tax, rural self-taxation arrears and arrears of state compulsory insurance of citizens;
- On December 7, 1984 was adopted the Code of Administrative Offences, in III-V sections of which procedural norms on bringing people to administrative responsibility were systematized.
- The period of establishing of an independent Ukraine was marked by:
- the adoption of the Constitution of Ukraine and the Law of Ukraine «On the Judicial System of Ukraine» dated February 7, 2002, where the structure and powers of the Administrative Courts were assigned;
- adoption on July 6, 2005 Code of Administrative Proceedings of Ukraine, that defined the powers of Administrative Courts to review cases of administrative jurisdiction, the procedure for appeal to the administrative courts and the procedure for administrative proceedings.

Fifthly, the development of scientific thought on administrative procedural law is inextricably linked with the development of procedural science in general, which is divided into four periods:

a) the period from the beginning to the end of the nineteenth century., when the ideas about procedural science were based on the concept of civil and criminal procedure, and an opinion of the existence of independent sciences of civil procedure and criminal procedure law was denied;

b) the period from the late nineteenth century until 1917, when the doctrinal justification of differences between sciences of civil law and civil procedure law and between sciences of criminal law and criminal procedural law appeared in scientific literature. During this period the concepts of judicial law appear;

c) Soviet period was marked by controversy between supporters of the concept of judicial law and its opponents, and by amplification of the meaning of concepts «legal process» and «procedural law». One part of scientists limited the expansion of the legal process to the enforcement of competent authorities to resolve disputes, and application of coercive measures, and the second part – to the activities on the application of substantive rules. The scientific literature presents discussions between representatives of «broad» and «narrow» understanding

of the legal process, such as between representatives of «jurisdiction» and «management» concepts of the legal process;

d) the current development of science of procedural law shows contradictory of scientific views on legal process, legal procedure, procedural law and judicial law. The concept of judicial law, science of procedural law, the concept of a broad understanding of legal process, the concept of a narrow understanding of legal process, jurisdictional concept of legal process, management concept of legal process, etc. acquired their further development in the works of modern scientists. At the same time it is impossible to give preference to any of scientific thoughts. They are almost equally represented in the legal literature [8, p. 10-11].

Sixthly, the development of scientific thought on administrative procedural law is closely linked to the development of the science of administrative law. Periods of administrative law includes four stages: a) the period of Cameralistics; b) the period of police law; c) the Soviet period of development of science of administrative law and d) the modern period of development of science of administrative law. It should be noted that generally accepted understanding of general part of administrative law, which included the subject and system of science of administrative law, the basic principles of public administration, sources of administrative law, administrative legal norms and relations, bodies of public administration, acts of government, public service, administrative and legal status of citizens and organizations was formed only in the Soviet period. Persuasion and coercion, as well as ensuring of the legality in public administration were included to it later. Today, the content of the most of textbooks on administrative law includes a section on the administrative process. The theses of the most of textbooks on administrative law describing the subject of administrative law, administrative legal relations and the subjects of administrative law are based solely on the research of administrative substantive rules and ignore peculiarities of administrative procedural norms. Due to the rapid development of social relations and the changing role of the state in regulation of them, redefining and refinement of the subject and method of administrative law, of categorical apparatus of the science of administrative law and of the role of administrative law in the legal system of Ukraine take place today. Therefore, it is important to pay attention to the problems of administrative procedural law, because the connection between the science of administrative law and the science of administrative procedural law is indisputable. This connection is much stronger than the connection, for example, between the science of criminal law and the science of criminal procedural law.

Seventhly, the scientific opinion on the issues of the administrative procedural law in Ukraine is scattered:

- the first part of scientists says about the existence of science of administrative procedural law proving the existence of an independent branch of law – administrative procedural law, including to the structure of administrative process, for example, licensing and registration procedures;

- the second part of scientists tries to prove the existence of an independent branch of law – administrative procedural law, including to the content of the administrative process only activity of the administrative courts regarding consideration public disputes within an administrative proceedings. On this basis it is concluded that there is an independent science of administrative procedural law;

- the third part of scientists, emphasizing affinity and strong connection between administrative material and administrative procedural norms, considers the knowledge about administrative procedures and administrative process as a part of a science of administrative law;

- the fourth part of scientists, emphasizing the different content of the concepts «administrative procedure» and «administrative process», claims that knowledge about administrative procedure related to the science of administrative law, and knowledge about administrative process – to the science of administrative procedural law [7, p. 110-111].

This situation has a negative impact both on the development of science itself, and the quality of law-making and law enforcement activities of authority.

Based on the above-mentioned theoretical generalizations about the emergence and development of administrative procedural law in Ukraine, we can make such conclusions.

Contemporary development of science of procedural law is characterized by contradictory scientific views on the legal process, legal procedure, procedural law and judicial law. Such situation has a negative impact on development of scientific thought regarding the administrative procedures and its correlation with the administrative process. Scientists differently substantiate correlation between «administrative procedure» and «administrative process» and differently determine the place of the administrative procedural or administrative processual law in the system of law of Ukraine.

The process of emergence and development of administrative procedural law in Ukraine has been closely associated with the development of administrative law. Such situation had also a negative impact. Thus, for a long time administrative norms, administrative and legal relations, administrative and legal personality considered in the legal and educational literature only from the standpoint of material administrative law. Today it should be recognized the dual nature of the subject administrative and legal regulation, which is apparent in the fact, that administrative law not only establishes a system of rights and duties of subjects, but also regulates their implementation, establishing the appropriate administrative procedures. Therefore, there is an urgent need to clarify the contents of the administrative procedure and its correlation with the administrative process.

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