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LEGAL FRAMEWORK OF ADVERSARY NATURE IN ADMINISTRATIVE PROCESS

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Here is determined a list of normative legal acts with emphasizing of law norms, which, according to the author, constitute legal framework of adversary nature in administrative process.

Keywords: administrative process, adversarial nature in administrative process, adversarial principle.

Discussing the normative framework of adversarial nature in administrative process, we proceed from the formulation of the administrative process, which we propose as a trial that has its own strictly verified structure, the scope of which includes the consideration of cases on bringing persons to administrative responsibility, as well as all cases on public-law disputes.

Issue of adversarial nature is very relevant now in the Russian legal framework. Adversarial nature received constitutional recognition in domestic law, in the basic acts of international law and is being actively implemented. Therefore, the idea of adversarial nature is seen as one of the most important democratic principles in the procedural sphere. Adversarial nature expresses panhuman wisdom: truth is born in dispute.

Talking about the sources of the administrative process, including adversarial principle, first of all, attention should be drawn to the incomplete formation of the legal base in this area. At the same time, the existing Russian legislation to some extent already allows you to emphasize "sprouts" of administrative-procedural law as an independent branch, and consider adversarial nature as a principle of this branch of law.

In our view, a list of legal instruments that could be taken as a normative base of adversarial nature in administrative process might look like this:

1. The Constitution of the Russian Federation [1], which is the first among equals, establishes the principle of equality of each not only before the law, but also before the court (article 123 of the Constitution of the Russian Federation provides a principle, in accordance with which court proceedings are conducted on the basis of adversarial nature and equality of parties). As noted in the scientific-practical comments to the RF Constitution, "the principle of procedural equality of the parties is such a rule, according to which the relevant (criminal, arbitration, civil, administrative) procedural legislation ensures the equality of persons involved in a case when applying to court, in granting equal opportunities to use procedural means to protect their interests in court" [20].

2. The Federal Constitutional Law "On the Constitutional Court of the Russian Federation" [2]. According to article 6 of the Law, the decisions of the Constitutional Court are binding on the entire territory of Russia for all representative, executive and judicial bodies of state power, bodies of local self-government, enterprises, institutions, organizations, officials, citizens and their associations. Then, in furtherance of the mentioned provision, in part 2 article 100 of the Law is said: "the Constitutional Court decision declaring that a law applied in a particular case does not comply with the Constitution of the Russian Federation is the ground for the revision of this case by a competent authority in usual manner".

3. "Court" legislation which regulates the general questions of judicial system and court procedure. This includes the Federal Constitutional Law "On the Judicial System of the Russian Federation" [4], article 26 of which establishes the possibility of creation of specialized courts to hear administrative cases, as well as the Federal Constitutional Law "On Arbitration Courts in the Russian Federation" [3] , the Federal Constitutional Law "On the Military Courts of the Russian Federation" [5], which in a certain part govern the operation of courts in consideration of public-law disputes (they should be attributed to the sources of administrative procedural law and indirectly to the normative framework of adversarial nature) .

Regarding the significance in determining the place the adversarial nature federal laws are followed by international legal instruments, such as:

4. The Universal Declaration of Human Rights, adopted by the UN [14] December 10, 1948, according to article 10 of which "everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

5. International Covenant on Civil and Political Rights, adopted by the UN General Assembly in 1966 [16], Part 1 article 14 of which enshrines the right of

everyone "to a fair public hearing of a case by a competent, independent and impartial court established by law".

6. Convention for the Protection of Human Rights and Fundamental Freedoms from 04.11.1950 (as amended by the Protocol No. 14 from 13.05.2004) [15], article 6 of which "enshrines the right of everyone in case of a dispute concerning its civil rights and obligations or of any criminal charge against it to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

7. Of course, the legal sources of adversarial nature include the judicial acts of the Constitutional Court of the Russian Federation. It must be said that the Constitutional Court of the Russian Federation has repeatedly addressed the issue of establishing the principles of procedural equality and the adversarial principle.

In one recent case the Constitutional Court of the Russian Federation reviewed the compliance with the Basic Law of certain provisions of the Civil Procedure Code of the RF, according to which the court considers an application for recognition of a citizen as incapacitated with the participation of the citizen itself, if possible by its state of health [18]. According to the applicants, who have been recognized by the court to be incapacitated, the challenged legislative provisions, allowing the possibility of consideration by the court of application on recognition of a citizen as incapacitated without the participation of the citizen itself, violate their rights guaranteed by the Constitution of the Russian Federation.

The exceptional value of the adversarial principle is constantly noted by the Constitutional Court of the Russian Federation, which says that "one of the guarantees of the right to judicial protection, including with respect to administrative court procedure, is the provision on the implementation of proceedings on the basis of adversarial nature and equality of parties, covering all stages of administrative court procedure" [17].

Of course, talking about adversarial nature, we cannot but specify article 15 of the Code of Criminal Procedure of the RF [9].

The adversarial principle and principle of equality of parties mean such a construction of judicial procedure, which during a court hearing of a criminal case provides for disengagement of the procedural functions of the prosecution and the defense that enjoy equal procedural rights to defend their legitimate interests.

8. Federal Law "On Prosecutor's Office of the Russian Federation" [11], which regulates not only the opportunity (or need) of prosecutor's participation in the resolution of disputes arising from public-law relations, but also in the cases determined by law the obligation of applying to court.

9. The next largest sources of adversarial nature include normative legal acts governing the issues of judicial resolution of public-law disputes of citizens and legal persons with bodies and officials of executive and administrative power. It should be noted that this is an enough "mobile" legal area that in the foreseeable future will be significantly altered in relation to the issues of administrative court procedure. In our view, this group could include:

- Federal Law of the Russian Federation "On Appealing against Actions and Decisions that Infringe Civil Rights and Freedoms" from April 27, 1993 (in edition of the Federal Law of December 14, 1995) [10].

The norms of the Law establish the right of any citizen to go to court with a complaint. This right arises from a citizen if it considers that its rights and freedoms have been violated by actions or decisions of state bodies, local self-government bodies, institutions, enterprises and their associations, public associations or officials, public servants. Definitely that adversarial nature takes place in consideration of civil cases in this category.

- Norms of civil procedural legislation, in particular as specified in section III of the Code of Civil Procedure of the RF (hereinafter CCP RF) [7] "Proceedings on Cases Arising from Public Legal Relations". These include:

a) Chapter 23. General Provisions;

b) Proceedings on Cases of Repealing Normative Legal Acts in Full or Partially;

c) Chapter 25. Proceedings on Challenging Decisions, Actions (inaction) of Public Authorities, Local Self-government Bodies, Officials, State and Municipal Employees;

d) Chapter 26. Proceedings on Cases of Protection of Electoral Rights and Right to Participate in Referendum of Citizens of the Russian Federation;

e) Chapter 26.1. Temporary Accommodation in a Special Institution of a Foreign Citizen, who is Subject to Readmission;

f) Chapter 26.2. Proceedings on Cases of Administrative Supervision over Persons Released from Prison.

According to part 1 article 12 CCP RF justice on civil cases is administered on the basis of adversarial nature and equality of parties. This norm is enshrined in Section 1 "General Provisions" of chapter 1 CCP RF, and certainly extends to the above mentioned provisions.

At present, it is essential to ensure not only legal, but also actual equality of parties. Practice shows that the transition to a fully adversarial process – the ultimate goal, which cannot be provided by a simple proclamation.

- Norms of arbitration and procedural legislation. In addition to general issues of court procedure, III section of Arbitration Procedure Code of the RF (hereinafter APC RF) [6] focuses on the regulation of cases arising out of administrative and other public legal relations. In particular, this section addresses the issues of: features of consideration of cases arising from administrative and other public legal relations (Chapter 22); consideration of cases on contesting normative legal acts (Chapter 23); consideration of cases on contesting non-normative legal acts, decisions and actions (inaction) of state bodies, local self-government bodies, other bodies, organizations with certain state or other public powers, which are given by a federal law, officials (Chapter 24); consideration of cases on administrative offences (Chapter 25); consideration of cases on recovery of compulsory payments and penalties (Chapter 26). A common feature among these cases is the presence of public dispute on the right, the peculiarity of which is the legal inequality of litigants who are in the relations of power and subordination.

The nature of these cases and the requirement for their consideration in the way of administrative court procedure predetermine the specific procedural form of exercising the court powers, while the arbitration court simultaneously performs two functions:

- protection of the rights and legitimate interests of persons carrying out entrepreneurial and other economic activity in a dispute with a body having powers of authority with respect to such persons;

- judicial control over the actions of state bodies, local self-government bodies, other bodies and officials, the process of implementing the powers of which encompasses the scope of entrepreneurial and other economic activity. At that, exactly the judicial protection predetermines in this case the monitoring over the actions of state and other bodies.

We should dwell on the problem of referring the Code on Administrative Offences of the RF to the sources of administrative procedural law in general, and adversarial nature in particular [8]. Currently, there is no single scientific approach to determining the preferred location of norms on appealing of administrative and judicial acts of proceedings on cases of administrative offenses grouped in chapter 30 of the Code on Administrative Offences of the RF. Moreover, this legal act does not say anything about adversarial nature.

At the same time in the scientific literature is firmly rooted an idea of adversarial nature in proceedings on cases of administrative offences. This is due to the fact that the adversarial principle is usually seen as an integral part of the process of bringing to legal responsibility.

Certainly, it is necessary to mention the draft Code of Administrative Court Procedure [19, 6-45], which contains chapter 24 "Specificity of Proceedings on Complaints against Decisions on Cases of Administrative Offenses", as well as chapter 1 "General Provisions", which contains article 8 "Administration of Justice on the Basis of Adversarial Nature and Equality of Parties", what leads to the thought about the impending deep processing of the Code on Administrative Offences of the Russian Federation, in particular its procedural sections.

11. A special place in our list is taken by the Federal law of the Russian Federation "On State Forensic Activity in the Russian Federation" [12], which not only defines the possibility and procedures of a judicial examination in judicial (including an administrative judicial) process, but also similar to APC RF legalizes the term of "administrative court procedure", with the consequent thought about the adversarial principle. In the introduction of the Law is said that "the present Federal Law defines the legal framework, principles of organization and main directions of the state forensic activity in the Russian Federation (hereinafter – state forensic activity) in civil, administrative and criminal court procedure".

Also we believe that the sources of administrative process and certainly adversarial nature must include the Federal Law "On Legal Practice and Advocacy in the Russian Federation". As stated in article 2 of the Law "Providing legal assistance, a lawyer: ... participates as a representative of a client in civil and administrative proceedings; participates as a representative or defender of a client in criminal proceedings and proceedings on cases concerning administrative offenses" [13].

In the Federal Law of the Russian Federation "On Legal Practice and Advocacy in the Russian Federation" on a par with the Arbitration Procedure Code of the Russian Federation and the Russian Federal Law "On State Forensic Activity in the Russian Federation" speak about administrative court procedure, what also at the legislative level legalizes the very concept of "administrative court procedure", and this, in turn, leads to the thought about the adversarial principle.

As has been mentioned above, the potential sources of administrative process and consequently adversarial nature can include a draft Code of Administrative Court Procedure of the Russian Federation [19, 6-45], which passed the first reading in the State Duma in 2003.

In our opinion, when reviewing the list of sources of normative framework for adversarial nature it is impossible not to mention the draft of the Russian Code of Administrative Procedure [21, 11-84], prepared by M. Ya. Maslennikov.

The fact that the scientist developed and proposed for extensive discussion a rather interesting legal document is welcomed. Especially it would be desirable to

highlight that among the principles of administrative process the author points out "adversarial nature in administrative process". That is very symbolic, because "the adversarial principle" is represented in both published today draft administrative-procedural documents. There is a hope that "adversarial nature in administrative process" will become a reality.

Certainly, the list of sources is not complete, because every normative act, including sub-legislative one, has a certain establishment that is used in administrative court procedure and in this part may be referred to the group of acts of administrative-procedural law and indirectly to the normative framework of adversarial nature in administrative process.

The same is true regarding the directives given by the Plenum of the Supreme Court of the Russian Federation, mandatory for courts, other bodies and officials that apply the law, which has been explained. However, there is no consensus in the legal literature concerning the attributing these directives to the sources of law. We support the view that they are not direct sources of law; their essence is acts of judicial interpretation of law norms.

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