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PRINCIPLES OF LEGAL PROCEEDINGS IN THE CODE OF ADMINISTRATIVE PROCEEDINGS AND IN THE CIVIL PROCEDURE CODE

Lydia A. Terekhova
Dostoevsky Omsk State University, Omsk, Russia

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The subject. The system of principles of legal proceedings is one of the indicators of the independence of the type of legal proceedings. The article analyzes the general and distinctive features of the principles enshrined in the Russian Civil Procedure Code and the Code of Administrative Procedure.

The purpose of the article is confirmation or confutation of the hypothesis that there is no independent system of principles of administrative proceedings that differs from the system of principles of civil proceedings.

The methodology of the study includes the formal legal method, analysis, synthesis.

The main results. All of the principles enshrined in the Code of Administrative Procedure are also enshrined in the Civil Procedure Code except some minor characteristics. So, the active role of the court, involving a number of exceptions to the usual rules of evidence, was also characteristic of the regulation of the consideration of cases arising from public legal relations in the Code of Civil Procedure. The court's active actions to determine the subject of evidence, to recover evidence are general rules of evidence for all types of proceedings. These rules existed both before the adoption of the Code of Administrative Procedure and after it. But the specifics of the execution of judicial acts adopted in cases of administrative proceedings require special attention. A characteristic feature in the consideration and resolution of most administrative cases is the immediate execution of decisions enshrined directly in the Code of Administrative Procedure. Such a rule can be considered as a priority of immediate execution, which is a characteristic feature of administrative proceedings. The author doubts about the need for normative consolidation of the principles, as well as the need for a special list of principles of administrative legal proceedings in separate article of the procedural code.

Conclusons. The absence of an independent system of administrative procedural principles confirms the thesis that administrative proceedings cannot be considered an independent branch of law separated from civil proceedings law. However, the priority of immediate execution of a court decision is a characteristic feature (perhaps even a principle) of administrative proceedings.

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1. Introduction

One of the characteristic features of Russian legislation is that it enshrines the principles of judicial procedure, starting with the Constitution of the Russian Federation, Federal constitutional laws, and then – in laws and procedural codes. At the same time, in most foreign jurisdictions, there is no such approach as fixing the principles of legal proceedings directly in the procedural codes. In particular, special Articles, devoted to the principles of justice, neither in the Civil Procedure code of Germany, nor the Rules of civil procedure, England, 1998. Neil Andrews pointed to the basic principles of civil process, highlighting 10 of them: adequate notice; disclosure of information before trial; protection against spurious claims and defences; the inevitability (efficiency) of justice; accelerated justice; the oral nature of the proceedings; publicity; promotion of the settlement; finality; competitiveness [1, 2]. The list shows that "principles" are rather essential features inherent in legal proceedings. After the introduction of the rules of Civil Procedure in 1998, the same author divided the "principles" of civil procedure into 4 categories: regulating access to the court and justice; ensuring a fair process: sharing responsibility between the court and the parties; ensuring a fast and effective process; achieving a fair and effective outcome of the case [2]. As can be seen from the text of the Rules, there are no independent, separate Articles on the principles in them. But the norms themselves, the "spirit" of law, allow us to distinguish them unmistakably and claim that they are the basis of legal proceedings.

The American procedural doctrine also does not pay special attention to the development of the concept of principles of civil procedure, this legal category is not mentioned in the literature or in normative legal acts, which, however, does not mean that there are no principles as the main principles of civil procedure law in the civil process of the United States [3, p.243].

According to A. F. Voronov, most of the objectively existing principles, although reflected in the norms of the branch of law, are not fixed in the form of a separate, clearly formulated norm [4, p. 35] This position is extremely important for further consideration of the issue of fixing the principles of legal proceedings in the procedural codes.

Russian courts of General jurisdiction use the code of Civil procedure and the code of administrative procedure when considering civil and administrative cases. Both codes, following the established traditions in our country, have special rules on the principles of judicial procedure, located in their General part. It is interesting to compare the CPC and Code of administrative Procedure (CAS) through these rules, as this will show on what, in the opinion of the legislator, the main principles of civil proceedings are built, and on what - administrative.

First of all, we note that the Codes were adopted not just at different times, but, it can be argued, at different legal epochs. The Code of Civil Procedure (CPC) of the Russian Federation was adopted on 14.11.2002, shortly after Russia's accession to the European Convention for the protection of human rights and fundamental freedoms and the first experience of citizens applying to the European Court of human rights. The CAS of the Russian Federation was adopted on 08.03.2015 during the period of "cooling" relations with the bodies of the Council of Europe. However, the CAS, as a document of a later date of adoption, could demonstrate a more modern and innovative approach to the formulation and systematization of procedural rules. And, in particular, the reflection of the main principles

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of legal proceedings in the CAS rules, in our opinion, could demonstrate the current vision of this issue.

2. The list of principles of administrative proceedings as a distinctive feature of the CAS

CAS devotes Article 6 to the list of principles of administrative procedure, a total of seven: the independence of judges; equality of all before the law and the courts; law and justice in cases; conduct of court proceedings within a reasonable time and the execution of judicial acts within reasonable time; publicity and openness of judicial proceedings; the directness of the proceedings; the adversary system and equality of parties, with the active role of the court (Article 6 CASS). Note that they cannot be called principles of proper administrative proceedings. The independence of judges (Article 8), equality before the law and court (Article 6); implementation procedure and execution within a reasonable time (Article 6.1); publicity (Article 10 CPC); the immediacy (Article 157); the adversarial and equality of parties (Article 12) provided in code of civil procedure. In the list of Article 6 of the CAS, only one of the principles – legality and justice-is not mentioned in the CPC.

Both codes also mention the language of legal proceedings (Article 9 of the CPC, Article 12 of the CAS), but the list of Article 6 of the CAS does not mention the language of legal proceedings, among others. Does this mean that it is not considered a principle? It is unlikely, since there is an independent Article 12 on this principle in the CAS and it is located in the corresponding Chapter, between other rules that establish the principles of administrative proceedings: transparency (Article 11) and immediacy (Article 13). Thus, we can state the obvious negligence of the legislator. The same negligence is demonstrated by the reverse example: the active role of the court noted in paragraph 7 of Article 6, then in Article 14 of the CAS, dedicated to the principles of competition and equality of the parties, is no longer reproduced.

Article 6 (paragraph 7) sets out the principle of "adversarial and equal rights of the parties to administrative proceedings in the active role of the court", but the title of Article 14 of the CAS on this principle does not mention the active role of the court at all. The first two parts of Article 14 are similar in content to the corresponding rules of the CPC. Part 3 of Article 14 of the CAS emphasizes the equal rights of the parties to exercise their procedural rights and ensure these rights. This rule does not say anything about the active role of the court. Rather, part 2 refers to the description of the active functions of the court (management of the judicial process, etc.), but these provisions are also present in the CPC, although the CPC does not use the term "active role of the court". Under the active role of the court, it is still customary to understand some exceptions to the General rules of evidentiary activity (for example, requesting evidence on its own initiative), but this is not mentioned in Article 14 of the CAS. It turns out that Article 14 of the CAS, in contrast to the CPC, added some provisions on equality of rights of the parties, however, this approach is nothing new or unusual, just read Articles 8 and 9 of the APC, which, in our opinion, more successfully explained certain aspects of equality of the parties and competition, including aspects of responsibility.

Thus, there is no particular innovation in the "set" of principles itself.

It is important to note that Article 6 of the CAS, which lists the principles of administrative proceedings, is an exhaustive rule from the point of view of legal technology. This gives the impression that there are no other principles of administrative proceedings (and they, as we can see, do not differ from the principles stated in

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the CPC). However, as you know, the principles of legal proceedings may not be fixed in the rules, but there is, for example, dispositivity. It seems that an exhaustive list is still not a reason to deny administrative proceedings and other principles, especially since it is possible to reflect the specifics of administrative proceedings in them.

In the literature, Article 6 of the CAS is confidently called the norm with a non-exhaustive list [5, p. 52-60; 6, p.18-20]. In fact, this is true, since it is generally accepted to recognize the existence of principles that do not have an independent normative basis (and this criterion, in particular, is based on one of the classifications of principles). However, this does not remove claims to the legal technique of CAS, since not all law enforcement officers are experts in legal doctrine, and Article 6 can be understood literally as a closed list. In addition, if there is an Article with a list of principles, it is quite difficult to promote ideas about the need for normative consolidation of certain principles, as well as to justify their existence.

3. Principles set forth in the CAS regulations

3.1. The independence of judges

Articles 7 of the CAS and 8 of the CPC on the independence of judges are almost identical. Each of them has 4 parts, parts 1 and 3 declare independence and its guarantees, parts 2 and 4 are more specific, establishing a ban on interference in the activities of courts. The characteristic of "interference" in the CAS differs: part 2 of Article 7 refers to interference "by state authorities, other state bodies, local self-government bodies, other bodies, organizations, officials and citizens" in the activities of courts. At the same time, part 2 of Article 8 of the CPC refers to "any interference" in the justice system, and does not outline the circle of persons who are specifically prohibited from doing so. The primary way is to indicate that judges should consider cases in conditions that "exclude extraneous influence on them". We recognize that the wording of part 2 of Article 8 of the CPC is better than part 2 of Article 7 of the CAS. In the case of CAS, it turns out that the listed persons are prohibited from interfering in the activities of judges, but everyone else can interfere. Apparently, the authors of the CAS believed that they remembered and listed all possible subjects in part 2 and thus secured the judges.

As for non-procedural appeals, both codes contain similar rules. We believe that the question of whether such a public statement by a judge ensures its independence is rhetorical. Such an action has a very indirect relation to independence: in certain situations, it can protect the judge from pressure, but it does not guarantee the protection of the judge in a situation with pressure on him by a person who has an administrative resource against the judge. The judge may not report the latter, and it is not possible to check it in any way. This rule is initially declarative.

The literature rightly points out the "conflicts" of this principle with others. For example, A. G. Pleshanov notes the conflict of independence of judges and procedural economy in the procedure of recusal of a judge - a judge cannot be impartial in evaluating his own actions [7, p. 42-49].

3.2. Equality of all before the law and the court

Both codes develop the provisions of the Constitution of the Russian Federation (part 2 of Article 19). The principle is one of those established by the Constitution and can equally be considered neither a principle of civil procedure nor a principle of administrative procedure. Conduct of legal proceedings on the basis of equality before the law and the court of citizens regardless of gender, race, nationality,

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language, religion and other circumstances, and organizations-regardless of their organizational and legal form, form of ownership, etc. - the intersectoral principle and its consolidation in the CAS does not give the principle a new content in comparison with the GPC. However, both Codes Supplement the constitutional norm by pointing to the equality of organizations before the law and the court.

3.3. Legality and fairness in the consideration of cases

Highlighting the principles of legality and justice in the consideration and resolution of administrative cases (Article 9 of the CAS) is one of the innovations inherent in the CAS. However, the code does not provide anything fundamentally new in the definition of these principles: legality and justice are ensured by compliance with the law; interpretation of normative acts in accordance with the circumstances of the case and obtaining judicial protection by citizens and organizations by restoring their violated rights and freedoms.

Disclosure of the concept of legality does not attract researchers, this principle has long been known and the doctrine of it has been developed. But the establishment of the principle of justice in the CAS immediately became a source of scientific discussion, the nature and range of which deserve attention.

It is widely believed that justice is not disclosed in the CAS [7, p. 42-49], it is noted that the combination of two principles in the disposition of one norm – legality and justice - is an obstacle to the disclosure of the content of justice, but based on the understanding of "justice" as impartiality, we can offer our own definition [8, p.11-15].

A.V. Ilyin believes that since it is not possible to establish the content of the principle of justice, and the procedural code should not contain phantoms, therefore, the principle of justice has no place in administrative proceedings. He comes to this conclusion by making suggestions about the possible purpose of this principle, which he later rejects. One of them is the assumption that the court should assume the burden of proving the position of the defendant-the public administration-in order to make up for the omissions in the latter's position. At the same time, the court must do everything possible, including collecting evidence, so that the fate of legality does not depend on the results of the competition of the parties and the incompetence or laziness of the public administration. The citizen-plaintiff does not need to be helped, since it is not difficult for the plaintiff to convey his position to the court. A.V. Ilyin rejects this model, pointing out that " it is unlikely that the domestic legislator was so cynical and such an interpretation has no right to exist." The second assumption in A.V. Ilina - the principle of justice characterizes the features of not considering, but resolving an administrative case: for example, a disputed action or decision is recognized as legitimate, but not fair. A.V. Ilyin also refutes this version and concludes that the principle of justice is a phantom [9, p. 95-101].

V.V. Yarkov notes that justice is quite voluminous and evaluative in terms of content. He proposes to apply to the Article.6 of the Convention for the protection of human rights and fundamental freedoms, on the basis of which justice includes the principle of equality of the parties, competition, publicity, as well as reasonableness, reasonable time for consideration, the inadmissibility of arbitrary cancellation of a decision and the right to unconditional execution of a judicial act. Justice is rather an independent General legal phenomenon [5, p. 52-60]. We agree that the appeal to the norms of the Convention in their interpretation by the European court of Justice is the key to a correct understanding of the concept of justice in legal proceedings.

It seems that the most interesting and accurate

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position of I. N. Spitsin on this issue. The key point he sees is the distinction between the substantive and procedural aspects of justice. The first concerns the outcome of the administration of justice, and the second concerns the procedure itself. The substantive approach is incorrect, as it will lead to a rethinking of the entire concept of proof, including the burden of proof. Attempts to give the principle of justice in a civil judicial process a substantive content should be avoided. The procedural and legal component of the principle of justice presupposes a standard of fair trial (due process). In practical terms, there will be no difficulties, since the fair trial standard has been developed in detail, in particular in law enforcement practice (ECHR) [10, p.28-34].

3.4. Conduct of court proceedings within a reasonable time and the execution of judicial acts within reasonable time

This principle is not something original for the CAS, since it is known both in the CPC (art. 6. 1) and in the agro-industrial complex (art.6.1). It should be noted that Article 10 of the CAS, more attention is paid to the solution procedure by the President of the court of the question of the acceleration of the administrative case review (parts 6 to 9 of Article 10 of the CAS). In part 6 Article 10 reflected the specifics of the actual administrative proceedings: the question of the acceleration can be solved not only at the request of the person concerned (as in AIC and GIC), but also on its own initiative, the President of the court. In this part, the principle is interlinked with the principle of activity of the court.

According to L.Yu. Zueva this principle is associated with a task of correct and timely consideration and permission of administrative cases and provides: 1) detailed regulation of procedural terms; 2) regulation of the use of the Internet, information technology, the scope of application of which the CAS is quite wide; 3) measures of procedural coercion (Chapter 11), the list of which CAS is wider than in the APC CPC [11, p. 44-47].

However, we note that the CAS provisions on this principle of legal proceedings do not contain any fundamentally new characteristics (in comparison with the CPC), and the ways to ensure deadlines are known to both codes.

3.5. Transparency and openness of court proceedings

The CAS is characterized by a slightly different understanding of the transparency of legal proceedings from the CPC (Article 11 of the CAS). The CPC is the relevant provision (Article 10) called "public trials", contains 8 parts, of which only 2 (part 1 and part 7) on open trial, and the remaining 6, that is, the vast majority – rules, closed-door trial. This is not to mention the fact that the CPC is still an example of an exceptionally narrow understanding of publicity-only as a matter of conducting an open/closed trial.

In the CA, the majority is also devoted to the rules of closed session. However, it is necessary to note the more successful title of the Article – "Transparency and openness of judicial proceedings". In addition to coinciding with the GPK rules about the openness of the proceedings and the right of individuals commit his stroke, in CASS formulated the rules prohibiting restrictions to the persons involved in the case, the right information and the process adopted in the case of judicial acts (part 3 of Article 11 CASS); about the right of everyone (and not only the persons participating in the case) to get acquainted with the decision on the case considered in open court (part 4 of Article 11). In fact, this is what is expected from the new code – taking into account the provisions formulated by modern trends.

3.6. The immediacy of the trial

Provisions on the immediacy of judicial proceedings in the CAS are included in Article 13, where it is noted that the court must directly examine all the evidence in the case. This Article is located among other Articles on principles, in Chapter 1 of section I "General provisions". In the CPC, on the contrary, the rule on immediacy is not located in Chapter 1 "Basic provisions", which contains rules on principles, but in Chapter 15 "Judicial proceedings" of subsection II of Section II (Article 157). Article 157 of the CPC also provides for the principle of oral proceedings, which the CAS did not pay attention to. Meanwhile, oral communication is directly linked to the principles of transparency and competition, ensuring them.

3.7. Adversarial nature and equality of the parties in the active role of the court

It should be noted that the principle of court activity is more attractive to researchers than the other two mentioned in the analyzed Article. This is quite understandable, given that competition and equality are already sufficiently represented in scientific works.

Adversarial means placing the burden of proof on the parties themselves and removing the duty to collect evidence from the court. In administrative proceedings, in contrast to civil, the court is characterized by greater judicial activity and the presence of significant powers to participate in evidentiary activities (part 3 of Article 62, part 2 of Article 14, part 1 of Article 63 CAS) [5, p. 52-60].

As rightly noted in the literature, the practical side of the question of the active role of the court in an adversarial and equal process is not limited only to the independence of the court in requesting evidence and the correct application of the law. Within the framework of civil proceedings, there is an opportunity for a worthy implementation of the active role of the court [12, p. 57-60]. Moreover, it is noted that as for civil proceedings (even built on the investigative type), there are no special grounds for distinguishing an independent principle of court activity, so there are no similar grounds in administrative proceedings [13, p. 102].

4. Conclusions

Thus, both codes, and the CPC, and CAS have special rules on the principles of legal proceedings, located in the General part. The CAS also has a rule containing a closed list of principles of administrative proceedings.

The technique itself – when the principles are necessarily fixed in the norms in the form of separate Articles-is flawed. Both foreign and Russian experience (not all production principles are enshrined in Russian laws) shows that you can do without normative consolidation, the main thing is that the principle is dissolved in the law itself, and "read" when analyzing the norms of a correctly written law.

As for the attempt made in the CAS to fix the list of principles in an independent Article, this experience also does not look successful. The existence of a list of principles impoverishes legal proceedings and impoverishes the content of the principles themselves, making them dependent on how well (and often unsuccessfully) the legislator wrote them down, although the description of individual principles in the text of the codes may be useful. Attempts to define a principle in the Articles of the code make it impossible for judges to interpret them in the same way as the ECHR interprets the provisions of Article 6 of the Convention.

The system of principles for a particular branch of law is formed under the influence of objective assumptions. the task of the legislator is to correctly identify these prerequisites, so as not to construct a far-fetched and non-working structure. If the authors of the CAS failed to create a new system of principles, this may be a positive result, which confirmed the absence of

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objective prerequisites for a new system of principles. As V. M. Sherstyuk notes, any principle of civil procedure law can be considered as an element of the paired category; the interaction and competition of these categories are the source of development of both; one of the categories at a certain historical stage may go into the shadows. To solve the question of whether a new principle has been formed in the field of law, it is important to have a pair category, in contrast to which a new idea is put forward, and the nature of their interaction [16, p.31-33].

A comparison of the rules of the civil procedure code and the CAS on the principles of judicial procedure shows that no new principles specific to the consideration of administrative cases have been formulated. Administrative proceedings are based on the same basic principles as civil proceedings. The absence of an independent system of principles confirms the thesis that administrative proceedings cannot be considered an independent branch separated from civil proceedings.

One of the features-the distribution of the burden of proof and the ability of the court to conduct a number of actions in proving on its own initiative - was removed from the CPC, along with the removal of all rules on cases arising from public legal relations.

Meanwhile, it could be productive to study and focus on some of the distinctive features of administrative proceedings, which, quite possibly, would become system-forming. In addition to the above-mentioned features of the distribution of the burden of proof and the active role of the court, it makes sense to pay attention to the specifics of the execution of judicial acts adopted in cases of administrative proceedings. A clear trend and, if you like, a characteristic feature in the consideration and resolution of most cases, is the immediate execution of decisions fixed directly in the CAS. GIC decisions subject to immediate execution at the direct instructions of the law, quite a bit: it's named in Article 211 of the CPC decisions (orders) about collecting of the alimony; about payment of employee wages for 3 months; reinstatement to work; the inclusion of the citizen in the voters list (the latter, moreover, must also be taken in connection with the transfer of cases of this category in CAS). In other cases (Article 212 of the civil procedure code), it is only possible to apply for immediate execution. In the CAS, on the contrary, it is the immediate execution of decisions in accordance with the direct instructions of the law that prevails. This, for example, the following compounds: a recognition illegal decisions and actions (inaction) of the authority on issues related to the harmonization of time and place of the public event (part 8, Article 227 CASS); inclusion of the citizen in the voter list, the immediate removal of the member of the precinct election Commission from participating in the work of the Commission (section 6 of Article 244 CAS); the awarding of compensation for violation of the reasonable time (part 3 of Article 259 CAS); termination of activities of public Association, religious or other nonprofit organization or termination of the search, receipt, production and dissemination of mass information media (part 3 of Article 264 CAS); hospitalization of a citizen in involuntary or prolongation of hospitalization of a citizen in involuntary order (section 6 of Article 279 CAS); hospitalization of the citizen in medical anti-tuberculosis organization in involuntary order (section 6 of Article 285 CAS). It should be noted that the General rule on immediate execution – Article 188 of the CAS-proceeds from other priorities than Articles 211 and 212 of the CPC. This is the priority of immediate execution, which is, in our opinion, a characteristic feature (perhaps a principle) of administrative proceedings.

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INFORMATION ABOUT AUTHOR

Lydia A. Terekhova – Doctor of Law, Professor, Honorary Worker of Higher School; Head, Department of Civil and Arbitration Process
Dostoevsky Omsk State University
55a, Mira pr., Omsk, 644077, Russia
E-mail: lydia@civpro.info
RSCI SPIN-code: 1478-7958; AuthorID: 678373

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