„Krytyka Prawa", tom 15, nr 1/2023, s. 81–100, ISSN 2080-1084, e-ISSN 2450-7938, © 2023 Authors.

YERIK BULATOVICH AKHMETOV[1],
YERMEK BAYAKHMETOVICH ABDRASULOV[2]

What We Talk About When We Talk About the Principle of the Active Role of the Court in Administrative Procedure[3]

Submitted: 17.09.2022. Accepted: 29.11.2022

Abstract

The article examines the application of the principle of the active role of the court in the administrative proceedings of the Republic of Kazakhstan and foreign countries. The attention is paid mainly to the identification of the main function and the system of application of this principle. The scientific novelty lies in the study of important subordinate guiding principles, the influence of which is decisive when applying the principle of the active role of the court in the administrative proceedings of the Republic of Kazakhstan. The authors conclude that the judge should apply the principle of the active role of the court in order to have a fair trial within a reasonable time.

Keywords: regularity, universality, system of principles, law and order, hierarchy, legality, proportionality, managerial activity, public rights, interests of citizens, officials, administrative affairs.

[1] Yerik Bulatovich Akhmetov, PhD student – L.N. Gumilyov Eurasian National University, Master of Law, Nur-Sultan c. (Kazakhstan); e-mail: ahmetov.er-0507@mail.ru; ORCID: 0000-0003-1618-8231.

[2] Yermek Bayakhmetovich Abdrasulov, PhD – L.N. Gumilyov Eurasian National University (Kazakhstan); e-mail: aermek_19@mail.ru; ORCID: 0000-0003-4835-9760.

[3] The research in this article has not been supported financially by any institution.

 DOI: 10.7206/kp.2080-1084.572

„Krytyka Prawa", tom 15, nr 1/2023, s. 81–100, ISSN 2080-1084, e-ISSN 2450-7938, © 2023 Authors.

AKHMETOV YERIK BULATOVICH,
ABDRASULOV YERMEK BAYAKHMETOVICH

O czym się mówi, gdy mowa o czynnej roli sądu w postępowaniu administracyjnym[4]

Streszczenie

Artykuł bada zastosowanie zasady czynnej roli sądu w postępowaniach administracyjnych w Republice Kazachstanu oraz za granicą. Uwagę poświęca się zwłaszcza głównej funkcji i systemowi stosowania tej zasady. Nowość badawcza kryje się w studium ważnych zasad przewodnich o podrzędnym charakterze, które mają decydujący wpływ przy stosowaniu zasady czynnej roli sądu w postępowaniach administracyjnych w Republice Kazachstanu. Autorzy dochodzą do wniosku, że sędzia powinien stosować zasadę czynnej roli sądu, aby proces był sprawiedliwy i odbył się w rozsądnym terminie.

Słowa kluczowe: regularność, uniwersalność, system zasad, prawo i porządek, hierarchia, legalność, proporcjonalność, działalność administracyjna, prawa publiczne, interesy obywateli, urzędnicy, sprawy administracyjne.

[4] Badania wykorzystane w artykule nie zostały sfinansowane przez żadną instytucję.

Introduction

Legal principles play a major role in the process of the application of legal norms, even though their legal nature has not been fully understood, and a clear line between legal norms and legal principles given in legislature has not been drawn yet. Dr Jordan Daci correctly points out the complexity of defining the legal principles due to the absence of singularity when it comes to the definition. In some cases, these principles are taken as specific legal norms, while, in other cases, they are treated as general legal regulations, and, still in other contexts, as standards that serve as a basis for legal norms.[5]

The importance of having a somewhat clear definition lies in the provision of compliance and correlation with scientific doctrine, practice of the legislation, as well as its application in the legal regulation of social relations.[6]

Joost Huysmans writes well on this matter, noting that legal principles given in the legislation do not have this sort of specific content as in the regular legal norms, but they still affect, even indirectly, the legal meanings of other legal norms in the process of their application *per se*.[7]

On 1 July 2021, a new Code of Administrative Procedure and Proceedings (thereinafter CAPP) entered into force. The CAPP aims to regulate the public law relations between an administrative body and a person in respect of whom the public functions of that administrative body are used as prescribed by law.

After acquiring independence, post-Soviet states began the process of building democratic nations, whose supreme values were declared to be individuals, their rights, and freedoms. This process included such processes, as relationship building between the state and the individual, conflict resolution among citizens and their unions as related to actions (inactions) and decisions of public authorities. The establishment and development of administrative justice period is beginning, and its essence lies in the system of decision making by administrative agencies, boards, committees and specialised courts. The meaning of administrative justice

---

5 J. Daci, *Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?*, "Academicus International Scientific Journal" 2010, 2.

6 A.V. Skorobogatov, A.V. Krasnov, *Sudebnaya praktika v pravovoj real'nosti Rossii: opyt kompleksnogo issledovaniya*, "RUDN Journal of Law" 2021, 25(3), pp. 545–561.

7 J. Huysmans, *The Role of Formal Principles in Legal Reasoning*, "Policy Within and Through Law" 2015, 1, pp. 237–259.

 DOI: 10.7206/kp.2080-1084.572

is accurately given in the following thesis: far more citizens have their rights defined by these agencies than by courts of general jurisdiction.[8]

We believe that the main feature of the principles of administrative justice is their direct applicability and specific regulatory nature. The principles of administrative procedure are not justified as declarations, but with the clear and pragmatic aim of being special legal instruments. The principles of administrative procedure are intended to provide guidance not only to the legislator but also to the enforcer.

Legal principles play a major role in the process of the application of legal norms, even though their legal nature has not been fully understood, and a clear line between legal norms and legal principles given in legislature has not been drawn yet.

In our opinion, the principle of the active role of the court in administrative proceedings is one of the special group of principles of administrative law. This principle defines the essence of dynamic regulatory activity of public authority.

Scientific doctrine and legislative recognition of application of the principle of the active role of the court in administrative proceedings of the Republic of Kazakhstan and foreign countries is discussed in this article take an important place in this process.

Research methodology

In the course of this study, general scientific theoretical methods were applied. The method of cognitional understanding of scientific and theoretical materials was the main method for all the work.

Some other methods were used in examining and analysing the basic principles of the administrative procedures. For instance, the method of literature analysis was used; the generalisation method was used when highlighting the basic principles; and the logical method was used when analysing problematic issues.

This article is aimed at the analysis of the meaning and role of legal principles in the system of administrative justice in Kazakhstan and foreign countries. Basically, the principle of the active role of the court. The article also investigates the experience of foreign countries that were the first out of all post-Soviet countries to begin the transition to the administrative justice.

---

[8] L. Sossin, *Future of Administrative Justice*, "Canadian Journal of Administrative Law & Practice" 2008, 21, p. 192.

Literature review

In order to analyse the principle of the active role of the court in the system of administrative justice from all angles, the authors tried to examine the works of Kazakhstani and foreign writers, scholars, and experts in the sphere of law, application of law and administrative law.

System-based analysis, comparison, theoretical and legal prognosis served as methodological basis of the research that allowed to get to certain conclusion in the article. Major focus has been given to the works of foreign legal academia experts who studied the problems of applying the legal principles and researched the questions of administrative justice: Lorne Sossin, Janis Načisčionis, Elise Poillot, Yu.N. Starilov, K.V. Davydov, T.M. Yablochkov etc. Special attention has been paid to the works of Kazakhstani authors of V. Konusova, R.K. Sarpekov, B.K. Nurgazinov and others.

Discussion

Administrative proceedings have some specific features in comparison with civil and other proceedings. The main one is being the inequality of the participants in this process.

One of the parties to the dispute is always the authority – the person who has the power and authority. The other side – the citizen – is definitely a weaker person in legal terms. The state always has great possibilities for the realisation of its rights and interests through its bodies. So, the court is obliged to equalise the parties of the dispute and in some way to help the weaker party of the dispute to realise the rights represented by law in order to comply with the most important constitutional principles.

In the Republic of Kazakhstan, as it has been noted by other researchers, questions of organisation of administrative justice have also been very relevant because the goal of its formation was in creating a clear legal framework that controls the actions of government agencies. Administrative justice had to provide additional protection of people and citizens' rights and increase investment attractiveness of Kazakhstan.[9]

It should be noted that the creation of an authentic administrative justice in Kazakhstan was delayed until 2020, because all the efforts taken by the lawmakers

[9] R. Sarpekov, V. Konussova, B. Nurgazinov, *Formation and Development of Administrative Justice of the Republic of Kazakhstan*, "Journal of Legal, Ethical and Regulatory Issues" 2021, 24(4).

 DOI: 10.7206/kp.2080-1084.572

since 2010 were focused on uniting two opposite powers of the administrative court: on the one hand, the authority to hold administrative proceedings and, on the other hand, to resolve any public conflicts and to protect the rights of people from illegal actions of authorised public figures and agencies. Thus, realising the inconsistency of this approach, the authors of the idea of creating administrative justice began to work on a new legislative project in 2015, development of which finished on 29 June 2020, with the Republic of Kazakhstan's enactment of the Code of Administrative Procedure and Proceedings.

The regulatory act that came into effect on 1 July 2021, became the beginning of the full functioning of the administrative procedures' system and administrative proceedings in the Republic of Kazakhstan, as their aim was to ensure a range of measures to establish balance between private and public interests in public relations, primarily through the protection of the rights and freedoms of people from possible arbitrary actions of executive power.

The Code of Administrative Procedure and Proceedings (thereinafter – CAPP). has established the following principles of administrative procedures and administrative proceeding: principle of legality, justice, protection of rights, freedoms, and legal interests; proportionality, principle of administrative discretion, principle of protection of the right to trust; principle of restriction of abusing formal requirements; presumption of credibility, principle of the court's active role; reasonable administrative trial time.

Administrative procedural law was defined in the Concept of Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020 as one of the important directions of the development of national law in general.[10]

With that in mind, that the judicial process has been of an investigative nature in the Republic of Kazakhstan since the establishment of procedural legislation. The court had a burden of proof and the parties to the proceedings acted as sources of evidence. An essential feature of the investigative process was the principle of evidence research and in-service proceedings.[11]

Further, in the Republic of Kazakhstan, the legislator took the path of eliminating the investigative process and replacing it with an adversarial process. At first, the competition was not explicit. The statute of civil proceedings stipulated the active participation of the court in the establishment of evidentiary material, however, only as an adviser to the parties. The court was obliged to establish the

[10] L.T. Zhanuzakova, *Ponyatie i priznaki administrativno-processual'nyh pravootnoshenij*, "Vestnik Instituta Zakonodatel'stva i Pravovoj Informacii RK" 2019, pp. 3–4.

[11] V.V. Yarkov, *Grazhdanskij process: ucheb. dlya vuzov*, 6 ed., Moskva 2006, p. 703.

proper performance of duties and to assist the parties. At the same time, the court was no longer an independent researcher of the circumstances.[12]

In this context, that modern procedural activity has a clear adversarial nature. The court acts as an arbitrator rather than an active participant in the proceedings. At this moment, the purpose of the court is no longer to establish the objective truth in the case and to help the parties in protecting the rights granted by the state. The court rather establishes the circumstances of the case and fixes them in the reasoning part of the decision.

The main feature of the principles of administrative justice is their universality. The principles of administrative procedure often become the principles of all management activities, going beyond the mere legislation on administrative proceedings.

The characteristic is the open nature of the system of principles. Whatever list is fixed in the legislation on administrative procedure (and in the legislation as a whole), it is not a 'frozen' dogma. The content of individual principles can be changed, clarified and supplemented, especially by case law. No list of principles of administrative procedure should be regarded as denying the right to the existence of other fundamental principles of public administration. It is necessary to remember this moment to legislators in post-Soviet states, inclined to create 'hard' and 'closed' legal forms.

The distinguishing feature is the hierarchy of principles. In the field of administrative procedures, there are at least three 'groups' of principles:

- Firstly, general legal principles and principles of administrative law in general.
- Secondly, the principles of the administrative process; finally, the principles of administrative procedures themselves.[13]

We are of the opinion that an exclusively competitive approach will not adequately protect the violated rights in administrative proceedings. The main reason is the inequality of participants in the process of administrative cases. In a lawsuit, one of the parties is always an authority with authority. On the other hand, a citizen is not always able to protect his or her rights properly, mainly due to the lack of certain legal knowledge. We believe that the exclusively adversarial nature of the process will not ensure the proper handling of the case.

---

12 D. Azarevich, *Pravda v grazhdanskom processe*, "Zhurnal Grazhdanskogo i Ugolovnogo Prava" 1888, 1, p. 5.

13 K.V. Davydov, *Special'nye principy administrativnyh procedur*, "Vestnik Nizhegorodskogo Universiteta im. N.I. Lobachevskogo" 2020, 2, pp. 125–133.

 DOI: 10.7206/kp.2080-1084.572

T.M. Yablochkov noted that "if you do not give the court a certain share of the initiative in clarifying the case, it is often not the party that is right that wins, but the one that is more skilful in the process." The scientist believes that an inexperienced applicant will incorrectly build his or her claim. He or she will not justify it with sufficient evidence and will fail the most just cause.[14]

The active role of the court in consideration of the cases is not considered as a circumstance that derogates from the constitutional requirements of the adversarial procedure, since the principle is based on 'objectively significant circumstances predetermined by the very nature of public-legal relations.'[15]

We completely agree with the position of S.N. Mahina, who noted that talking about an active role of the court with regard to the adversarial and equal rights of the parties, logically unjustified.[16] As a result, protection and fair treatment of the citizens is what law in a democratic state should strive for.[17]

The present document highlights the need for the adoption of the administrative procedural and process-related code. A clear identification of the object of the regulation of administrative procedure, the principles of administrative proceedings, and the creation of the Institute of Administrative Justice which resolves disputes of law arising from public relations between the state and a citizen (organisation).

In this context, administrative procedures should become an integral form of justice, as well as criminal and civil proceedings.[18]

We are of the opinion that it is in administrative proceedings that one should not get carried away with formalism. The conduct of the trial and the evidence procedure itself should take into account all the specific features resulting from the very nature of the public-legal relationship. Therefore, the expediency of changing the nature of the administrative process to an investigative-adversarial one does not present any doubts.

The legislator made significant changes. It includes the formulation of a new principle – the principle of the active role of the court. It is understood as giving the court a number of powers that allow it to independently influence the trial process.

So, now the court has the right to form the subject of proof and demand evidence in an administrative case. It is not bound by the grounds and arguments of the

14 T.M. Yablochkov, *Uchebnik russkogo grazhdanskogo sudoproizvodstva*, Yaroslavl' 1910, p. 326.

15 A.V. Orlov, *Aktivnaya rol' suda v administrativnom sudoproizvodstve*, "Ros. Sud'ya" 2016, 8, pp. 12–15.

16 S.N. Mahina, *Teoriya dokazyvaniya i dokazatel'stv v administrativnom sudoproizvodstve: stanovlenie i razvitie*, "Administrativnoe Pravo i Process" 2016, 2, pp. 4–9.

17 E. Poillot, *The True Story of the Active Role of Courts in Consumer Litigation: Introduction to the Speech Given by Etienne Rigal*, [in:] A.M. Mancaleoni, E. Poillot (eds.), *National Judges and the Case Law of the Court of Justice of the European Union*, Rome 2021, p. 8.

18 Zhanuzakova 2019, pp. 3–4.

stated claims in a number of administrative cases. At its discretion, the court has the right to appoint an expert examination, call the necessary witness, assist persons who have applied for judicial protection, as well as conduct a number of other procedural actions.

The principle of the active role of the court is provided for in Article 16 of APPC (Active role of the court). According to part one of the same Article 16, administrative proceedings are conducted on the basis of the active role of the court. Part two provides that the court not limited to explanations, statements, petitions of participants of the administrative process, presented by them arguments, evidence and other materials of the administrative case. The judge examines all the factual circumstances relevant to the correct resolution of an administrative case. The judge has the right to express his or her preliminary legal opinion on the legal grounds relating to the factual and/or legal parties to the administrative case. In Article 16(3) of the Code of Administrative Procedure, the court shall on its own initiative or on the basis of a reasoned request by the participants in the administrative proceedings, collect additional materials and evidence and perform other actions aimed at solving the tasks of the administrative proceedings.[19]

According to the former Chairman of the Administrative Division of the Supreme Court of Kazakhstan, 21 specialised administrative courts (CMAS) have been established in Kazakhstan to strengthen the protection of citizens' rights. 17 of them are regional in administrative centres and 4 more are in the cities of Kaskelen, Semey, Zhezkazgan and Ekibastuz, which consider claims of individuals and legal entities to administrative bodies. The CMAS consists of 179 units, which are formed by redistribution of the full-time number of judges of the courts of the republic. In order to strengthen the judicial community, personnel from the corporate legal sector (the former Chairman of the Judicial Board) was attracted.

At the same time, a significant impact on the simplification of the administration of justice was the COVID-19 pandemic, which made adjustments and accelerated the digitisation of the judicial system. For instance, the judiciary in Kazakhstan is already inconceivable without the use of videoconferencing. At present, almost all trials are conducted online, which has reduced the procedural (judicial) costs and greatly facilitated the administration of justice, including for natural and legal persons.

Thus, we are of the opinion that before announcing the tools available in the specialised administrative courts for administrative cases arsenal, it is right and necessary to dwell on the main stages of administrative proceedings and the need for their consistent passage.

[19] Administrative Procedure Code of the Republic of Kazakhstan of 29 June 2020, 350-VI.

 DOI: 10.7206/kp.2080-1084.572

According to Article 117 of the Administrative Procedure Code of the Republic of Kazakhstan (General Rules of Administrative Procedure) in Administrative Proceedings there are five main stages:

1) Registration of the claim in court
2) Court action in an administrative case and preliminary hearing
3) Judicial proceedings
4) The judgement of the court, its reading and explanation
5) Execution of the judgement and judicial review (Administrative Procedure Code of the Republic of Kazakhstan).

We propose to take three of these stages for consideration.

1) Registration of the claim in court

In Article 116(1) of the Administrative Procedure Code, the court is not bound by the stated cause of action, but it may not go beyond the claims. The court may assist the party in formulating and/or modifying the claims with prior clarification of the legal consequences.

Article 116. Limits of Court Proceedings in Administrative Cases

1. In determining the subject of the claim, the court is not bound by the formulation of the claim, the text of the claim and documents attached to it or submitted later.

The court may assist the party in formulating and/or modifying the claim with prior clarification of the legal consequences.

The court is not bound by the stated cause of action, but it is not entitled to go beyond the claims.

We believe that this is an important point and one of the essential tools aimed at protecting the participants in the regulated relations provided for in Article 3(2) of the Administrative Procedure Code, namely natural and legal persons, as opposed to state and administrative bodies and officials (Administrative Procedure Code).

For instance, during the consideration of the administrative case of the Administrative Court in Aktobe region on 12 October 2021. The complaint of the LLP 'Paris Commune XXI' to the state judicial executive.

Administrative case 1594-21-00-4/167 of 8 October 2021. CMAS on Aktobe at 09.30: "At the request of the limited liability partnership 'Paris Commune XXI' to

the State Court Officer E. on recognition of illegal actions and annulment of orders on imposing a penalty on property and transfer of the seized property for sale." For reference, the Bestamax livestock complex is a large pig-breeding enterprise out of 70 enterprises included in the industrialisation plan of the Republic of Kazakhstan. The company was established 19 years ago in 2002. Thus, this year the Aktobe Economic Court imposed an administrative fine on the pig farm for environmental pollution of 7,027 billion tenge, which is about 16.4 million dollars.

In the course of the administrative proceedings, one of the plaintiff's representatives, three of them, took advantage of the rule and increased the claims, by the way, after the judge proposed in accordance with the first paragraph of Article 116(2) of the Administrative Procedure Code, that the court may assist the party in formulating and/or modifying the claims, with prior clarification of the legal consequences.

Thus, the principle of the active role of the judge is provided in Article 16 of the APC. It was applied by the Court in this process. However, the judge asked the respondent a question, to which the respondent replied that he asked the plaintiff not to answer the question, while the prosecutor replied that it was the plaintiff's right under the APC.

2) The court's action on receiving the administrative case and a preliminary hearing

This is an independent stage of administrative proceedings. This stage is mandatory in all administrative cases. The purpose of this stage of the court's actions is on receiving the administrative case and the preliminary hearing. The judge is to ensure the correct and timely consideration and resolution of the case. The goal is clear and obvious, but in practice there is a formal attitude of judges to this stage, which may entail a violation of the principle of legality and a reasonable period of administrative proceedings.

According to the third part of Article 29 of the APPC, the possibility of replacing the defendant at this stage is provided for. Such facts have not been encountered with the participation of administrative cases, but we are of the opinion that such cases may occur frequently. For instance, if the court established that the claim was brought against the wrong person who should answer the claim, the judge would call the plaintiff and it would explain the consequences of filing a claim against an improper defendant. Then, with the consent of the plaintiff, it allows for the replacement of the improper defendant with the proper one. After the replacement of the improper defendant, the preliminary hearing and consideration of the administrative case in the court session are carried out from the very beginning.

 DOI: 10.7206/kp.2080-1084.572

At the preliminary hearing under Article 120(5) of the APPC, the parties may apply for approval of the conciliation agreement. Mediation or the settlement of a dispute by means of a participatory procedure is examined by the court or at a preliminary hearing.

3) Judicial proceedings

First of all, the court has a large number of additional powers to participate in evidentiary activities in administrative proceedings, which has its own characteristics.

The active role of the court is the 10th principle of administrative proceedings out of the 12 existing principles of administrative procedures and proceedings of the APPC.

Thus, Article 16 of the APPC consists of three parts:

1. Administrative legal proceedings are carried out on the basis of the active role of the court
2. The court is not limited to explanations, statements, petitions of participants in the administrative process, arguments, evidence and other materials of the administrative case submitted by them, comprehensively, fully and objectively examines all factual circumstances relevant for the correct resolution of the administrative case.

   The judge has the right to express his preliminary legal opinion on the legal grounds relating to the factual and/or legal sides of the administrative case.
3. The court collects additional materials and evidence on its own initiative or at the reasoned request of participants in the administrative process, as well as performs other actions aimed at solving the tasks of administrative proceedings (administrative procedural court).

We are of the opinion that the right of the court is not limited to the evidence presented by the parties. The court has the right to investigate all the circumstances that it deems necessary to establish within the evidentiary process. The court collects evidence on its own initiative if it is insufficient. The administrative body is obliged to prove its case, bear the burden of proof, the parties as a whole are obliged to submit documents and information to the court.

According to the second part of Article 116 of the APPC, the court is obliged to check during the trial whether the limits of administrative discretion and their compliance (proportionality) with the objectives of the adoption of an administra-

tive act established by the legislation of the Republic of Kazakhstan have not been exceeded.

In general, whether an administrative body or an official had the right to make a decision based on an assessment of their legality whether it was proportionate, i.e. suitable, necessary and proportional.

We will give the same example in the same case, which was considered by the SMAS in the Aktobe region on the claim of Paris Commune – XXI LLP to the state bailiff. Due to the fact that the actions (inaction) of the state bailiff were appealed against by the prosecutor. The process took place and was completed within two days. The prosecutor's actions were passive. The prosecutor did not ask questions to the parties. The prosecutor replied that there were no questions to the judge's question whether the prosecutor had any questions. Only after the completion of the process, the prosecutor read out his conclusion that the conclusion of a mediation agreement does not contradict subparagraph 9 of part two of Article 138 of the APPC, according to which the parties concluded an agreement on reconciliation, mediation, which he can approve.

During the process, the plaintiff tried to apply for the recusal of the judge according to subparagraph 1 of part two of Article 111 of the APPC. The recusal of the judge is possible in accordance with the procedure established by the Civil Procedure Code of the Republic of Kazakhstan. During the process, the plaintiff had a premonition that the judge was personally, directly or indirectly interested in the outcome of the case, or if there were other circumstances that raised reasonable doubts about his impartiality. For instance, the plaintiff's repeated petitions were rejected by the judge. Thus, the judge requested the materials of the enforcement proceedings and made copies. The judge attached these copies to materials of the administrative case and returned to the state bailiff. The plaintiff categorically objected, since the bailiff did not suspend the enforcement proceedings. In the end, the plaintiff went to conciliate the parties in order not to lose the trial.

In other words, in theory, the court is able to fully and objectively investigate all factual circumstances relevant to the correct resolution of an administrative case. The judge makes it without limiting itself to the explanations, statements and petitions of the participants in the administrative process, as well as the arguments, evidence and other materials presented by them in the administrative case. This is, in theory, but not always in practice, what is written in the Code by the court and the representative of the plaintiff, in order not to lose the process. He or she frequently has a reputation of someone who greatly cherishes using tactics, namely, as in this case, going for a mediation agreement.

For instance, an individual loses sight of some essential aspect of the case that could strengthen his or her position. Then the court has the right to independently

 DOI: 10.7206/kp.2080-1084.572

take into account this circumstance without the plaintiff specifying it. At the same time, the phrase 'entitled' will always remain at the discretion of the court. Moreover, the court has the right to demand evidence both at the request of the persons participating in the case and on their own initiative. The court's duty to assist the plaintiff in eliminating formal errors. The court clarifies unclear expressions, filing petitions on the merits of the administrative case, supplementing incomplete factual data. It submitting all written explanations relevant to the full definition and objective assessment of the circumstances of the administrative case at all stages of the process meets the same goal.

Let us turn to the judicial practice of foreign countries, especially those where cases arising from public legal relations are considered for a long time with the application of specialised legislation. One can draw attention to the fact that the principle of the active role of the court is of the greatest importance when considering cases of this category.

Baltic countries were first to engage in the process of transitioning to the administrative justice out of all post-Soviet countries, quickly moving away from the dominance of state interests over personal interests. Their administrative law began highlighting the importance of universal human values.[20]

In Germany, for instance, this principle is called the 'principle of investigating the circumstances of a case on duty' (*Untersuchungsgrundsatz*), or the 'inquisitorial principle'. The court, with its leading role, smoothes out the imbalance inherent in administrative proceedings. In accordance with this principle, the administrative court in Germany is not bound by the evidence presented and is obliged to investigate all the circumstances that are necessary to make an appropriate decision on the case

At the same time, the court must investigate every circumstance, even if there is no objective need for it. The court can use the right given to it in the event that it is really important for the resolution of the case. The court may also take the initiative to collect evidence and has the ability to demand the necessary documents.

The inquisitorial principle in force allows the court to have a leading role in the process in Germany. It allows the judge not only to be an arbitrator overseeing compliance with procedural law, but also to actively influence the process. It undoubtedly has a positive effect on the final result.

The German model is based on the existence of a separate branch of courts that are not the part of the system of courts of general jurisdiction. At the same

[20] J. Načisčionis, A. Urmonas, *Administrative Law in the Sphere of Public Policy upon Restoration of Independence of Latvia and Lithuania*, "Public Policy and Administration" 2021, 20(11), p. 129.

time, such isolation is conditioned by independence from the executive branch and the separation of public and private interests. Accordingly, the main difference from the French model is the attribution of administrative courts to the judiciary not the executive branch.

According to part four of Article 19 of the Basic Law of the Federal Republic of Germany of 23 May 1949, the person has the right to go to court in the event of a violation by a public authority of his or her rights, the latter has the right to go to court. If no other jurisdiction is established, the general courts are competent. Relations in the field of administrative proceedings are regulated by the German Law 'On Administrative Proceedings' of 21 January 1960. Thus, for instance, the name of paragraph 88 of the Administrative Procedure Code of Germany 'Binding of the Court to the Claim' indicates the attachment of the court to the claim.

According to Article 41 of the Administrative Procedure Code of the Republic of Estonia, dated 29 March 2015, "The Court cannot make a decision regarding a claim or a ground that is not presented in the complaint, as well as go beyond the claim." According to Article 249 of the Administrative Procedure Law of the Republic of Latvia, dated 1 March 2017, the court makes a decision regarding the subject of the application indicated by the applicant. The court does it without exceeding requirement.

In accordance with the current law of France, the judge is obliged to take an active role, i.e. to assist in collecting missing evidence and materials, including doing it independently. However, he or she is bound by the requirements of the statement of claim and has the right to investigate only the questions put to him or her.[21]

The principle of the active role of the court in one or another of its manifestations also applies in Georgia, Lithuania, Latvia and in many other countries. Administrative proceedings are carried out on the basis of specialised legislation.

When it comes to countries where the rules of law governing the consideration and resolution of cases in the framework of administrative proceedings are only being formed, then the principle of the active role of the court plays an important role there. For example, the draft Administrative Procedure Code of the Kyrgyz Republic included the inquisitorial principle. According to this administrative courts act within the framework of official duties. They are not bound by statements and explanations of participants in the administrative process.[22]

The main act regulating the public relations in the United Kingdom is On Tribunals, Courts and Law Enforcement the UK Law of 2007. Nowadays, there is

[21] D. Galligan, V.V. Polyanskij, Yu.N. Starilov, *Administrativnoe pravo: istoriya razvitiya i osnovnye sovremennye koncepcii*, Moskva 2002, p. 410.

[22] E.K. Manaliev, *Osnovnye principy administrativnogo processa v proekte administrativno-processual'nogo kodeksa Kyrgyzskoj Respubliki*, [in:] *Ezhegodnik publichnogo prava 2015: Administrativnyj process*, Moskva 2015, p. 464.

 DOI: 10.7206/kp.2080-1084.572

a system of tribunals in Great Britain. These tribunals are quasi-judicial bodies and occupy an intermediate position between the executive and the judiciary. These bodies are designed to resolve a wide range of disputes, mainly between a person and the state. The main elements of this system are first-level tribunals and higher tribunals consisting of several chambers. The tribunals can review their decisions not only on the statements of individuals, but also on their own initiative. Also, the decisions of the tribunals can be appealed to the court. The Supreme Court has the right to create precedents that are mandatory for first-level tribunals. In addition to these bodies, the administrative justice system of the United Kingdom includes an administrative court. It is a specialised court in the King's Bench Division of the Supreme Court and it has competence to review decisions of courts, tribunals, other bodies and others. The Court of Appeal, the Supreme Court, the County Courts, the Crown Court and the Magistrates' Courts also have certain competence in the field of administrative proceedings.

In this context, the principle of the active role of the court has a positive orientation. It makes a balance of power between the disputing parties. It allows for the most effective and rapid consideration of administrative cases.

We are of the opinion that consideration of this principle should be through the prism of the goals and objectives of the legislation on administrative proceedings. The principle of the active role of the court that allows us to observe the principles of competition and equality of the parties without violating the existing balance of power. Thus, the court provides assistance to the weaker side of the dispute, which is a citizen. It equalises objectively existing inequality in public law disputes and guarantees prompt and effective consideration and resolution of cases, making a fair decision.

We believe that the existence of the principle of the active role of the court is due to the very nature of public legal relations and is a sign of the fairness of administrative proceedings.

The principle of the active role of the court is due to the rules of the CAPP. Thus, according to paragraph 3 of Article 16 of the CAPP of the Republic of Kazakhstan: "The Court, on its own initiative or at the reasoned request of participants in the administrative process, collects additional materials and evidence, as well as performs other actions aimed at solving the tasks of administrative proceedings."

The study and analysis of the provisions of the of the CAPP of Republic of Kazakhstan proves the most important role of the investigating principle. It's impact on the institution of proof and on the entire process of consideration and resolution of administrative cases.

The active role of the court is manifested in the implementation of main principles of judicial proceedings. For instance, in the implementation of the principle

of equality of all people to the law and the court; the principle of legality and fairness of judicial proceedings.

Thus, taking into account the exceptional importance of the principle of the active role of the court for the administration of justice in administrative cases. We consider it necessary to devote a separate article to this principle. It allows us to reflect in the most detailed way all the powers of the court endowed with an active role in administrative proceedings. It allows us to reflect the peculiarities of this branch of law, its difference from other branches in particular features of civil law.

In this context, it should be said that administrative proceedings have significant features in comparison with other types of procedural activities, because the disputing parties are obviously not equal. Thus, a citizen is a person who has the least opportunities to protect his rights, unlike a public legal body.

The court cannot play the role of a 'silent' arbitrator in the process in order to comply with all the goals and objectives of administrative proceedings. The court must assist the parties in exercising their rights in a certain way. The court should make a proper balance of equality. At the same time the court should not disturb the constitutional principles of adversarial, equality and fairness of judicial proceedings.

In this regard, administrative proceedings have a mixed, investigative and adversarial nature. It allows establishing the necessary equality of the parties to comply with the above constitutional principles.

The legislator fixed the principle of the active role of the court in order the court has an objective right to influence the course of the process. This principle was not disclosed in detail in the norms of the CAPP.

We are of the opinion that the principle of the active role of the court is of crucial importance for administrative proceedings. In this regard, the expediency of its consolidation does not present any doubts. At the same time, it should be noted that at the moment it seems necessary to amend a number of articles of the CAPP of the Republic of Kazakhstan.

One of the priorities of such modernisation is the creation of the administrative justice system as an institution. This institution is the most important feature of a modern rule of legal state.

Therefore, an exclusively adversarial approach will not be able to properly ensure the protection of violated rights in administrative proceedings. The main problem is the inequality of the participants in the process in administrative cases. It should be noted that one of the parties is always an authority with the powers vested in it by the state, and the other is a citizen who is not always able to protect his rights properly. Mainly due to the lack of certain legal knowledge. It gives reason to believe that the exclusively adversarial nature of the process will not be able to ensure proper business management.

 DOI: 10.7206/kp.2080-1084.572

Justice as a type of state activity is designed to ensure justice in relation to those whose rights and interests are affected by it. These rights are based on both legal and moral principles.[23]

Yu.A. Popova believes that the settlement of disputes between citizens and bodies in court on the legality of issued legal acts. These decisions are a kind form of the constitutional right to judicial protection.[24]

The main feature of such cases is the specificity of the legal situation of the disputing entities. They are in a state of power. The obligatory participant in such legal relations is a public authority or official with the right to exercise authority, organizational, other legally significant.

In this regard, Kazakhstan is actively working on the formation of high-quality administrative justice, which was started as part of the implementation of the Concept of Legal Policy of the Republic of Kazakhstan for the period from 2010 to 2020. It states that "an important direction on the way to a rule of law is the development of administrative procedural law, the pinnacle of which would be the adoption of the Administrative Procedure Code."[25]

At the same time, in order to form a system of administrative justice that meets international standards of the rule of law and its effective functioning in Kazakhstan. The purpose of this is to protect the violated rights and legitimate interests of individuals and legal entities from illegal decisions and actions (inactions) of state bodies and their officials. It is necessary to create effective institutions and an appropriate system of special bodies ensuring judicial control over the activities of public authorities.

The foundations of the institution of administrative justice depend on the types of legal systems that have historically developed in various countries of the world.[26] Meanwhile, we believe that disputes arising from public relations between individuals and public authorities should be resolved by special judicial bodies – administrative courts. It should be separated from courts of general jurisdiction.

---

23 A.S. Koblikov, *Yuridicheskaya etika*, Moskva 2004, p. 32.

24 Yu.A. Popova, *Zashchita publichno-pravovyh interesov grazhdan v sudah obshchej yurisdikcii*, Krasnodar 2001, p. 296.

25 Koncepciya sovershenstvovaniya administrativnoj yusticii v Respublike Kazahstan [Elektronnyj resurs], http://online.zakon.kz/Document/?doc_id=32990560#pos=0;196 (access: 1.05.2019).

26 Administrativnyj procedurno-processual'nyj kodeks Respubliki Kazahstan ot 29 iyunya 2020 goda, No. 350-VI, https://adilet.zan.kz/rus/docs/K2000000350 (access: 16.09.2022).

Conclusion

In international relations, administrative courts, exercising the function of 'judicial supervision' for creating public trust and confidence in institutions, as well as a favourable legal ground for the economic freedom of foreign investors are an indicator with 'good government'.

Thus, the creation of administrative courts and administrative proceedings is an important step that will contribute to the creation of a full-fledged administrative justice in Kazakhstan. The object of its consideration will include disputes arising from public legal relations.

With that in mind, the acquisition of an independent procedural form by administrative proceedings is caused by a number of features, one of which is the 'formally' unequal position of participants (parties) in the administrative process. In this regard, the draft of the CAPP introduces a conceptually new principle of administrative proceedings. It provides an equation of the position of the parties. This principle is called the 'active role of the court'.

The legislator made significant changes. One of them is including the formulation of a new principle – the principle of the active role of the court. It is understood as giving the court a number of powers that allow it to independently influence the trial process. At present, the court has the right to form the subject of proof and to demand evidence in an administrative case. The court is not bound by the grounds and arguments of the stated claims in a number of administrative cases. The court also has the right to appoint an expert examination, call the necessary witness, assist persons who have applied for judicial protection. The court could conduct a number of other procedural actions.

In this context, it should be noted that administrative proceedings have significant features in comparison with other types of procedural activities. It is so because the disputing parties are obviously not equal. A citizen is a person who has the least opportunities to protect his rights, unlike a public legal body.

With that in mind, the court cannot play the role of an arbitrator in the process in order to realise all the goals and objectives of administrative proceedings. The court must in a certain way assist the parties in exercising their rights, restoring the necessary balance of equality. Therefore, a judge should in no case violate the constitutional principles of adversarial, equality and fairness of judicial proceedings.

Thus, the legal status of the administrative court established by the draft of the CAPP of the Republic of Kazakhstan. Its role in administrative proceedings will allow us to reach a new level of protection of the rights and legitimate interests of individuals and legal entities from unlawful decisions and actions of state bodies and their officials.

 DOI: 10.7206/kp.2080-1084.572

Bibliography

Azarevich D., *Pravda v grazhdanskom processe*, "Zhurnal Grazhdanskogo i Ugolovnogo Prava" 1888, 1.

Daci J., *Legal Principles, Legal Values and Legal Norms: Are They the Same or Different?*, "Academicus International Scientific Journal" 2010, 2.

Davydov K.V., *Special'nye principy administrativnyh procedur*, "Vestnik Nizhegorodskogo Universiteta im. N.I. Lobachevskogo" 2020, 2, pp. 125–133.

Galligan D., Polyanskij V.V., Starilov Yu.N., *Administrativnoe pravo: istoriya razvitiya i osnovnye sovremennye koncepcii*, Moskva 2002.

Huysmans J., *The Role of Formal Principles in Legal Reasoning*, "Policy Within and Through Law" 2015, 1, pp. 237–259.

Koblikov A.S., *Yuridicheskaya etika*, Moskva 2004.

Mahina S.N., *Teoriya dokazyvaniya i dokazatel'stv v administrativnom sudoproizvodstve: stanovlenie i razvitie*, "Administrativnoe Pravo i Process" 2016, 2.

Manaliev E.K., *Osnovnye principy administrativnogo processa v proekte administrativno-processual'nogo kodeksa Kyrgyzskoj Respubliki*, [in:] *Ezhegodnik publichnogo prava 2015: Administrativnyj process*, Moskva 2015.

Načisčionis J., Urmonas A., *Administrative Law in the Sphere of Public Policy upon Restoration of Independence of Latvia and Lithuania*, "Public Policy and Administration" 2021, 20(11), pp. 127–143.

Orlov A.V., *Aktivnaya rol' suda v administrativnom sudoproizvodstve*, "Ros. Sud'ya" 2016, 8.

Poillot E., *The True Story of the Active Role of Courts in Consumer Litigation: Introduction to the Speech Given by Etienne Rigal*, [in:] A.M. Mancaleoni, E. Poillot (eds.), *National Judges and the Case Law of the Court of Justice of the European Union*, Rome 2021.

Popova Yu.A., *Zashchita publichno-pravovyh interesov grazhdan v sudah obshchej yurisdikcii*, Krasnodar 2001.

Sarpekov R., Konussova V., Nurgazinov B., *Formation and Development of Administrative Justice of the Republic of Kazakhstan*, "Journal of Legal, Ethical and Regulatory Issues" 2021, 24(4).

Skorobogatov A.V., Krasnov A.V., *Sudebnaya praktika v pravovoj real'nosti Rossii: opyt kompleksnogo issledovaniya*, "RUDN Journal of Law" 2021, 25(3), pp. 545–561.

Solov'ev A.A., *Nekotorye osobennosti pravovogo regulirovaniya administrativnogo sudoproizvodstva v Federativnoj Respublike Germaniya*, "Vestnik Arbitrazhnogo Suda Moskovskogo Okruga" 2015, 4, pp. 92–100.

Sossin L., *Future of Administrative Justice*, "Canadian Journal of Administrative Law & Practice" 2008, 21, pp. 192–222.

Strogovich M.S., *Problemy sudebnoj etiki*, Moskva 1974, p. 272.

Yablochkov T.M., *Uchebnik russkogo grazhdanskogo sudoproizvodstva*, Yaroslavl' 1910.

Yarkov V.V., *Grazhdanskij process: ucheb. dlya vuzov*, 6 ed., Moskva 2006.

Zhanuzakova L.T., *Ponyatie i priznaki administrativno-processual'nyh pravootnoshenij*, "Vestnik Instituta Zakonodatel'stva i Pravovoj Informacii RK" 2019.