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LEGAL FRAMEWORK FOR THE RIGHT TO GOOD GOVERNANCE

Ляман Ілгар кизи Аббасли. ЮРИДИЧНІ ЗАСАДИ ПРАВА НА НАЛЕЖНЕ ВРЯДУВАННЯ. Досліджено правові питання щодо формування та закріплення у нормативних правових актах права на належне врядування. Окрім того, що стаття 41 Хартії Європейського Союзу про основні права певним чином містить авторитетне визначення права на належне врядування, вона не є нововведенням. Ні мета, ні зміст принципу належного врядування не є новими для адміністративного права. Новаторська цінність статті 41 полягає, серед іншого, у проголошенні нею належного врядування як суб'єктивного права.

Реалізуючи це суб'єктивне право? громадяни можуть покладатися на належне врядування у своїх відносинах з державними органами так само, як і на інші закріплені в Хартії суб'єктивні права. Так само, як вони можуть ставитись до права на свободу думки, совісті та релігії, вони можуть претендувати на право отримати підстави для адміністративного рішення. В обох випадках громадянам надається інструмент для забезпечення виконання їхніх вимог щодо адміністративних органів.

Наукова новизна статті пов'язана з вищевикладеним, у тому числі з подальшим розвитком національного законодавства Азербайджанської Республіки. Визначення належного врядування надається (хоч і не вичерпним чином) пунктами 2-4 статті 41 так: право бути заслуханим до вжиття будь-якого індивідуального заходу, який торкнеться сторони; право кожної особи мати доступ до свого досьє з урахуванням законних інтересів конфіденційності та професійної і ділової таємниці; обов'язок органу надати підстави для прийняття рішень щодо тієї чи іншої особи. Результати статті можуть бути використані у майбутніх наукових дослідженнях, у тому числі при подальшому розвитку міжнародних та національних нормативно-правових засад стосовно права на належне врядування.

***Ключові слова**: права людини, право на хороше управління, Хартія ЄС про основні права, резолюцію Ради Європи, Європейський омбудсмен, Європейський суд з прав людини*.

Relevance of the study. The way in which the right to good governance is set out in Article 41 of the EU Charter of Fundamental Rights does not give a complete picture of its content. In fact, it was seen as a compendium, albeit incomplete, of individual rights developed by the court, and, moreover, as a formulation of the general right to good government. This requires some explanation. First, the rights listed in Article 41 of the Charter may include or incorporate other administrative principles not expressly set forth in its paragraphs. The first paragraph defines good governance as the right to impartial, fair and timely adjudication of cases. It does not mention the principle of prudence or due diligence, which includes the duty to respond to requests, the duty to act in a timely manner, to collect sufficient information and to consider the request.

However, they were considered to fall under the broader principle of good governance and should be included within the scope of Article 41(1) [3, p. 257]. Secondly, article 41 is a general provision. Since the sub-rules referred to in Article 41(2) are not listed exhaustively, the scope of the right to good governance is not limited to the rights directly listed. Thus, it may include rights other than those specifically listed in Article 41(2), i.e. other than the right to be heard, to have access to one's file and the duty of the administration to give reasons for its decision.

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In this regard, it should be noted that principles relating to important substantive administrative law, such as the principles of proportionality and legal certainty, are not mentioned in article 41. This leads to the third paragraph, which is a reminder that article 41 includes both procedural and substantive – legal requirements that provide individuals with the means to use them in their dealings with public authorities. The same applies to their relations with the EU institutions dealing with these issues [9, p. 244].

Recent publications review. Issues of legal basis of the right to good governance were considered in the works by S. Cassese, N. Foster, X. Groussot, C. Harlow, M. Hertogh, R. Kirkham, K. Kańska, R. Levin, E. Gellhorn, T. Mcgarity, J. Reichel and others.

The research paper's objective is to characterize the current structure and identify trends for future changes in the field of the right to good governance.

Discussion. The original intention of the Swedish government representative in the Convention on the Future of Europe was to ensure that the right to good governance had a specific legal basis in Part III of the treaty. The right to good governance is enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. The European Ombudsman also called on the Convention to include a Charter of Fundamental Rights in the Constitution and to create a clear legal framework for an open, accountable and service-oriented administration. When the Presidium presented the draft treaty, the term "good governance" was dropped and replaced by the phrase "open, efficient and independent governance". Thus, the current Article III-398 states that: 1. In the fulfilment of their tasks, the institutions, branches, branches and agencies of the Union shall be supported by an open, efficient and independent European administration. 2. In accordance with the provisions on personnel and terms of employment adopted on the basis of Article III-427, European laws establish the relevant provisions [2, p. 702].

In 1977, the Council of Europe, in its resolution 77 (31) TP4 PT, argued that since the development of the modern state has led to an increase in the importance of public administration, administrative procedures more often affect individuals). The main task of the Council of Europe is to protect the fundamental individual's rights and freedoms, and therefore it intends to make efforts to improve the procedural position of the individual in relation to the administration by promoting the adoption of rules that will ensure fairness in the relationship between the citizen and the administrative authorities. The following principles were stated: I – right to be heard; II – access to information; III – help and representation; IV – reasoning reasons; IV – justification of remedies.

In order to limit the scope of the principles, the Council stated that the proposed principles apply to "the protection of individuals or legal entities in administrative proceedings in respect of any individual action or decision taken in the exercise of public authority and of a nature which directly affects the rights, freedoms or interests of individuals or legal entities". The term "administrative procedures" excludes litigation from its scope, while the term "individual measures or decisions" excludes administrative acts of a more general nature, and finally, this term expressly excludes those who are only indirectly affected by an administrative act.

In hindsight, this resolution was an important first step towards establishing good administration as an operational legal concept, as it established a number of principles that today are generally regarded as central to the right to good governance. However, the term "good governance" is actually used in the Resolution as a limiting requirement for the implementation of the principles, and not as an individual right. The principles should be implemented with due regard to the "requirements of good and efficient management" [10].

European courts have highlighted the importance of due process as opposed to administrative discretion. The Court of Justice further recognized a set of general administrative principles, for example: the general principle of legal administration; the principle of non-discrimination; the principle of proportionality; the principle of legal certainty; protecting legitimate expectations; the right to be heard before an unfavorable public decision is made.

The obligation to present the grounds for decisions is fixed in the treaty in article 253 (former article 190): rules, directives and decisions ... set out the grounds on which they are based and refer to any suggestions or opinions that should have been received in accordance with this Agreement. The Court of Justice of the European Union and the European Court of Human Rights have made this article a fundamental right of individuals, thus creating an unwritten administrative law based on case law. Such reasoning of the EU Court of Justice and the Court of First Instance can be interpreted as an evolution from the French administration-oriented tradition to a more individual view of the administrative procedures of the community [4, p. 3].

The right to good governance, as well as the right to access documents, was included in the EU Charter of Fundamental Rights, which was signed and proclaimed in Nice on 7 December 2000. Article 41 contains the right to good government:

1. Everyone has the right to impartial, fair consideration of his case within a reasonable time by the institutions and bodies of the European Union.

2. This right provides, in particular: the right of each person to express his opinion, before measures are personally applied to him, which may entail adverse consequences for him; the right of every person to have access to materials concerning him, while respecting the legitimate interests of confidentiality, as well as professional and commercial secrets; the duty of administrative bodies to motivate the decisions made.

3. Everyone has the right to compensation by the Community for damage caused by its institutions or by its employees in the performance of their duties, in accordance with the general principles of the law of the Member States.

4. Each person may apply to the EU institutions in one of the official languages of the treaties and must receive a response in the same language.

Article 42 contains the right to documentation access: Every EU citizen, or any individual or legal entity residing or having an official registered seat in one of the Member States, has the right of access to the documents of the European Parliament, the Council and the European Commission. Article 41 is based on case law, which enshrined various principles of good governance. It should be noted that the right to good governance is considered as a category of rights, and not as an independent right. It is a group of rights listed in paragraphs 2-4. This list is not intended to be exhaustive and therefore the right to good governance may include rights other than those listed in this article. It still leaves grounds for the court to add new principles to the concept of the right to good governance [6, p. 325].

In accordance with the Maastricht Treaty, the Institute of the European Ombudsman was established with the aim of combating administrative violations in the activities of institutions and bodies of the community. Before the Ombudsman, there was only the Petitions Committee, which received complaints from the public. The committee still exists today, but plays a minor role in the work of good governance. Over the years, the Ombudsman has been continuously working on a general law on good governance as a means of preventing abuse. The Ombudsman has developed a code of good administrative conduct, containing 27 articles, which are intended in various ways to serve as rules of good administrative conduct.

The introduction states that by promoting good governance, the Ombudsman should help strengthen relations between the EU and its citizens. According to the Ombudsman's definition in his 1997 annual report, "Bad governance occurs when a public authority fails to act in accordance with a rule or principle that is binding on it". The European Parliament approved this definition [5, p. 138].

Future developments in the area of the right to good governance may follow some next trends. The eventual success of the new paradigm of administrative law as a member of the social sciences, interested not only in detecting and controlling illegal behavior through judicial review, but also in promoting better decision-making and better governance in the service of the common interest, will have an impact on epistemology and methodology, used by administratives in the future [1, p. 605]. A different approach to the general interest, a change in the idea that it already exists and can be found through bureaucratic expertise and a transition to understanding it as a combination of public and private interests that must be taken into account during the administrative procedure. This will lead to a conflict of interests and the role of the lobby in the executive branch. In this sense, the decision of the general court in case T_286/09 of June 12, 2014 is interesting in that it links good governance with transparency, objectivity and the need to register unofficial contacts.

More difficult is the regulation of procedures and organizations to promote good governance, using scientific developments about the human mind. It is likely that in the future we will be able to draw on cognitive psychology to identify cognitive illusions, better structure the administrative procedure, and propose an appropriate standard of judicial review regarding the duty of due care. In this sense, a derivative of good governance, so-called better or prudent regulation, relies more and more on the development of the behavioral sciences (especially psychology and economics). In relation to rulemaking, the doctrine of the rigid view is also referred to as the test of adequate consideration. Lower courts routinely apply it as the basis for concluding that an agency rule is arbitrary and capricious because the agency did not "adequately" address remarks criticizing its proposed rule, potential alternatives to that rule, and

studies inconsistent with the actual predicates for that rule. Since the 1970s, the courts have required institutions to include in their statements of reason and purpose a detailed discussion of their reasons, confirming the exercise of discretionary powers and indicating due care in considering the findings and observations presented during public hearings under article 553 of the APA [7]. Some authors have stressed that there is judicial activity and that the necessary restraint required by the principle of separation of powers has disappeared. Several professors argue that judicial review causes delays and is a waste of time and money, paralyzing public policy in some sectors and threatening public interests such as public health and the environment. This phenomenon is known as ossification or paralysis by analysis [8, p. 1385].

On the other hand, other opinions hold that the benefits of a hard look approach outweigh the costs, although they are not denied. This is the case of Shapiro (2003), who argues that the new judicial requirements "made rulemaking more time-consuming and costly, but the costs seemed worthwhile not only in terms of democratic benefits, but also in terms of increased rationality of the outcomes. An administrator faced with legal requirements for transparency and participation will almost automatically complete the regulatory cost-benefit analysis required by the rationality school". With regard to the overall results of the study, it should be noted that before the passing of the new constitutional treaty, the concept of good governance was codified in two documents with different status. First, in the EU Charter of Fundamental Rights, which has only the ambiguous status of "solemn proclamation" by the three most important institutions of the Union. Second, the meaning of this concept has been clarified in the Ombudsman's Code of Good Administrative Conduct, which is also non-binding. Thus, the legal status of the right to good governance will be significantly strengthened if the new constitutional treaty with Article III-398 is ratified.

In most EU Member States, there is also a clear trend towards strengthening the procedural rights of persons affected by administrative decisions. Over the past 15-20 years, a number of laws on administrative procedures have been adopted or reformed, indicating a greater degree of regulation of administrative procedure, as well as a greater emphasis on ethical frameworks. The following rights and obligations are part of Articles 41 and 42 of the Charter, and naturally should be considered as a central part of the concept of good governance: impartial and fair consideration of one's cases within a reasonable time (Article 41.1); be heard before any individual action is taken that will adversely affect the citizen (Article 41.2); have access to his or her file regarding any individual measure that could affect him or her (Article 41.2); the obligation to state in writing the reasons for all decisions (Article 41.2); the right of access to documents (Article 42).

Conclusions. With regard to the special results of the study, if we compare the provisions regarding the right to good governance in the legislation of the Republic of Azerbaijan with the analysis carried out, we can state the following:

– although the right to good governance is not established by a separate article in any legislative act of the Republic of Azerbaijan, if taken as a whole, all elements of this right can be found in national legislation. The main elements of the right to good governance are: the right to apply; a fair and impartial approach; consideration of cases within a reasonable time; to be heard and receive legal assistance in general; freedom of access to information. Article 60 of the Constitution of the Republic of Azerbaijan, entitled "Administrative and judicial protection of rights and freedoms", article 61, entitled "Right to receive legal assistance", article 32, establishing the right to personal inviolability, can be singled out as constitutional norms that include these elements, we can mention Article 57 entitled "Right of appeal". We consider it a serious need to adopt a separate legislative act on "good governance" as a mechanism of legal protection, including a number of constitutional rights;

– in general, the legislation of the Republic of Azerbaijan provides for giving special priority to human rights. Here we are talking about "the recognition, observance and protection of the rights and freedoms of man and citizen". This issue is also known as the responsibility of the state. On the basis of the Basic Law (Constitution) of the Republic of Azerbaijan, it can be argued that the functional goal of the state's fulfillment of its obligations in the field of human rights is to create the necessary (political, legal, economic, etc.) conditions for ensuring universally recognized standards in the field of human rights. On the one hand, the national features of the state-legal regulation of relations between the state and the individual are associated with historical and cultural traditions. On the other hand, in accordance with Articles 10, 12, 71, 148 of the Constitution of the Republic of Azerbaijan, international human rights act as a limiting factor of state sovereignty and require the implementation of the rights and freedoms

proclaimed in the Constitution (their implementation). In other words, it requires "good governance";

– one of the structural elements of the right to good governance is the right to appeal. Thus, the normative definition and effective implementation of the right to appeal allows the optimal implementation of the right to good governance in general. We believe that the legislation of the Republic of Azerbaijan has not fully taken into account the requirements of international legal acts in this area when determining the subject composition of the right to appeal. The fact is that if in international legal acts this right extends to "everyone", then in the Constitution of the Republic of Azerbaijan, where the right to appeal extends to "citizens", a restriction is applied to the circle of subjects of this right. In Article 57 of the Constitution of the Republic of Azerbaijan, the right to appeal is specifically established in relation to "citizens". Taking into account the provisions of the main international legal instruments on human rights, it is more correct to assume that the right to apply also applies to foreigners and stateless persons;

– one of the most important elements of the right to good governance "compensation for damages" is of particular importance. There are both legal and psychological problems here. The legal issue is that the state is trying to maintain a certain legal balance, creating an opportunity for a person whose rights have been violated to demand compensation for material damage. The psychological question is that if a person is not able to compensate for the material damage caused to him in the event of a violation of his/her rights, or if he/she is deprived of this opportunity, no matter how severe the decision against the perpetrator, the person may not be satisfied. For example, the possibility of filing a claim for compensation for material damage to the person who committed the crime;

– issues related to obtaining legal assistance, which are important elements of the right to good governance, are regulated in detail by the Constitution and sectoral legislation of the Republic of Azerbaijan. Article 61 of the Constitution of the Republic of Azerbaijan directly recognizes this right and guarantees its implementation. The mentioned article states that everyone has the right to receive quality legal assistance. In our republic, this right is mainly used by lawyers. In this regard, the relevant issues are specified in the Law on Advocates and Advocacy. The law defines the basic principles of advocacy, the legal status of lawyers and the basis of their self-government to provide quality legal assistance to individuals and legal entities in the Republic of Azerbaijan. The main tasks of a lawyer are to protect the rights, freedoms and interests of individuals and legal entities and to provide them with high-quality legal assistance. In addition, the right to protection is a guarantee of the legitimate interests of a person, as well as a guarantee of the interests of justice, is a social value. Since the legal relations arising in connection with ensuring the right of everyone to receive legal assistance reflect public interests, they testify to the fulfillment by the state of constitutional obligations in this area. This requires the state to take more positive action to protect human rights when necessary;

– one of the important elements of the right to good governance are "legality" and "reasonableness". In general, this element is based on the principle of legality. In accordance with the principle of legality, public authorities, local self-government bodies, officials, citizens and their associations are obliged to comply with the Constitution and laws of the Republic of Azerbaijan. The principle of legality is of great importance in the field of management. This importance is due to many factors. First of all, compliance with the law is the guarantor of the effective functioning of the management system. Secondly, to ensure the normal, lawful behavior of the subjects of the management system interacting with each other, it is necessary to comply with this principle, that is, an official must comply with the law when providing services to citizens, and a citizen, guided by the requirements of this principle, can appeal against illegal decisions and actions. official. At the same time, a citizen should not exceed the requirements of the law in relation to state bodies and officials, should not allow abuse.

Conflict of Interest and other Ethics Statements

The author declares no conflict of interest.

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ABSTRACT

The article deals with the study of the legal issues of the formation and consolidation of the right to good governance in regulatory legal acts. Apart from the fact that Article 41 of the Charter of Fundamental Rights of the European Union contains, to a certain extent, an authoritative definition of the right to good administration, it is not new.

The scientific novelty of the article is directly related to the above, including the further development of the national legislation of the Republic of Azerbaijan. Good governance is defined (although not exhaustively) by paragraphs 2-4 of Article 41 as follows: the right to be heard before taking any individual measure that affects a party; the right of every person to have access to his file, taking into account the legitimate interests of confidentiality and professional and business secrecy; the obligation of the body to give grounds for making decisions in relation to a particular person. The results of the article can be used in future scientific research, including in the further development of the international and national normative-legal foundations of good governance.

Keywords: *human rights, right to good administration, European Union Charter of Fundamental Rights, Council of Europe Resolutions, European Ombudsman, European Court of Human Rights.*

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THE CONSTITUTION OF UKRAINE AS THE MOST IMPORTANT LEGAL GUARANTEE OF SOVEREIGNTY AND TERRITORIAL INTEGRITY OF THE NATION

Ігор Сердюк. КОНСТИТУЦІЯ УКРАЇНИ ЯК НАЙВАЖЛИВІША ЮРИДИЧНА ГАРАНТІЯ СУВЕРЕНІТЕТУ ТА ТЕРИТОРІАЛЬНОЇ ЦІЛІСНОСТІ ДЕРЖАВИ. При підготовці цієї статті автор визначив за мету з'ясувати роль Основного Закону Української держави як важливої юридичної гарантії законності і правопорядку, у забезпеченні її суверенітету та територіальної цілісності. Під юридичними гарантіями законності в юридичній науковій літературі розуміють передбачені законодавством спеціальні засоби впровадження, охорони і, в разі порушення, відновлення законності. Збройна агресія російської федерації проти України актуалізувала проблему захисту суверенітету та територіальної цілісності нашої держави не лише у

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