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IMPLEMENTING “GOOD GOVERNANCE” PRINCIPLES IN THE PRACTICE OF PUBLIC CONTROL

WDRAŻANIE ZASAD „DOBREGO RZĄDZENIA” W PRAKTYCE KONTROLI PUBLICZNEJ

Abstract: The concept of secure functioning of public administration is defined, which is understood as the proper performance of its functions, which involves the implementation of European principles and standards of good administration. In Ukraine, which aspires to become a full member of the European Union, the implementation of these principles is one of the priority tasks, as it means the full protection of human rights and freedoms. The normative enshrinement and content of these principles are analysed, including legality, non-discrimination, absence of abuse of power, respect for privacy, respect of confidentiality, legal certainty (judicial protection of violated rights) and appeal against decisions. It is concluded that the implementation of these principles requires constant and effective control over the activities of public administration, which is entrusted to all governmental entities, as well as members of the public. The peculiarities of certain types of such control are clarified: parliamentary, presidential, internal administrative (control of executive bodies), judicial, municipal and public.

Zarys treści: Zdefiniowano pojęcie bezpiecznego funkcjonowania administracji publicznej, rozumiane jako prawidłowe wykonywanie jej funkcji, co wiąże się z wdrażaniem europejskich

zasad i standardów dobrej administracji. W Ukrainie, aspirującej do pełnego członkostwa w Unii Europejskiej realizacja, tych zasad jest jednym z zadań priorytetowych, gdyż oznacza pełną ochronę praw i wolności człowieka. Analizowane jest uregulowanie normatywne i treść tych zasad, w tym legalność, niedyskryminacja, brak nadużycia władzy, poszanowanie prywatności, poszanowanie poufności, pewność prawa (sądowa ochrona naruszonych praw) oraz odwołania od decyzji. Stwierdza się, że realizacja tych zasad wymaga stałej i skutecznej kontroli nad działalnością administracji publicznej, powierzonej wszystkim podmiotom rządowym, a także członkom społeczeństwa. Wyjaśniono specyfikę niektórych rodzajów takiej kontroli: parlamentarnej, prezydenckiej, wewnętrznej administracji (kontrola organów wykonawczych), sądowej, komunalnej i publicznej.

Key words: public administration, functioning, European principles, security, control

Słowa kluczowe: administracja publiczna, funkcjonowanie, zasady europejskie, bezpieczeństwo, kontrola

Nowadays, radical reform of practically all spheres of public administration is taking place in Ukraine. The main purpose of this reform is to ensure the functioning of a democratic state apparatus for the benefit of the people and to significantly improve their lives, which also requires improvement in the mechanism of exercising people's rights and freedoms. The principles of good administration are fundamental in its functioning as they are a guide for the practical implementation of public administration functions and are aimed at protecting the rights of individuals when dealing with them.

In Ukraine, however, there are still many issues with regard to this, one of which is to ensure its safe operation and thus provide for the creation of conditions for the free and full performance of its functions and to prevent violations of the rights, freedoms and legitimate interests of individuals, the ultimate consumers of government services. Implementation of this requires constant and effective control over the activities of public administration, the leading role in which belongs to civil society institutions.

The legal literature notes the growing popularity in Ukraine of the European concept of governance and its aspect of 'good governance', which reflects the state (qualitative and quantitative characteristics) of key public relations between public authorities and individuals, and provides a number of important indicators for a democratic society (indexes) which assess the conditional proximity of the country to the 'pure types' of principles and standards of good governance.¹

At the same time, the focus is mainly on the general principles of governance aimed at ensuring the proper functioning of public administration, such as proper legislation, participation, transparency in decision-making, access to information, appropriate staff, proper financial and budgetary management and efficiency, etc. We want to address the principles of good administration, which determine the possibility of exercising control over the activities of governmental entities in order to ensure

¹ A.A. Pukhtets'ka, *Zaprovadzhennya pryntsyyp i vta standartiv nalezhnoho uryaduvannya udiyal'nosti publichnoyi administratsiyi*, http://ekmair.ukma.edu.ua/bitstream/handle/123456789/3840/Pukhtetska_Zaprovadzhennia_pryntsyypiv.pdf;jsessionid=2CB367A63F732B45EA54BBBF9708EF6?sequence=1, [access: 23.02.2022].

the safety of their functioning. These include, in our opinion, the principles of good administration set out in the Council of Europe Recommendation CM/Rec (2007) 7² and the European Code of Good Administrative Behaviour,³ such as legality, non-discrimination, absence of abuse of power, respect for privacy, confidentiality, legal certainty (protection of violated rights), appeals against decisions, etc. Ensuring control over the proper functioning of public administration is also included in European standards of good administration.

It is clear that the formulation of certain principles, standards and recommendations is the basis for their implementation in the relevant legislation, which should ensure their actual implementation. In particular, many of them are enshrined in the European Commission’s Code of Good Administrative Behaviour for Staff of the European Commission in Their Relations with the Public,⁴ which includes legality, non-discrimination, proportionality of measures pursued by the principles on which relations between the Commission and the public should be based and consistency of administrative behaviour.

It should be noted that in the national legislation of different countries, these principles are reflected differently. For example, Article 29 of the Constitution of the Republic of Lithuania⁵ defines the principle of non-discrimination as follows: ‘The rights of the human being may not be restricted, nor may he be granted any privileges on the ground of gender, race, nationality, language, origin, social status, belief, convictions, or views’. Article 3 of the Law of the Republic of Lithuania ‘On Public Administration’⁶ sufficiently defines the principle of absence of abuse of power, according to which public administration entities are prohibited from performing public administration functions without public administration powers granted in accordance with the procedure established by law or make administrative decisions aimed at achieving goals other than those provided by law or other regulations.

In the Constitution of the Republic of Poland⁷ many articles are also devoted to the mentioned principles. For example, Article 7 quite succinctly and clearly enshrines the principle of legality: ‘Public authorities act on the basis of and within the law’. Article 32 also summarizes the principle of non-discrimination: ‘No one may be discriminated against in political, public or economic life for any reason’.

² *Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration*, <https://rm.coe.int/cmrec-2007-7-of-the-cm-to-ms-on-good-administration/16809f007c>, [access: 23.02.2022].

³ *The European Code of Good Administrative Behaviour*, <https://www.ombudsman.europa.eu/en/publication/en/3510>, [access: 23.02.2022].

⁴ *Code of Good Administrative Behaviour for Staff of the European Commission in Their Relations with the Public*, https://ec.europa.eu/info/sites/info/files/code-of-good-administrative-behaviour_en.pdf, [access: 23.02.2022].

⁵ *Constitution of the Republic of Lithuania*, <https://www.wipo.int/edocs/lexdocs/laws/en/lt/lt045en.pdf>, [access: 23.02.2022].

⁶ *Republic of Lithuania Law on Public Administration*, https://e-seimas.lrs.lt/portal/legalAct/lt/TAID/6996d4c0d86111e8820ea019e5d9ad04?jfwid=-fxdp6xrf#part_3e432904ef014c3dad16d29b0df755fa, [access: 23.02.2022].

⁷ *Konstytucja Rzeczypospolitej Polskiej*, <http://www.sejm.gov.pl/prawo/konst/polski/kon1.htm>, [access: 23.02.2022].

These principles are reflected in the Constitution of Ukraine⁸. In particular, p. 2 of Art. 19 in a generalized form defines the concept of legality in the activities of public authorities: 'public authorities and local self-governments, their officials are obliged to act only on the basis, within the powers and in the manner prescribed by the Constitution and laws of Ukraine'. Other articles discuss non-discrimination, confidentiality, protection of violated rights, appeals against decisions, etc.

Thus, from the above we can conclude that in legal documents of different levels the principles of good administration, including those relating to the security of public administration, have been systematically enshrined. The task is for their full and proper implementation and effective control over this process in order to identify and eliminate possible violations. The literature emphasizes the importance of implementing these principles by states seeking to have a good and efficient administration, which should be carried out, inter alia, on the basis of their proper understanding⁹.

It is necessary to elaborate in more detail on the content of these principles and the system of control over their observance. Thus, legality is the leading constitutional principle of the functioning of public administration, which includes security. The definitions of this concept in the Constitutions of Ukraine and of the Republic of Poland were discussed above. The analysis of their provisions allows us to summarize that legality in the field of public administration means: a) accurate and uniform implementation of laws by all its subjects; b) compliance of administrative actions with the state will, which is expressed in laws; c) decision-making by the specified subjects within their competence, in an established order and a certain form; d) the impossibility of changing the competence of the subject of power by said subject of power; e) effective control over observance of laws.

Article 2 of the above-mentioned Council of Europe Recommendations also defines the principle of legality in great detail. It stipulates that public authorities must act in accordance with the law; they should not take arbitrary measures, even in the exercise of discretion; they must comply with national law, international law and the general principles of law governing their organization, operation and activities; they must act in accordance with the rules governing their powers and the procedures set out in their rules of management; they exercise their powers only if the established facts and current legislation allow them to do so and only for the purpose for which they were provided¹⁰.

The principle of non-discrimination was also mentioned above. Article 5 of the European Code of Good Administrative Behaviour deals with ensuring equality. Thus, when considering public requests and making decisions, the official ensures

⁸ *Konstytutsiia Ukrainyvid 28 chervnya 1996 r.*, <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text>, [access: 23.02.2022].

⁹ M. Batalli, A. Fejzullahu, *Principles of Good Administration under the European Code of Good Administrative Behaviour*. Pécs Journal of International and European Law - 2018/I, http://ceere.eu/pjiel/wp-content/uploads/2018/08/28_pjielPJIEL1801.pdf, [access: 23.02.2022].

¹⁰ *Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration*, <https://rm.coe.int/cmrec-2007-7-of-the-cm-to-ms-on-good-administration/16809f007c>, [access: 23.02.2022].

compliance with the principle of equality. If there is any difference in treatment, the official must ensure that it is justified by the objectively relevant features of the particular case. In particular, the official shall avoid any unjustified discrimination between members of the public on the basis of nationality, sex, race, colour, ethnic or social origin, genetic characteristics, language, religion or belief, political or any other opinion, belonging to a national minority, property, birth, disability, age or sexual orientation.¹¹

Article 7 of this Code also discloses the content of the principle of absence of abuse of power: powers are exercised exclusively for the purposes for which they were granted by the relevant provisions. In particular, an official should avoid using those powers for purposes which have no basis in law or which are not motivated by any public interest.

The principle of respect for privacy and confidentiality is disclosed in Article 9 of the Council of Europe Recommendation CM/Rec (2007) 7, according to which public authorities must respect confidentiality, especially when processing personal data. When public entities are authorized to process personal data or files, in particular by electronic means, they must take all necessary measures to ensure confidentiality. The rules concerning the protection of personal data, in particular the right to access personal data and to ensure the correction or deletion of any data that is inaccurate or should not be recorded, apply to personal data processed by public authorities.¹² Article 21 of the European Code of Good Administrative Behaviour adds that an official must avoid the processing of personal data for unlawful purposes or the transfer of such data to unauthorized persons.¹³

The protection of infringed rights and the right to appeal against decisions is enshrined in Article 22 of the Council of Europe Recommendation CM/Rec (2007) 7, which stipulates that individuals have the right to request, directly or exceptionally, a judicial review of an administrative decision directly affecting them, their rights and interests. Administrative appeals, prior to judicial review, may, in principle, be possible. In some cases, they may be required. They may concern an appeal on the merits or an appeal against the legality of an administrative decision. Individuals should not suffer from prejudices on the part of public authorities to appeal an administrative decision.¹⁴

It is necessary to highlight that we directly link the proper implementation of governance with ensuring the security of functioning of public administration. This conclusion can be made, in particular, from the analysis of the so-called security

¹¹ *The European Code of Good Administrative Behaviour*. <https://www.ombudsman.europa.eu/en/publication/en/3510>, [access: 23.02.2022].

¹² *Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration*. <https://rm.coe.int/cmrec-2007-7-of-the-cm-to-ms-on-good-administration/16809f007c>, [access: 23.02.2022].

¹³ *The European Code of Good Administrative Behaviour*. <https://www.ombudsman.europa.eu/en/publication/en/3510>, [access: 23.02.2022].

¹⁴ *Council of Europe Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration*. <https://rm.coe.int/cmrec-2007-7-of-the-cm-to-ms-on-good-administration/16809f007c>, [access: 23.02.2022].

legislation of Ukraine, primarily the Law of Ukraine ‘On National Security of Ukraine’ of 21 June 2018 № 2469-VIII¹⁵ and the National Security Strategy of Ukraine approved by the Decree of the President of Ukraine of 14 September 2020 № 392/2020.¹⁶ For example, the mentioned Strategy recognizes, as threats to the national security and national interests of Ukraine; insufficient efficiency of state bodies, crime, inconsistency and incompleteness of reforms, corruption and insufficient protection of property rights, etc. Among the main directions of the state’s internal political activity to ensure its national interests and security, the Strategy stipulates that Ukraine is determined to establish the constitutional principle of the rule of law and equality before the law. The state will, in particular, ensure transparency and accountability of state bodies, integrity of officials, effective access to justice and improve pre-trial investigation of criminal offences as well as trials of criminal proceedings and execution of sentences imposed by courts. The declaration of the principle of zero tolerance for corruption, ensuring the effective operation of bodies that prevent and combat corruption offences is also declared. Thus, the prospects are outlined quite accurately and correctly. The main thing is that they are just as clearly and consistently turned into a real practice of public administration.

Control over compliance with the principles of good administration in Ukraine is exercised by virtually all governmental entities, especially law enforcement and regulatory agencies, as well as members of the public. The mentioned Law of Ukraine ‘On National Security of Ukraine’ defines the principles of democratic civil control, its principles, subject and system. Hence, the system of civil control consists of control exercised by the the following; the President of Ukraine, the Verkhovna Rada of Ukraine, the National Security and Defence Council of Ukraine, the Cabinet of Ministers of Ukraine, executive bodies and local self-government bodies, judicial control and public oversight. The allocation of control by the National Security and Defence Council of Ukraine is not entirely clear, as this Council is headed by the President of Ukraine, so in the theory of administrative law it is considered an element of presidential control.

In its essence, such a system of control reflects the structure of public authorities and local self-government, supplementing them with public actors. It should be emphasized that in Ukraine there is no specific, specialized controlling body at the highest level of state power, unlike, for example, the Republic of Poland, which in Art. 202 of the Constitution provides for the establishment of the highest body of state control – the Supreme Chamber of Control. According to Article 203 of the Constitution of the Republic of Poland, this Chamber supervises the activities of governmental bodies, the National Bank of Poland, state legal entities and other state organizational units in terms of legality, economy, expediency and good faith. On the same grounds, the Supreme Chamber of Control may control the activities of other

¹⁵ *Pro natsional'nubezpekuUkrayiny, zakon Ukrayinyvid 21 chervnya 2018 roku № 2469-VIII*, <https://zakon.rada.gov.ua/laws/show/2469-19?lang=en#Text>, [access: 23.02.2022].

¹⁶ *Stratehiya natsional'noyi bezpekyUkrayiny: zatverdzhena Ukazom Prezydenta Ukrayinyvid 14 veresnya 2020 roku № 392/2020*. <https://www.president.gov.ua/documents/3922020-35037>, [access: 23.02.2022].

entities such as local self-governments, communal and other organizational units and entities within the limits in accordance to which they use state or municipal property and funds.¹⁷

Presidential control in Ukraine is divided into direct and indirect control. The first is carried out when solving personnel issues, in the rule-making sphere, etc. Indirect presidential control is exercised through auxiliary structures whose activities are aimed at verifying the implementation by public administration entities of decrees and orders of the President through the Office of the President (both in general and through specialized departments, as well as special entities, such as the President’s representative in the Cabinet of Ministers of Ukraine).

Parliamentary control is exercised by the Verkhovna Rada of Ukraine and its structural subdivisions. Specialized subjects of parliamentary control are committees of the Verkhovna Rada of Ukraine, temporary special commissions and temporary investigation commissions. The Accounting Chamber of Ukraine is a permanent body that carries out activities to control the use of funds from the State Budget of Ukraine. The Commissioner for Human Rights of the Verkhovna Rada of Ukraine exercises control over the observance of human and civil rights and freedoms in the activities of public administration. Finally, control is exercised in the activities of individual deputies (the right of parliamentary request, participation in verification of compliance with the law by the subjects of public administration, the requirements for a particular subject of public administration, etc.).

Internal administrative control (control by executive bodies) includes control of bodies of general competence – the Cabinet of Ministers of Ukraine, local state administrations; departmental control – control carried out by central executive bodies, their structural subdivisions in relation to subdivisions organizationally subordinated to them; supra-departmental control – control carried out in relation to things that are not organizationally subordinated to the subject of control (individual ministries and other central executive bodies); administrative supervision – the implementation of special state bodies (state inspections) control and supervisory functions for compliance with various bodies, enterprises, institutions and organizations and citizens, regardless of their subordination to the rules, norms and standards established in regulations in the relevant field.

Judicial control is a law-based activity of courts of all types and levels to verify the legality of acts and actions of public administration entities and their officials.

Self-governing (municipal) control is exercised in two ways: control over the activities of local self-governments themselves in the exercise of public administration activities (a kind of internal control) and control over the activities of local executive bodies (local state administrations are accountable to the relevant councils for socio-economic and cultural development programmes and budgets which are held accountable and under control in terms of the powers delegated to them by the relevant councils).

¹⁷ *Konstytucja Rzeczypospolitej Polskiej*, <http://www.sejm.gov.pl/prawo/konst/polski/kon1.htm>, [access: 23.02.2022].

It is worth paying attention to the regulation of public control, which in the Law ‘On National Security of Ukraine’, given its specifics, is called supervision, because its subjects have no control (in the classical sense) powers, including the right to interfere in the operational activities of subjects public administration and the right to prosecute independently. Members of the public mostly detect violations of the law in the activities of government entities but, nevertheless, cannot undertake personal measures to address them on their own.

Hence, Article 10 of the above mentioned Law stipulates that citizens of Ukraine participate in civil control through public associations of which they are members, through deputies of local councils, personally by appealing to the Verkhovna Rada Commissioner for Human Rights or state bodies. A public association registered in the manner prescribed by law is guaranteed a number of rights to exercise public supervision. In accordance with the Constitution and laws of Ukraine, as well as statutory provisions, they may:

1. receive in the prescribed manner from state bodies information on their activities, except for information with confidential access;
2. carry out research on national security and defence, publicly present their results and create public funds, centres and teams of experts;
3. conduct a public examination of draft laws, decisions, programmes and submit their conclusions and proposals for consideration by the relevant state bodies;
4. participate in public discussions and open parliamentary hearings on the activities and development of the security and defence sector, issues of legal and social protection of military personnel and employees of intelligence and law enforcement agencies.¹⁸

It is clear that these rights of public associations are not limited to the security and defence sector, there are similar rights in all spheres of life of the state and society.

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¹⁸ *Pro natsional'nubezpekuUkrayiny: zakon Ukrayinyvid 21 chervnya 2018 roku № 2469-VIII*, <https://zakon.rada.gov.ua/laws/show/2469-19?lang=en#Text>, [access: 23.02.2022].

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Summary

Ensuring the safe functioning of public administration involves the proper performance of its functions, which in a concentrated form is reflected in the European principles and standards of good administration. In Ukraine, which aspires to become a full member of the European Union, the implementation of these principles is one of the priority tasks, because it means the full protection of human and civil rights and freedoms. The implementation of this task requires constant and effective control over the activities of public administration, which is entrusted to all governmental entities, as well as members of the public.