

Definition, signs and types of administrative and procedural guarantees: Established views and the need for their modernization

Definición, signos y tipos de garantías administrativas y procesales: puntos de vista establecidos y la necesidad de su modernización

Definição, sinalização e tipos de garantias administrativas e processuais: Pontos de vista estabelecidos e a necessidade de sua modernização

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Received: March 3rd, 2021

Accepted: April 4th, 2021

Published: July 6th, 2021

How to cite this article:

Roman Volodymyrovych Shapoval, Etiana Olexsandrivna Kolomoiets, Oksana Valeriivna Brusakova & Mikayil Vagif oglu Garayev. *Definition, signs and types of administrative and procedural guarantees: Established views and the need for their modernization*. DIXI, vol. 23, n.º. 2, julio-diciembre 2021, 1-13.

DOI: <https://doi.org/10.16925/2357-5891.2021.02.05>

Research article. <https://doi.org/10.16925/2357-5891.2021.02.05>

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Abstract

The purpose of this article is to determine the nature and content of administrative and procedural guarantees. In this regard, it is necessary to solve the following tasks: To clarify the definition of administrative and procedural guarantees, to characterize their types, to reveal the features of administrative and procedural guarantees, and to determine the place of this legal phenomenon in the general legal system. Issues related to theoretical and legal interpretation, legislative definition and direct implementation of administrative and procedural guarantees are updated and considered. The influence of administrative-procedural guarantees on the level of development of the domestic legal system is analyzed. Attention is drawn to the fact that the quality of proper functioning of administrative-procedural guarantees directly depends on the development of state institutions of a particular country, as well as on the level of perfection and efficiency of the entire state-power mechanism, i.e. the state system. Given that the essence of modern administrative and procedural guarantees provides for the proper consolidation of rights, freedoms and legitimate interests of individuals, it is justified that the key role in these processes will always play the level of legal awareness, along with the level of transparency and timeliness. The author's definitions of the terms "administrative-procedural guarantees", "protection of legal guarantees of citizens" and "legal awareness of the population" are given. Some of the characteristic features of foreign models of administrative and legal regulation are proposed for implementation.

Keywords: Administrative-procedural guarantees, administrative process, legal awareness, legal regulation administrative law, protection of legitimate interests, protection of rights and freedoms of persons.

Resumen

El objetivo de este artículo es determinar la naturaleza y el contenido de las garantías administrativas y procesales. En este sentido, es necesario resolver las siguientes tareas: Aclarar la definición de las garantías administrativas y procesales, caracterizar sus tipos, revelar los rasgos de las garantías administrativas y procesales, y determinar el lugar de este fenómeno jurídico en el ordenamiento jurídico general. Se actualizan y examinan cuestiones relacionadas con la interpretación teórica y jurídica, la definición legislativa y la aplicación directa de las garantías administrativas y procesales. Se analiza la influencia de las garantías administrativo-procesales en el nivel de desarrollo del sistema jurídico nacional. Se llama la atención sobre el hecho de que la calidad del funcionamiento adecuado de las garantías administrativo-procesales depende directamente del desarrollo de las instituciones estatales de un país concreto, así como del nivel de perfección y eficiencia de todo el mecanismo de poder estatal, es decir, del sistema estatal. Dado que la esencia de las garantías administrativas y procesales modernas prevé la correcta consolidación de los derechos, las libertades y los intereses legítimos de las personas, se justifica que el papel clave en estos procesos siempre jugará el nivel de conciencia jurídica, junto con el nivel de transparencia y puntualidad. El autor define los términos "garantías administrativo-procesales", "protección de las garantías jurídicas de los ciudadanos" y "conciencia jurídica de la población". Se proponen algunos de los rasgos característicos de los modelos extranjeros de regulación administrativa y jurídica para su aplicación.

Palabras clave: garantías administrativo-procesales, proceso administrativo, conciencia jurídica, regulación jurídica derecho administrativo, protección de los intereses legítimos, protección de los derechos y libertades de las personas.

Resumo

O objetivo deste artigo é determinar a natureza e o conteúdo das garantias administrativas e processuais. A este respeito, é necessário resolver as seguintes tarefas: Clarificar a definição de garantias administrativas e processuais, caracterizar seus tipos, revelar as características das garantias administrativas e processuais e

determinar o lugar deste fenômeno jurídico no sistema jurídico geral. Questões relacionadas à interpretação teórica e jurídica, definição legislativa e implementação direta de garantias administrativas e procedimentais são atualizadas e consideradas. A influência das garantias administrativas-processuais no nível de desenvolvimento do sistema jurídico nacional é analisada. Chama-se a atenção para o fato de que a qualidade do funcionamento adequado das garantias administrativas-processuais depende diretamente do desenvolvimento das instituições estatais de um determinado país, bem como do nível de perfeição e eficiência de todo o mecanismo de poder estatal, ou seja, do sistema estatal. Considerando que a essência das garantias administrativas e processuais modernas prevê a consolidação adequada dos direitos, liberdades e interesses legítimos dos indivíduos, justifica-se que o papel fundamental nesses processos sempre desempenhe o nível de consciência jurídica, juntamente com o nível de transparência e pontualidade. As definições do autor dos termos "garantias administrativas-processuais", "proteção das garantias legais dos cidadãos" e "consciência legal da população" são dadas. Algumas das características dos modelos estrangeiros de regulamentação administrativa e jurídica são propostas para implementação.

Palavras-chave: Garantias administrativas-processuais, processo administrativo, consciência jurídica, regulamentação jurídica direito administrativo, proteção dos interesses legítimos, proteção dos direitos e liberdades das pessoas.

I. INTRODUCTION

Considering the dynamic changes and new trends that are currently taking place in both domestic and global society, it can be noted that all new legal relations between government officials or between government agencies and citizens must be reliably protected and regulated. It should be noted that, first of all, the rights, freedoms and legitimate interests of each person as the subject of legal relations, both as a person and as a citizen, should be effectively protected by domestic legislation and the national state system. After all, these benefits are a fundamental component of the normal existence of any person and are the guarantor of his/her positive interaction with other entities.

Therefore, based on the above-mentioned statements, the rights, freedoms and legitimate interests of individuals should be the most important subject of defense, protection and proper observance by the state. Effective functioning, administrative and procedural guarantees should be a way to ensure such compliance and protection. Several specialists in the field of general theory of law and administrative law have studied the issue of administrative and procedural guarantees, their essence and classification. However, the development of legal relations requires the state to introduce into public life more effective guarantees of ensuring and respecting the rights and freedoms of participants in such legal relations.

Today, in Ukraine it is time to form a new public law and public protection of human rights and freedoms, which is possible only if there are legally established

guarantees of their protection, including administrative and procedural guarantees. The objectivity and regularity of the existence of such guarantees are actively justified in discussions and theories of legal science. A similar trend is observed in other countries. This, in turn, places solution of a new problem on scientists, including the revision of established views on the definition, signs and types of administrative and procedural guarantees.

II. METHODOLOGICAL BASIS OF THE STUDY

The research methodology is based on a set of methods and techniques of scientific knowledge. The main one is the general scientific dialectical method of cognition, which allows to study the problems in the unity of their social content and legal form, in order to carry out a systematic analysis of legal aspects in the field of study. Along with this, general scientific and special research methods were used, which are widely used in modern legal science. The formal-logical, system-structural and comparative-legal research methods were used in the study, which allowed:

1. To give the author's definition of "administrative and procedural guarantees", "protection of legal guarantees of citizens" and "legal awareness of the population".
2. To analyze the approaches of legal scholars to understand the essence of administrative-procedural guarantees; in this connection, conclusions regarding the current state of affairs in the field of compliance with legal guarantees in the domestic legal environment are formed.
3. To consider successful examples of the effective functioning of administrative and legal guarantees in some developed countries of Western Europe, which have the status of states with true rule of law. Some of the characteristic features of foreign models of administrative and legal regulation proposed for implementation.

III. RESULTS AND DISCUSSION

Administrative law enforcement is based on several main grounds, those are:¹

1 Ahmad Tholabi Kharlie. *The Application of the Strict Liability Principle in the Indemnity Laws for Livelihoods in Indonesia. Analysis of The Supreme Court's Decision Number 1794K/PDT/G/2004*. JURNAL CITA HUKUM (INDONESIAN LAW JOURNAL) 1. 2020. Pg. 65-84. <https://doi.org/10.15408/jch.v8i1.15000>

- a) Functioned as a controlling, preventing and overcoming tool for some prohibited acts;
- b) A preventive juridical instrument of administrative law and a function to end or stop the environmental violations;
- c) As reparatory (restore to the original condition);
- d) Administrative sanctions does not require a long court process;
- e) As means of more efficient prevention in terms of funding and settlement time compared to criminal and civil law enforcement;
- f) Administrative law enforcement costs including the costs of supervision and laboratory testing, which are lower than the costs of collecting evidence, field investigations, and the costs of expert witnesses to prove aspects of causality in criminal and civil cases.

The development of national legislation governing administrative procedures is due, *inter alia*, to the improvement of administrative procedural norms, as the effectiveness of administrative procedures depends not only on the establishment and consolidation of substantive administrative rules, but also on the existence of an effective mechanism for their implementation. Administrative and procedural guarantees of the rights and freedoms of citizens are the part of this mechanism. Nowadays, the current legislation regarding the regulation of administrative procedures has many shortcomings and gaps. Among the large number of unresolved issues, a special place is occupied by the problems of guaranteeing the rights and freedoms of citizens and separately – the implementation of administrative and procedural guarantees.²

According to various jurists, the possibility of successful and unimpeded realization by the subjects of public relations of their own rights, freedoms and legitimate interests is a key condition for the proper functioning of both the state system and society as a whole. When the state is unable to ensure a satisfactory level of protection of the rights and interests of individuals, society loses harmony in the legal relations between the parties. Moreover, the subjects themselves, logically fearing the high risks and dangers posed by legal relationships that are not provided with reliable legal guarantees, cease to interact with each other actively and uninterruptedly, thus stopping the natural development of society as a whole.

In this context, lawyers O. M. Dorosheva and L. Y. Odegova point out that in one way or another legal guarantees, as a basis for protecting the rights and interests of

2 Oleksander Pabat. ADMINISTRATIVE-PROCEDURE GUARANTEES OF HUMAN RIGHTS AND FREEDOMS. Kharkiv National University of Internal Affairs. (2008).

society, are set out in the very foundations of society. After all, legal (administrative-legal) guarantees express the natural social needs and freedoms of individuals by their essence.³

According to the authoritative dictionary of the Ukrainian language, set up by I. K. Bilodid, the concept of "guarantee" is defined as a certain condition by which it is possible to ensure the implementation of a particular goal or objective. However, with regard to the term "legal guarantee", it is important to note that there are different views of scholars on this definition, i. e. the opinions of lawyers in this area are uneven.⁴ Thus, it can be noted that according to the vast majority of jurists, the concept of "legal guarantee" is somehow associated with the ability of persons who are subjects of public relations to successfully and unhindered exercise their rights and freedoms, and to have the right to protect their legitimate interests. Also, it is a question of specific ways of protection by persons of the fundamental goods, and at the same time of effective methods and ways of termination of illegal conduct concerning their goods.

According to lawyer O. Frytsky, the concept of "legal guarantees" is defined as the activities executed by state bodies to provide individuals as subjects of public relations formal legal compulsory guarantees, which are recognized as important for each person to have the opportunity to exercise their personal rights, freedoms and legitimate interests.⁵

V. F. Pohorilko considers legal guarantees as "the provision by the state of formal (legal) general obligation to those conditions that are necessary for everyone to be able to exercise their constitutional rights and freedoms". According to the scientist, their goal is the real provision by legal means of the maximum implementation, protection and defense of the rights and freedoms of citizens.⁶

V. V. Subochev emphasizes that the essence and content of administrative-procedural guarantees should be defined as "specially established by law, means of direct ensuring the lawful conduct of public relations subjects, their rights and freedoms".⁷ For the most part, we tend to agree with this statement, because we really believe that a prerequisite for the functioning of administrative-procedural guarantees is their enshrinement in legal and regulatory instruments.

3 O. M. Dorosheva & L. Yu Odegova. *Constitutional Guarantees of Human and Civil Rights and Freedoms in Ukraine*. LAW JOURNAL OF DONETSK UNIVERSITY 1. 2011. Pg. 30-35.

4 I. K. Bilodid (Ed.). *DICTIONARY OF THE UKRAINIAN LANGUAGE (1970-1980)*. Nauk Opinion. (1980). Pg. 32-33.

5 Oleh Frytsky. *CONSTITUTIONAL LAW OF UKRAINE*. Yurinkom Inter. (2003). Pg. 177.

6 Viktor Pohorilko (Ed.). *CONSTITUTIONAL LAW OF UKRAINE*. Nauk Dumka. (1999). Pg. 222.

7 V. V. Subochev. *LEGITIMATE INTERESTS*. Norma. (2011). Pg. 416.

The above-mentioned specialist in the field of law and law enforcement, O. M. Dorosheva, emphasizes that such a social and legal phenomenon as administrative and procedural guarantees can be revealed as a set of conditions for proper protection and ensuring the ability of individuals to exercise their rights, freedoms and legitimate interests. Lawyer L. Odegova agrees to support such a statement, but concretizes the essence of administrative-procedural guarantees precisely as a set of conditions and guarantees, functioning for the unimpeded realization of legal rights, freedoms and interests. She also emphasizes the great need for the proper functioning of administrative and procedural guarantees as one of the basic pillars of the democratic and true legal existence of the state and society.⁸

According to the reviews provided by the representatives of the domestic, theoretical and legal community, the statements and scientific views of these two representatives of the legal branch, in their foundation and essence, tend to reflect the true state of affairs regarding legal guarantees. We also support the theses expressed by the scientist N. Vitruk, in which he characterizes the content of administrative-procedural guarantees as a set of methods (tools) enshrined in domestic law, and which can be used and are used to properly protect and ensure rights, freedoms and the legitimate interests of individuals both as persons and as citizens or other legal status.⁹

Along with this, we recognize that the right to exist deserves the position of jurist V. Kuchynskyi, who argues that researchers of these processes should focus less on the protection of the rights of individuals by administrative procedural guarantees, where the situation is stable, studied and understood, and should turn their attention to the wide possibilities and directions of development of administrative-procedural guarantees in the sphere of ensuring the interests and lawful encroachments of persons.¹⁰

However, in our opinion, P. Rabinovych managed to most fully and clearly formulate such a legal category as administrative-procedural guarantees. This scholar-lawyer defines the essence of this legal phenomenon as clearly defined by regulations of domestic law, a set of certain law enforcement tools (methods), through which it is possible to manage the activities of individuals, directing them in the right legal course, as well as recording them in the norms of national administrative law.¹¹

8 L. Yu Odegova, O. M. Dorosheva & E. V. Kulakova. *JURISPRUDENCE: A TEXTBOOK*. DonNU. (2018). Pg. 68-95.

9 N. V. Vitruk. *On the Categories of the Legal Status of the Individual in Socialist Society*. SOVIET STATE AND LAW 12. 1974. Pg. 6.

10 V. A. Kuchynskyi. *PERSONALITY, FREEDOM, LAW*. Legal Literature. (1978). Pg. 46.

11 Petro Rabinovych. *STRENGTHENING OF THE LEGALITY — THE PATTERN OF SOCIALISM. QUESTIONS OF RESEARCH THEORY AND METHODOLOGY*. Higher School. (1975). Pg. 237.

After investigating and consistently revealing the content of administrative procedural guarantees, it is important to provide a clear definition of the object of this type of procedural guarantees. Currently, having as a basis a large number of theses and statements of scholars in the field of legal science, expressed by them regarding the problems of this issue, it can be noted that the object of administrative-procedural guarantees is regulated by the norms of domestic law, public relations, related to the satisfaction of legal requirements, needs and interests of persons, as well as protection and defense of their legal capabilities.

Thus, the above-mentioned state of affairs in the domestic, administrative and legal science creates a legal reality in which the legal norms enshrined in the acts of domestic law, in fact, receive the status of conditions (guarantees), obligatory for the unimpeded realization by persons-subjects of public legal relations, their own rights, freedoms, interests and legal encroachments. As is well known, a large number of legal scholars divide legal guarantees into those that actually provide the procedure for individuals to exercise their rights and interests (guarantees of implementation) and those that help individuals to properly protect their rights and interests (guarantees of defense, protection).

Here, it is important to single out a quite logical statement that the second category of administrative-procedural guarantees is no less important than the first one (security). After all, in the system of national law there is no right or interest that does not need its protection (defense), and in principle there can not be. That is why the activity of jurists is very important, as well as not indifferent representatives of the domestic, legislative branch of government, in the field of introducing and ensuring the proper functioning of legal guarantees, including administrative and procedural ones in such a legal format, according to which the activities of individuals in their public and private, social relations, could be carried out freely and unimpeded.

In the context of the above, it should be noted the need to develop legal regulation of administrative and procedural guarantees. Because in the absence of effective, clear, but at the same time flexible legislation in this area, which would help to carry out positive and rational regulation of modern, dynamic social relations, the functioning of the entire state and social mechanism of the country would be at risk.

According to the scientific and theoretical position expressed by Professors A. Malko and V. Subochev, such a function of administrative procedural guarantees as protection of the rights, freedoms and legitimate interests of individuals follows from the historical trends of law, its natural essence and foundation.¹² In addition, the legal

12 A. V. Malko & V. V. Subochev. LEGITIMATE INTERESTS AS A LEGAL CATEGORY. Legal Center Press. (2004). Pg. 266-267.

scholar V. Subochov emphasizes that not all the ensuring and protection of administrative-legal and other legal guarantees should rely on the state and its bodies. In particular, the scientist notes that a significant part of the activities for the protection of legal guarantees should be performed by the subjects of legal relations, because without their interest in the effectiveness and inviolability of administrative procedural guarantees, they cannot be fully implemented by the state.¹³ However, we tend to consider such a position of the scholar-lawyer to be mostly wrong and not fully true. To support our views in this area, we put forward a completely rational conclusion, in our opinion, that shifting responsibility to the subjects of public relations would be wrong.

In our conclusion, we rely on the fact that the state is still a prominent (central) subject of public relations, and the only one which has the ability to legally regulate these relations, as well as to manage the activities of executive bodies in the spirit of the state-defined legal regulation of these social relations. Therefore, in accordance with all of the above, we can confidently argue that the state should play a leading role in the processes of creating, developing, reformatting and termination of administrative procedural guarantees, as well as a leading role in their recording, protection and defense, and their proper ensuring. The instrument of formal legal recording of administrative and legal guarantees is currently the legal norm enshrined in normative legal acts.

We believe that the main source to ensure administrative and procedural guarantees, and accordingly the main source of ways to protect and ensure the rights, freedoms and legitimate interests of individuals, is domestic (national) legislation. Researcher Oleksander Pabat's especially highlights the statement that, as a rule, the whole mechanism of legal regulation of public legal relations with the help of administrative-procedural guarantees is based on legal norms and principles enshrined in legislative acts.¹⁴ In addition, the scholar tends to believe that administrative procedural norms are derived from substantive administrative norms, which he, as well as many other jurists, define as primary. It follows that it is the substantive legal norms of administrative law that play the role of a fundamental and primary regulator of social legal relations among the subjects of administrative law.

In relation to the procedural guarantees of administrative law, substantive rules are constitutive. In practice, this is expressed on the example that the very existence of certain norms of substantive law in acts of national legislation already creates the conditions (guarantees) for the emergence and functioning of administrative procedural legal norms. The latter, in turn, by their very existence and consolidation in the norms

13 V. V. Subochov, *supra*, note 11. Pg. 111.

14 Oleksander Pabat, *supra*, note 6. Pg. 42-43.

and principles of substantive law, create opportunities for persons-subjects of public relations to take certain actions in order to protect, restore and ensure their rights, freedoms and legitimate interests. These possible types of use of administrative-procedural guarantees by persons, as a rule, are implemented during court proceedings.

In relation to administrative procedural guarantees, scholars tend to identify several key principles of their operation. For example, well-known legal experts L. Voevodin and I. Silich provide a list of those principles that, in their opinion, most fully and clearly characterize the essence of administrative-procedural guarantees, as well as specify the framework and directions of their operation.¹⁵

L. Leontieva, a specialist in the field of domestic and administrative jurisprudence, emphasizes that the whole mechanism of functioning of administrative and legal guarantees is inextricably linked with the daily activities of the state power subjects. Namely, this relates to the bodies and institutions of state power and local self-government¹⁶. It should be noted that the authoritative activity of these administrative subjects is actually reflected in the fact that they carry out certain actions or make certain decisions intended to ensure the inviolability of fundamental rights and freedoms of persons-subjects of public relations, as well as to protect their legitimate interests. Accordingly, it is possible to form a fundamental statement that the quality and efficiency of the activities of the authorities, namely representatives of public authorities and local governments, have a direct and immediate impact on the effectiveness of administrative and procedural guarantees, as well as their ability to ensure protection and free realization of the rights, freedoms and legitimate interests of individuals during their interaction with each other within public relations.

In this context, one of the most effective means (tools) to influence the subjects of power on individuals, in order to protect and comply with legal guarantees, is administrative coercion. In addition, the authorities have a large number of administrative and legal instruments provided to them by acts of domestic law to properly ensure the inviolability of the rights of persons protected by law. Among them, there are administrative termination and administrative warning.

At the end of the study, we note that most scholars divide legal guarantees into two groups: Guarantees of implementation and guarantees of defense (protection). The realization of legitimate interests is impossible without their protection. There is no

15 Ivan Silich. *Guarantees of Protection of Citizens' Rights and Freedoms in the Administrative Process*. Dissertation Ph.D. Kharkiv National University of Internal Affairs. (2008). Pg. 41.

16 Lina Leontieva. *WOMEN'S RIGHTS AND LEGAL GUARANTEES OF THEIR PROTECTION IN UKRAINE (THEORETICAL AND LEGAL ASPECTS)*. National University of Internal Affairs. (2005). Pg. 11-12.

legitimate interest that does not need protection. Guarantees of defense (protection), which are structural elements of the mechanism for ensuring the legal opportunities of citizens, are at the same time guarantees of their implementation, i. e. they cannot exist outside their implementation. Guarantees of protection relate to normative-legal definition of limits of realization of legal possibilities of citizens, definition and realization of ways of prevention, termination of illegal activity and administrative offenses in the field of property, application of measures of administrative-legal influence in order to counteract various manifestations of activity which violates the legitimate interests of citizens, punish perpetrators. Guarantees of protection are based on the legal presumption of liability for an illegal act, but in connection with the actual commission of such an act law enforcement and penal aspects of protection begin to be implemented, they are transformed into guarantees of protection aimed at preventing violations, encroachment, application to violators measures of responsibility in the order established by the law, and compensation of the caused damage. Guarantees of defense cover a wide system of instruments that contribute to the rule of law in public relations in the field of property (control, supervision by public authorities, application of measures of responsibility, restoration of legal right to own, use and manage property, etc.)¹⁷.

IV. CONCLUSIONS

Summarizing the study, we come to the following considerations:

First, administrative-procedural guarantees, being an integral part of the administrative-legal system of Ukraine, are a harmonious, holistic mechanism, the main purpose of which is to influence the subjects of public relations, carried out exclusively within domestic law, and committed to protect and ensure the rights, freedoms and legitimate interests of persons, protected by the norms set out in national, normative legal acts.

Secondly, the state authorities of Ukraine, as well as local governments, have a large number of administrative and legal instruments by which they can influence the subjects of public relations, in order to ensure the inviolability (integrity) of legally protected, public and private benefits of each of the subjects of legal relations. In particular, such administrative-procedural measures (means) that are possessed by the subjects of exercising power are administrative coercion, administrative termination

17 Iryna Lychenko. *Administrative and Legal Basis Ensure the Protection of the Citizens' Legal Interests in the Property Field*. BULLETIN OF LVIV POLYTECHNIC NATIONAL UNIVERSITY 855. 2016. Pg. 412.

and administrative warning. The procedure and limits of application by the authorities of these administrative-procedural means are currently mostly regulated and governed by the norms recorded in the normative-legal acts of the domestic legislation.

Third, the quality of functioning of the domestic mechanism of administrative-procedural guarantees has not yet reached its maximum, and therefore, requires the joint work of lawyers and legislators to further improvement.

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