

DOI <https://doi.org/10.51647/kelm.2020.8.1.37>

## POSTĘPOWANIE ADMINISTRACYJNE W UKRAIŃSKIM PRAWIE ADMINISTRACYJNYM: OBECNY STAN I PERSPEKTYWY ROZWOJU

*Mykhailo Maletych*

*kandydat nauk prawnych*

*ORCID ID: 0000-0002-2933-0623*

*e-mail: m.maletich.61@gmail.com*

W artykule autor rozważa ważne kierunki rozwoju administracyjno-prawnej regulacji postępowania administracyjnego, proponuje zastosowanie europejskich podejść do poprawy formy prawnej, treści, zasad, gwarancji w regulacyjnym ustalaniu wymagań dotyczących postępowania administracyjnego.

Zaproponowano opracowanie szeregu nowych aktów prawnych – Narodowej Strategii i Narodowego Planu Reformy Administracyjnej pod auspicjami Gabinetu Ministrów Ukrainy, Ustawy Ukrainy „O ogólnych zasadach postępowania administracyjnego” z utwaleniem w nim wspólnych i specjalnych cech systemu postępowań administracyjnych, ich rodzajów, podmiotów i obiektów, odpowiedzialności uczestników postępowań administracyjnych i procedury ochrony ich praw.

**Słowa kluczowe:** postępowanie administracyjne, uczestnicy postępowania administracyjnego, regulacje administracyjno-prawne, zasady, gwarancje, prawa człowieka, ochrona sądowa, zaskarżenie administracyjne, delikt administracyjny, Kodeks.

## ADMINISTRATIVE PROCEEDINGS IN THE UKRAINIAN ADMINISTRATIVE LEGISLATION: MODERN STATE & DEVELOPMENT PERSPECTIVES

*Mykhailo Maletych*

*Candidate of Legal Sciences*

*ORCID ID: 0000-0002-2933-0623*

*e-mail: m.maletich.61@gmail.com*

**Abstract.** In this article author has reviewed the main approaches of administrative legal regulation development for administrative proceedings, has proposed implementation of European approaches to improvement of the legal form, essence, principles, guaranties in normative fixation of demands to administrative proceedings. Author proposed to develop a range of new legislative acts – the National Strategy and the National Plan of administrative reform realization under guidance of the Cabinet of Ministers of Ukraine, the Law of Ukraine “On general grounds of administrative proceedings” with fixation in it of general and special features of the system of administrative proceedings, their types, authorized bodies and objects, responsibility of participants to administrative proceedings and the order of their rights protection.

**Key words:** administrative proceeding, participants to administrative proceeding, administrative legal regulation, principles, guaranties, human rights, court protection, administrative review, administrative offence, code.

## АДМІНІСТРАТИВНІ ПРОВАДЖЕННЯ В УКРАЇНСЬКОМУ АДМІНІСТРАТИВНОМУ ЗАКОНОДАВСТВІ: СУЧАСНИЙ СТАН ТА ПЕРСПЕКТИВИ РОЗВИТКУ

*Михайло Малетич*

*кандидат юридичних наук*

*ORCID ID: 0000-0002-2933-0623*

*e-mail: m.maletich.61@gmail.com*

**Анотація.** У статті автором розглянуті важливі напрями розвитку адміністративно-правового регулювання адміністративних проваджень, запропоновано застосування європейських підходів до вдосконалення правової форми, змісту, принципів, гарантій у нормативній фіксації вимог до адміністративних проваджень. Запропоновано розробку низки нових актів законодавства – Національної стратегії та Національного плану проведення адміністративної реформи під егідою Кабінету Міністрів України, Закону України «Про загальні правила адміністративних проваджень» із закріпленням у ньому загальних і спеціальних ознак системи адміністративних проваджень, їх видів, суб'єктів і об'єктів, відповідальності учасників адміністративних проваджень та порядку захисту їхніх прав.

**Ключові слова:** адміністративне провадження, учасники адміністративного провадження, адміністративно-правове регулювання, принципи, гарантії, права людини, судовий захист, адміністративне оскарження, адміністративний делікт, кодекс.

**Introduction.** Actuality of administrative proceeding development in Ukraine became important due to ineffective state regulation and control in the sphere of economics, banking activity, finance, agriculture, education & science, public health protection. Many official measures had not been taken during reasonable time that resulted into incapacity to influence important types of legal relations. In this respect it is important to develop new European approaches as to the form, methods, types of administrative proceedings introduced in the effective legislation of European countries, showing positive trends for development of domestic legal regulation and law-enforcement practice.

The main aim of this article is to review modern approaches to development of administrative proceedings in the Ukrainian legislation and to provide proposals for codification & systematization of a wide range of by-laws, regulating important spheres of social relations with private persons. Among the main assignments of this article I would like to stress attention on the following aspects: generalization of modern state of administrative regulation of administrative proceedings in the effective legislation of Ukraine; explanation of the main drawbacks & ineffective practices in administrative relations; proposals and recommendations as to development of domestic administrative procedures, administrative review, judicial review of administrative action.

**Main part.** Administrative reform in Ukraine had led to development of certain types of administrative proceedings, defined in the main codified acts, such as: draft Administrative procedure code, Code on administrative offences of Ukraine, Code of administrative adjudication of Ukraine, Law of Ukraine “On citizen’s applications”, Law of Ukraine “On the grounds of public health protection”, Law of Ukraine “On civil service” and a variety of others, that still have strong impact of a former Soviet legal tradition, having strong state-centered nature, not taking into consideration real needs of private persons and citizens. Democratization of administrative regulation in Ukraine had partial impact, as had been introduced only in the spheres non-influenced by powerful oligarch structures, as the formers do not need any transformations and development except for their own business interests (Averianov, 2005: 25).

Decentralization of the state, that has been proclaimed in 2016 showed partial effectiveness of the introduced administrative regulations and immanent to them administrative proceedings, as the most of them had been constructed according to the Soviet rules and law-drafting practices, not taking into account external influence and impact on social relations, local administrations, local self-governance institutions activities. In this respect, in my opinion, modern Ukrainian legislation should transform in a way, proposed by the leading European countries and introducing effective measures for human rights realization and protection, providing possibilities to review any illegal administrative action.

At legislative level, one should admit, that the effective legislation of Ukraine witnessed serious influence of neo-Soviet tradition, trying to introduce partially positive features of legal regulation, approved by the oligarch community. Such a partial implementation of democratic standards, practices led to ineffective administrative regulation & drawbacks of modern domestic administrative practice that has strong negative effect of development of the state as a whole. Among positive features, I should note approval of a range of new legislative acts, developing the scope of administrative law in Ukraine: Law of Ukraine “On civil service”, “On banking activity”, “On citizens applications”, the Code of administrative adjudication of Ukraine, draft Administrative procedural code of Ukraine and many others.

At the level of by-laws Ukrainian legislation has significantly increased and showed tendency to uncontrolled multiplication along with the trend of multiplication of administrative bodies and agencies due to the steps of administrative reform realized in 2010–2021 at central level. Administrative legal status of ministries had been upgraded, although only partially at legislative level, but most of functions, obligations and proceeding are regulated at by-laws level, such a state cannot be considered as a necessary consequence of administrative reform, and needs further transformation & review of administrative mechanisms applied both at central and local levels.

To summarize the above-mentioned, it should be underlined, that effective domestic legislation had been partially modernized due to the interests of state & state-related oligarch institutions that take care primarily of their own prerogatives. Lack of state financing for development of new legislation in the sphere of economics, finance, public health, banking activities leads to a more that twenty years difference in legal regulation practice & methods applied for modernization of administrative proceedings (Averianov, 2006: 89). Only economically developed countries may dispose significant financial costs for future development at legislative level, in Ukraine such a financing is realized by political parties, representatives of powerful private companies and oligarch structures that protect their interests (Administrative procedure and control, 1999: 124). That is why many laws are drafted in a such a way, that makes it possible to apply to an only state company or an only private person in economy.

So, it is important to develop at doctrinal and legislative levels *modern conceptual framework for improvement of administrative legal regulation of administrative proceedings*, so that such a regulation would have common nature for the most important social relations & would provide necessary possibilities and guaranties for human rights realization and protection, administrative review, administrative decision-making, consulting citizens. Such a conceptual framework must focus on the administrative procedures, administrative judicial proceedings, administrative review procedures and also consulting & information activities connected to the nature of administrative proceeding under review. Till this time such a conceptual framework had not yet been realized and needs specification as to the mentioned main types of administrative proceedings under the effective Ukrainian legislation.

I would suggest developing legislative provisions, covering common features of administrative proceeding both of conflict and non-conflict nature, as it is important to introduce a new kind of administrative proceedings, having complex features introduced in European practice, to avoid partial implementation of European standards of public

administration activities. It could be named as *Law of Ukraine "On general grounds of administrative proceedings"*, that would provide legislative grounds for implementation of good administration rules and principles in the Ukrainian legislation, that till this time had not taken any act or by-law on this issue. The structure of such a Law should contain chapters on the definitions used, administrative proceedings types, administrative proceedings rules, administrative proceedings standards and principles applied, administrative liability rules, administrative review and administrative execution modes, final provisions.

General legislative framework of administrative regulation should transform according to the introduced rules of the above-mentioned law according to the *National Strategy and National Plan of administrative reform, developed by the Cabinet of Ministers of Ukraine*, differentiating independent steps of such reforms and sharply concretizing the effects, results of such activities, their contribution and correlation with other actions of the Government and central administrative bodies.

Codified acts of administrative legislation of Ukraine should take first positions in the proposed National Strategy and National Plan of administrative reform, as they have prior influence on realization of administrative relations, protection of public interests. Among them I should admit drafting *Administrative procedural code of Ukraine* as a necessary complex legal normative act, defining not only general, but all necessary legal conditions, stages of administrative procedures, and administrative decisions to be taken by administrative bodies that would make it possible to obtain a desired effective administrative acts during reasonable time and under effective external control of civil society.

Amendment and, in fact, re-structuring of the *Code on administrative offences of Ukraine* should result into new classification of objects of administrative legal protection, that would, finally, lead Ukrainian practice of administrative sanctions application to a new democratic model, protecting a person, not a state, above all. Administrative conflict proceedings need significant review of the mechanisms applied, the powers realized, their limits and possibilities of review according to the concept of good administration, I mean, to provide at site implementation of the mentioned concept in administrative procedures and conflict proceedings.

Development of the *Code of administrative adjudication of Ukraine* in modern perspective has more positive features, that the above-mentioned codified acts, but still lacks implementation of the Rule of law grounds, minimum standards of human rights protection, review of administrative action according to the principles implied via implementation of European administrative law principles.

At the same time, it is important to explain the main drawbacks & ineffective practices in administrative relations, governed by the effective Ukrainian legislation rules. Among certain drawbacks I should admit *negative practice of third persons influence on the administrative proceeding, corrupted practices that sometimes make impossible licensing or registration proceedings*, due to impact of oligarch companies or employed civil servants, taking decisions on the issue. New legislation must propose such an effective administrative mechanism that would make it possible for any personal application to reach the goal – legal administrative act taken in an individual case. Without such a reform, administrative proceedings stay a toy in their hands, but Ukrainian citizens deserve effective legal mechanisms and human rights protection rules.

Another negative feature of modern Ukrainian practice in realization of administrative positive proceedings is *lack of implementation of European principles of administrative law, common to the leading European countries*, that also has strong negative effect of citizen's rights realization. For example, right to be heard, right to review any administrative act are a rare doctrinal example, but not a legal framework necessary element, that needs further strengthening in Ukraine. The same is true for implementation of *modern European standards of public administration activity* that is a necessary source for real transformation of administrative proceedings in Ukraine. Such amendments should take place at the level of the Constitution of Ukraine and substantive Laws of Ukraine "On the Cabinet of Ministers of Ukraine", "On central executive authorities", "On civil service" etc.

Ukrainian administrative practice of central administrative agencies activities shows a *significant number of refusal case, that are not allowed in common European practice* are to be subject to further transmission to a competent administrative body. It is important for a wide population, as general level of legal knowledge and capacity to protect his interests are at very low level and people should consult administrative body on the necessary procedure. In Ukraine it is necessary to implement due digital consulting and informing citizens on the rendered administrative services, order of administrative decision-making.

Also, I should not ignore important negative aspect of *formal refusal letters, that contain answers on citizen's applications*, as such a negative practice has wide application and citizens cannot overcome such a violation of their rights, as believe, that administrative body had duly exercised their powers. Unfortunately, many public officials do not have enough time or knowledge to take individual decisions, and in the most of unsure cases, citizens may receive formal refusal letters (Bezverhniuk, 2008: 201). So, it should be drafted such provisions of the General Law on administrative proceedings, that would contribute to raising legal certainty in administrative relations with public administration bodies.

*Absence of private costs* is another aspect that needs peculiar attention, as in Ukraine citizens have a very low-income rate and cannot dispose their family budget destined to food and communal payments, in such a situation additional payments for any administrative actions shows refusal to use administrative services. So, in future it would be desirable to draft a separate Law of Ukraine "On free rendering administrative services to vulnerable groups & citizens in Ukraine". As such an experience is already used in European countries, it would have positive effect for development of administrative infrastructure and new modes, terms of rendering administrative services

to the population.

As to the third assignment of this article, I would like to draw your attention to the following proposals and recommendations as to development of domestic administrative procedures, administrative review, judicial review of administrative action in their correlation with formal administrative proceedings rules transformation perspectives. Unfortunately, recent approaches to development of separate administrative codes in Ukraine were underestimated, so general rules for administrative proceedings had not been introduced, that causes into such a state of legal and by-law administrative regulation, that provides chaotic mechanisms and practice for administrative decision-making. Main types of administrative proceedings, necessary for private persons and business, such as registration, licensing, permission procedures are different as to the will of administrative body, providing correspondent administrative acts (Koliushko, 2002: 172). In my opinion, general grounds of administrative proceedings do need common administrative legal regulation and the above-mentioned Law would be the best normative act for that.

Development of administrative procedures in Ukraine also faces many different approaches to their performance, even payment grounds as not the same for different administrative bodies, citizens and legal entities. Administrative services although well-appreciated among Ukrainian population, but need further development of infrastructure for providing administrative services not only at special administrative centers, offices, but at the most suitable for general public level, including modern tools and modes of digital administrative services rendering, digital consulting, digital informing, digital sending and notification on taken administrative decision to a private person.

Administrative review of administrative action in Ukraine should not be subject to different interpretation at the level of by-laws, but to be an element of a codified normative act, a separate stage of administrative procedure, having not a compulsory nature, but needing to be shaped by common standards & principles of review of administrative action (Pukhtetska, 2014: 74), introduced in European countries and showing capability to review and to protect human rights at any level of administrative bodies. Till this time administrative review is differentiated according to the scope of administrative authority functions, and the scope of review may differ, both as the grounds, terms and responsibility of public servants. Such drawbacks may be improve within the frame of a codified act on administrative procedure.

Judicial review of administrative action refers to a specific type of conflict administrative proceedings subject to administrative justice jurisdiction rules, but most of rules still do not contain demands on proportionality, Rule of law demands application, granting minimum procedural guarantees to the parties of administrative case, so the effective Code of administrative adjudication of Ukraine should be amended according to the modern rules of the European court of human rights decisions in the spheres of realization of public interest, common interest, protection of private interest from illegal impact or activities of empowered bodies.

**Conclusions.** Modern state and development of effective administrative regulation of administrative proceedings in Ukraine faces serious external and internal influence of transformational period's in a social, democratic state, but lacking new mechanism, legal forms, guaranties provided in the European legislation for human right protection in relations with executive authorities.

Generalization of modern state of administrative regulation of administrative proceedings in the effective legislation of Ukraine has been performed on the examples of modern codified acts development and adopting new laws, by-laws, that made it possible to provide general and specific proposals as to development of new laws, national strategies and plans, further steps of administrative reform in Ukraine.

Main drawbacks & ineffective practices in administrative relations have been described according to the effective demands of Ukrainian legislation and were oriented on overcoming negative practice of formal refusal letters to the citizens of Ukraine, improvement of administrative services rendering, consulting and informing people on the nature, rules, terms, obligations of empowered administrative bodies in a concrete administrative proceeding, rules of review of administrative action.

Proposals and recommendations as to development of domestic administrative procedures, administrative review, judicial review of administrative action have been formulated according to the discussed drawbacks. Here have been proposed recommendations for amending administrative regulations, drafting new laws and by-laws, review of negative practices in activities of administrative bodies.

#### Bibliography:

1. Адміністративне право України. Академічний курс : підручник. У 2 т. Т. 2 Особлива частина / Ред. колегія: В.Б. Авер'янов (голова) та ін. Київ : Юридична думка, 2005. 624 с.
2. Авер'янов В.Б. Національна доповідь «Соціально-економічний стан України: наслідки для народу та держави». Підрозділ 5.5. Політичні, соціальні та гуманітарні аспекти становлення нової культури управління. Новий курс: реформи в Україні. 2010–2015. / Національна доповідь за заг. ред. В.М. Гейця. Київ : НВЦНБУВ, 2010. 232 с.
3. Авер'янов В.Б. Нова доктрина українського адміністративного права: концептуальні позиції. *Право України*. 2006. № 5. С. 12.
4. Адміністративна процедура та контроль за діяльністю адміністративних органів в Угорщині, Польщі, Болгарії, Естонії та Албанії. Київ : Вид-во УАДУ, 1999. 236 с.
5. Безверхнюк Т.М. Європейські стандарти врядування на регіональному рівні : монографія. Національна академія держ. управління при Президентові України, Одеський регіональний ін-т держ. управління. Одеса : Видавництво ОРІДУ НАДУ, 2008. 326 с.
6. Коліушко І.Б. Виконавча влада та проблеми адміністративної реформи в Україні. Ін-т держави і права

ім. В.М. Корецького НАН України, Центр політико-прав. реформ. Київ : Факт, 2002. 259 с.

7. Пухтецька А.А. Про зміст і спрямованість принципів адміністративного права. *Адміністративне право і процес*. 2014. № 3 (9). С. 73–86.

#### References:

1. Averianov, V. (2005). *Administrativne pravo Ukrainy* [Administrative law of Ukraine]. Akademichny kurs. Pidruchnyk u dvoch tomah. Osoblyva chastyna. Kyiv: Yurydychna doumka. 624 p. [in Ukrainian].
2. Averianov, V. (2010). *Natsionalna dopovid "Socialno-economicichni stan Ukrainy: naslidky dlya narody ta derzhavy"* [National Report "Social & economic conditions of Ukraine: consequences for the people and the state"]. Pidrozdil 5.5. Politychni, socialni ta humanitarni aspekty stanovlennya novoyi kultury upravlinnya. Novyi kurs: reform v Ukraini. 2010–2015: Natsionalna dopovid za zagalnoyu red. V.M. Heitsya. Kyiv: NVTsNBUV. 232 p. [in Ukrainian].
3. Averianov, V. (2006). *Nova doctrina Ukrainskoho administrativnoho prava: kontseptualni positsii* [A new doctrine of the Ukrainian administrative law: conceptual positions]. *Pravo Ukrainy*. 2006. No. 5. P. 12–18 [in Ukrainian].
4. *Administrativna procedura* (1999). *Administrativna procedura i control za diyalnistiy administrativnyh organov v Ugorshchini, Bolharii, Estonii ta Albanii* [Administrative procedure and control for activity of administrative bodies in Hungary, Bulgaria, Estonia, Albania]. Kyiv: Vydavnytstvo UADU. 246 p. [in Ukrainian].
5. Bezverhniuk, T.M. (2008). *Evropeiskie standarty uryadouvannya na rehionalnomy rivni* [European standards of governance at regional level]: monografia. Natsionalna akademiya derzhavnogo upravlinnya pri Presidentovi Ukrainy, Odesskyi rehionalnyi instytut derzhavnogo upravlinnya. Odessa: Vydavnytstvo ORIDU NADU. 326 p. [in Ukrainian].
6. Koliushko, I.B. (2002). *Vykonavcha vlada ta problemy administrativnoyi reformy v Ukraini* [Executive power and the issues of administrative reform in Ukraine]. Instytut derzhavy i prava imeni V.M. Koretskoho NAN Ukrainy. Kyiv: Fakt. 259 p. [in Ukrainian].
7. Pukhtetska, A.A. (2014). *Pro zmist i spryamovanist pryntsyypiv administrativnoho prava* [On the essence and orientation of administrative law principles]. *Адміністративне право і процес*. No. 3 (9). P. 73–86 [in Ukrainian].