

PRINCIPLES OF OFFICIALITY AND PUBLICITY IN REGISTRATION ACTIVITIES OF THE UKRAINIAN MINISTRY OF JUSTICE

Serhiy Mykytiuk - International University of Business and Law (Kherson city)

В статье раскрыто правовая природа принципов официальности и публичности в регистрационной деятельности органов Министерства юстиции Украины, проведено разграничение этих принципов, исследовано проблемы их практического применения.

Ключевые слова. Принципы, регистрационная деятельность, принципы регистрационной деятельности, принцип официальности, принцип публичности.

În articol se dezvăluie natura legală a principiilor oficialității și publicității în activitățile de înregistrare ale organelor Ministerului Justiției din Ucraina, sa făcut o distincție între aceste principii și au fost explorate problemele aplicării lor în practică.

Cuvinte cheie. Principii, activitatea de înregistrare, principiile activității de înregistrare, principiul oficialității, principiul public.

У статті розкрито правову природу принципів офіційності та публічності в реєстраційній діяльності органів Міністерства юстиції України, проведено розмежування цих принципів та досліджено проблеми їхнього практичного застосування.

Ключові слова. Принципи, реєстраційна діяльність, принципи реєстраційної діяльності, принцип офіційності, принцип публічності.

The research of the principles of registration is essential for both theory and practice as they are the guiding ideas that characterize the content of the registration, as well as its separate stages and institutions, with their help the result of registration and legality is provided.

The study of such legal category as the principles of law was conducted at the fundamental level. It is reflected in the works of O. Zaychuk, O. Skakun, A. Kolodiy, V. Kopeichikov, N. Onishchenko, M. Tsvik, O. Petryshyn, O.Yu. Nechiporenko, Yu. Ponymatchenko, P.Rabinovich and others. In western jurisprudence the issues related to the principles of law were researched by E. Anders, L.M. Brown, E. Bradley, J. Geansburg, A.V. Daisy, M. Jones, B. Jacques, R. Kay, T.K. Hartley

and others. In the Ukrainian administrative law this legal phenomenon drew attention of O. Bandurka, Yu. Bytiak, A. Komziuk and S. Kuznichenko. Some legal principles of registration activity were elucidated in the theses of M. Gurkovskii, S. Savchenko, Ya. Ponomariova and O. Yushkevich. Although due to the topics of their theses the letter two described these concepts at the level of separate registration proceedings, which in our opinion is somewhat more narrow than the concept of registration activity in general, hence the proceedings are an integral part of the registration.

The first signs of normative consolidation of the registration principles we were able to track in the substantive law of the Russian Empire dated since the second half of the XIX century. The Pro-

visions on the notarial units of the Russian Empire on April 14, 1866, and the Draft of the Patrimony Statute of 1881 contained the key positions for the behavior of the person who did the registration of the real estate rights. In particular, the authors of the draft of the Patrimony Statute stipulated the maintenance of the patrimonial system and its functioning on the principles of “transparency, certainty and, most importantly, hardness of land rights, simplification of the procedure for acquisition, approximation of the real estate legislation to the population, elimination of informal property” [1].

Ya. Ponomariova explains the registration principles as the main laws determined by the objective and subjective nature of registration activities, that build a set of interconnected key ideas, formulated and enshrined in the Constitution of Ukraine, the laws of Ukraine which regulate the administrative activities of the authorities in general and special legal acts, which establish the conditions and procedures of the registration [2]. Ya. Ponomariova lists the following general principles: the principle of legality; the principle of protection of the interests of the state and the person; principle of officiality; principle of limited publicity (officiality); the principle of controllability (or guaranteed legal protection); the principle of independence in decision-making; the principle of formal truth; the principle of equality before the law of the participants in the administrative process; the principle of speed and economy; principle of responsibility of officials [2].

According to Ya.O. Ponomariova the special principles inherent to the registration of real estate are the following: obligatory state registration; the principle of a single state register for real estate; indivisibility of real estate; the principle of recognition of previously acquired rights to real estate; the principle of priority of registered real rights and their restrictions on unregistered ones; the principle of territorial division of powers of registration bodies; principle of unity of rules (order of registration); principle of availability [3].

Defining the principles for the registration procedures of the bodies of internal affairs S. Savchenko formed the following groups: “firstly, the fundamental principles which include: the legality, priority of human rights and freedoms,

justice, humanism; and secondly, the general principles of the activities of the internal affairs bodies which include: publicity, responsibility, impartiality, professionalism, integrity, etc.; third, special principles which include: equality of participants in the registration procedure, free access of citizens to the information necessary for registration actions, transparency of the decision-making process; proper documentation of registration actions; possibility of appeal against the decision” [4].

Outlining a number of the most important principles under which registration is carried out O.G. Yushkevich lists: 1) legality; 2) time limit; 3) payment; 4) territoriality; 5) society control of the registration body; 6) concentration of actions; 7) efficiency; 8) legal equality; 9) independence in decision-making; 10) authenticity. In addition to these ten principles, the scientist notes another important, relatively historically new, typical for the registration proceedings in Ukraine the principle of a “one-stop shop” [5].

Investigating the registration activities of the public authorities M.P. Gurkovskii defined the principles of registration as “guiding ideas that characterize the content of this activity, its essence and purpose in society, namely: the registration of actions directed at the relevant objects of registration. They are synthesizing foundations, unifying ties, ideological basis of occurrence, formation and functioning of many social and legal phenomena in the field of registration”. He simultaneously categorized their list on:

- general which include: the principle of legality; the principle of publicity; the principle of objective truth; the principle of the optimal balance of state and personal interests; the principle of professionalism; the principle of science and others;

- sectoral principles that are regulated by the norms of administrative law and are intrinsic to the registration activities of public administration, in particular: the principle of speed and efficiency; the principle of independence and objectivity; the principle of the inevitability of liability of officials and citizens for violation in the field of registration and others.

- special principles of registration, which according to M.P. Gurkovskii constitute a special group while they are specific to this legal institution: the principle of a definite and optimal pro-

cedure for registration of public administration regarding some types of registration; the principle of interaction between the registration bodies and with the other public structures; the principle of authenticity of the data in the single register; the principle of priority of previously registered objects; the principle of payment for the registration services; the principle of the availability of registration data; the principle of informational, scientific, technical, material and personnel support of registration authorities.

In addition, M. Gurkovsky considers it necessary to distinguish the concept of "the principles of registration activity" and "the principles of the registration system", since these principles relate to different groups of principles, which are the underlying foundation of different legal categories [6].

Unfortunately, despite the size of his research M. Gurkovskii elucidated neither the content of general principles which, in our opinion, are fundamental, nor branch principles. He focused only on the special principles of registration activities. In addition, some of the statements set out in his work are debatable: regarding the inherent nature of these principles both in the registration in general and in the registration activities of the bodies of the Ministry of Justice of Ukraine.

There is also a debatable statement that all of registration activities meet the public access principle. The reasons for such a discussion are regulatory acts regulating the access to restricted information, as we will describe below, and the procedure for access to personal data.

The analysis of the above mentioned normative legal acts regulating the registration activities of the bodies of the Ministry of Justice of Ukraine and the summary of the above stated scientific positions give an opportunity to conclude that such registration activity is based on the following principles: the rule of law; legality; protection of the interests of the individual and the state; equality of parties; the state language of registration activity; logical sequence of registration actions; independence of the registration body in decision-making; efficiency; cost effectiveness; one-stop shop; objectivity and impartiality; controllability; responsibility of participants in registration proceedings; formality; publicity.

In general, the listed principles of the investigated registration activity can be divided into three groups:

1. Fundamental principles of law.
2. Principles characterizing the state activity in general.
3. Principles forming the main regularities and connections of registration activities carried out by the bodies of the Ministry of Justice of Ukraine.

While researching lists of principles given by different researchers one can draw different conclusions about their existence: to agree or deny their existence or argue the completeness of such lists. However, in our opinion, it is indisputable that only the system of principles (as opposed to their list) is capable of ensuring the effective implementation of these guidelines in registration of legal relations. The construction of such a system should start with the research of each individual principle, because analysis of the content of the following principles of registration activities of the bodies of the Ministry of Justice of Ukraine and the ways of ensuring their implementation, will allow to clearly outline their entire system, thus defining their relationship with each other and other principles of legal practice.

The principle of officiality of registration has been almost not investigated in the scientific literature. This principle should be understood as the duty of the registration authorities (in our case, the bodies of the Ministry of Justice of Ukraine) which carry out registration to consider and resolve registration cases on behalf of the state, taking into account both the interests of the state, specific stakeholders and public interests. Registration actions, according to this principle, can only be carried out by those officials or registration authorities who are empowered in accordance with the law. Although there is no clear vision about its content among the researchers.

V. Kolisnichenko understands this principle as tracing of proceedings according to law; boundaries of application; language acceptable to the parties; prohibition to refuse acceptance of an application; prohibition to disclose the content of an application s, etc. [7].

When investigating this principle Ya. Ponomariova, in our opinion, mistakenly equals it to the principle of publicity, explaining that "the

principle of publicity (officiality) consists in the accessibility for citizens to the proceedings information.” The researcher also substantiates the essence of this principle in informational accessibility for citizens, considering that its implementation results in access to information accumulated during registration proceedings [2].

We absolutely can not agree with this statement. The principle of officiality, although is often implemented publicly, however, it has its own content, and it is inherent both to all procedural branches of law and to administrative and procedural activities, registration in particular. This content is of authoritative nature as it is carried out on behalf of the state and in the interests of society, moreover, regardless of any natural or legal persons. Registration always has its own specific external manifestations, is carried out in real form by the authorized units with attributes of power in compliance with the procedure.

When criticizing the scientists who equal publicity and officiality V.S. Zelenetsky aptly remarked: “Publicity is not the same as officiality; although in most cases officiality is publicly implemented, it has its own content; it is not only possible but should be considered as an independent principle. In our country, as well as in any country in the world, there is a large number of state bodies always acting in no other manner than official. And there are no officials who would act informally when exercising any state functions. But publicity is not always present in their activities, in some cases they are legally obliged to act confidentially and even secretly. That is how these two phenomena (officiality and publicity) differ” [8]. For example, during the state registration of legal acts with restricted access the publicity of registration is excluded, the “public document” and “document with restricted access” are diametrically opposite concepts. This can be traced in the relevant legislation. In particular, indent 3 of the point 3.2. of the Procedure for Conducting Audits for the Compliance with the Legislation on State Registration of Normative Acts by the Units of Justice, approved by the Decree of the Ministry of Justice of Ukraine dated January 19, 2012, No. 93/5 states: “In case of adoption of acts with the restricted access by the rule-making authority information on these acts is provided in accordance with the requirements

of the Laws of Ukraine “On Information” and “On State Secrets”. In this regard, this list and the cover letter to it may have access restriction “[9].

When questioning the scientific position of Ya.O. Ponomareva we absolutely do not exclude the existence of the principle of publicity in registration. Of course, the principle of publicity is inherent to the registration activities of the units of the Ministry of Justice of Ukraine. We fully agree with the scientific positions of Ya. Ponomareva, I. Koliushko and the others that the principle of publicity can also be equal to the principle of openness and transparency [2; 10]. There is no single understanding of the content (elements) of publicity and openness in the science. Often one can find the idea that the concept of transparency is broader than the concept of publicity and includes the latter as one of the components [11]. V. Perepeliuk and S. Potapenko name this principle “the principle of procedural authority” [12; 13]. Although, in our opinion, the procedural power is more characteristic to the principle of officiality. And publicity (openness) is realized in the form of the possibility of access to information about registration activities and information about registered objects and their registration characteristics and other data contained in the registers pursuant to the Law of Ukraine “On access to public information” [14] and other special legislation. For example:

parts 3 and 4 of the Article 17 of the Law of Ukraine “On Public Associations” stipulate that “the basic information of the Register of Public Associations is accessed freely on the official web-site of the authorized registration body” and that “for the realization of the right to access to the information of the Register of Public Associations the users are allowed to search, view, copy and print the data.”[15];

paragraph 16 of the Procedure for maintaining the Unified State Register of Legal Acts and its use, approved by the Resolution of the Cabinet of Ministers of Ukraine on April 23, 2001 No. 376: “Legal and natural persons may receive copies of reference texts of normative legal acts from the Register’s information fund on electronic or paper media by contacting the Registry administrator or directly by the authorized access to the Register’s information database”[16].

M. Gurkovsky called this category "the principle of public access to registration data" but explained it the following way: "In accordance with this principle, any person, on the basis of the publication of the registration in the official source is considered aware of the registration of the object, which deprives the party ability to refer to the unawareness of information contained in a single register"[6].

So, officiality and publicity are not identical concepts and can be used independently in the legislation. This way they become less abstract and the tendencies of their legal regulation become evident.

Literature

1. Проект Вотчинного устава с объяснительной к нему запиской. Спб, 1893г. – [цит. по: Дмитриев А.В. От «укрепления прав» до государственной регистрации прав на недвижимое имущество: опыт России]. // Законодательство. – 2000. – № 7.
2. Пономарьова, Я.О. Адміністративні провадження з державної реєстрації речових прав на нерухоме майно: дис. канд. юрид. наук, спец.: 12.00.07 / Я.О. Пономарьова; Харків, 2009. – 208 с..
3. Пономарьова, Я.О. Класифікація принципів адміністративних проваджень з державної реєстрації речових прав на нерухоме майно / Я.О. Пономарьова // Право і Безпека. – 2012. – № 1. – С. 99-102.
4. Савченко, С.С. Реєстраційні процедури в діяльності органів внутрішніх справ: автореф. дис. ... канд. юрид. наук. 12.00.07 / С.С. Савченко; Київ, 2012. – 18 с.
5. Апанасюк, О.Г. Реєстраційне провадження: сутність та особливості // Вісник Національного університету внутрішніх справ. – Харків, 2005. – № 31. – С. 180-184.
6. Гурковський, М.П. Реєстраційна діяльність публічної адміністрації: організаційно-правовий аспект: дис. ... канд. юрид. наук : 12.00.07 / М.П. Гурковський; Львів, 2010. – 196 с.
7. Колісніченко, В.В. Про спеціальні та особливі принципи адміністративно-процесуальних форм захисту права інтелектуальної власності / В.В. Колісніченко // Юридичний науковий електронний журнал. – 2014. – №1. [Електронний ресурс]. – Режим доступу: http://www.lsej.org.ua/1_2014/21.pdf
8. Зеленецький, В.С. Принцип офіційності в сучасному кримінальному процесі / В.С. Зеленецький // Ежегодник украинского права. 2013. №5 : сб. науч. тр. / Нац. акад. правов. наук Украины. – Х. : Право, 2013. – С. 540-542., с.541.
9. Про затвердження Порядку проведення органами юстиції перевірок стану додержання законодавства про державну реєстрацію нормативно-правових актів. Наказ Міністерства юстиції України від 19.01.2012 №93/5. [Електронний ресурс]. – Режим доступу: <http://zakon2.rada.gov.ua/laws/show/z0067-12>
10. Тимошук, В.П. Адміністративна процедура та адміністративні послуги. Зарубіжний досвід і пропозиції для України / Авт. упоряд. В.П. Тимошук; [Ред. І. Б.Коліушко]. – К.: Факт, 2003. – 496 с.
11. Менів Олексій. Проблеми розуміння принципу гласності та публічності цивільного судочинства. Юстиніан. Юридичний журнал [Електронний ресурс]. – Режим доступу: <http://www.justinian.com.ua/article.php?id=3350>
12. Перепелюк, В.Г. Адміністративний процес. Загальна частина: [навч. посібник] / В.Г. Перепелюк. – Чернівці: Рута, 2003. – 367 с.
13. Потапенко, С.В. Система принципів адміністративного процесу України та проблеми їх класифікації. [Електронний ресурс] / С.В. Потапенко // Форум права. – 2010. – С. 403-408. – Режим доступу: <http://www.nbuv.gov.ua/e-journals/FP/2010-2/10pcvpik.pdf>
14. Про доступ до публічної інформації. Закон України. [Електронний ресурс]. – Режим доступу: <http://zakon2.rada.gov.ua/laws/show/2939-17>
15. Про громадські об'єднання. Закон України. [Електронний ресурс]. – Режим доступу: <http://zakon2.rada.gov.ua/laws/show/4572-17>
16. Про затвердження Порядку ведення Єдиного державного реєстру нормативно-правових актів та користування ним. Постанова Кабінету Міністрів України від 23.04.2001 №376. [Електронний ресурс]. – Режим доступу: <http://zakon3.rada.gov.ua/laws/show/376-2001-p>