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TITLE

The Application of the Ex Officio Principle in the RA Administrative Procedure

When a administrative body sued against the other administrative body who has more active role in the administrative procedure-the court or the parties

STUDENT'S NAME

SAHAK SAMSON MANUKYAN

SUPERVISOR'S NAME

PROF. ANI CHILINGARYAN

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Abstract

One of the purposes of administrative law is to ensure that public authorities act within the scope of their competences as determined by law. Every citizen must rest assured that he or she is treated in accordance with the law and public authorities will not act wrongfully. Given the disparity in power between public authorities as actors of the state and citizens, a fair process in administrative procedure can only be guaranteed when the authorities are bound to comprehensively and objectively examine the case. The guarantee of the above-mentioned could be the main principles of procedural organization in administrative law: the principle of ex officio examination. When the administrative litigation process starts, the principle of examining the facts of the case ex officio acquires a special significance. The active role of the court in administrative procedure reflects the specific features of public law, specifically when resolving the dispute between the participants of public relations, the court eliminates the factual inequality between the natural and legal persons and the public authority. Since the "ex officio principle" is designed for eliminating the factual inequality between the natural persons, the legal persons and the public authority, when one administrative body is sued against another administrative body, this means that the court has to play not the active, but the passive role.

Keywords: principle of examining the facts of the case ex officio, administrative procedure, active role of administrative court, adversarial procedure, inquisitorial procedure, administrative body, administrative act, administration action, public relations, evaluation of evidence, burden of proof

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LIST OF ABBREVIATIONS

AA	Administrative Act
AB	Administrative Body
AC	Administrative Court
APC	Administrative Procedure Code of the Republic of Armenia

"…it is right among us,
it is multilateral,
it never sleeps: executive power…"

– Erich Kaufmann
German Lawyer, Public Law Teacher

INTRODUCTION

Owing to the constitutional amendments in the Republic of Armenia (2005)[1], not only strengthened constitutional justice, but also laid the foundation for the institutionalization of administrative justice. The role of administrative justice has more increased during the 2015 constitutional amendments[2] when the administrative court was specifically mentioned on the constitutional level (Article 163). As a result of these changes the list of subjects entitled to apply to the Constitutional Court and the scope of the case subject to the court were clearly defined, thereby opening the way for a separate trial. Until then, there were no administrative courts (hereinafter referred to as "AC") and administrative proceedings in Armenia, these cases were examined and resolved by the rules of Chapter 23 of the Civil Procedure Code as a special suit. The legal basis for administrative justice was Administrative Procedure Code of the Republic of Armenia adopted in 2007.[3]

Therefore, the administrative justice is deemed to be comparatively the youngest and at the same time one of the least studied law fields in the Republic of Armenia. From this perspective, the principle of examining the facts of the case "ex officio" or simply "ex officio" principle is not exclusion either. The submission of administrative action is the legal fact, after which the administrative litigation process "being in passive state" before launches and starts

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[1] Հայաստանի իրավական տեղեկատվական համակարգ, Հայաստանի Հանրապետության Սահմանադրություն (փոփոխություններով), ընդունվել է 1995թ. հուլիսի 5-ի ՀՀ հանրաքվեով: Սահմանադրության փոփոխությունները կատարվել են 2005թ. նոյեմբերի 27-ի ՀՀ հանրաքվեով, *available at* https://www.arlis.am/DocumentView.aspx?DocID=75780 (last visited Mar. 26, 2019).

[2] Հայաստանի իրավական տեղեկատվական համակարգ, Հայաստանի Հանրապետության Սահմանադրական փոփոխություններ: Սահմանադրության փոփոխությունները կատարվել են 2015թ. դեկտեմբերի 6-ի ՀՀ հանրաքվեով, *available at* https://www.arlis.am/DocumentView.aspx?DocID=102510 (last visited Mar. 26, 2019).

[3] Հայաստանի իրավական տեղեկատվական համակարգ, Հայաստանի Հանրապետության Վարչական Դատավարության Օրենսգիրք, ուժը կորցրել է 07.01.2014 թվականին, *available at* https://www.arlis.am/DocumentView.aspx?DocID=51822 (last visited Mar. 26, 2019).

proceeding, including the relevant legal consequences.[4] When the administrative litigation process starts, the principle of examining the facts of the case "ex officio" acquires a special significance. The active role of the administrative court in administrative procedure reflects the specific features of public law. Specifically, when resolving the dispute between the participants of public relations, the AC eliminates the factual inequality between the natural and legal persons and the public authority. For the first time "ex officio" principle was set in Administrative Procedure Code of the Republic of Armenia in 2007 (Article 6). Although a new Administrative Procedure Code of the Republic of Armenia[5] (hereinafter referred to as "APC") was adopted in 2014, "ex officio" principle was not only denied, but also given qualitatively new content (Article 5). The APC provisions give new impetus in making a dramatic shift toward not only the protection of natural and legal persons' rights, but also serves the interests of justice as a whole.

In the legal literature there are two types of procedure-the adversarial and the inquisitorial.[6]

The adversary procedure requires the opposing sides to bring out pertinent information and to present and cross-examine witnesses. This procedure is observed primarily in countries in which the Anglo-American legal system of common law predominates, although, beginning in the late 20th century, several other countries adopted aspects of the adversary system.[7]

Under the adversary system, each side is responsible for conducting its own investigation. In criminal proceedings, the prosecution represents the people at large and has at its disposal the police department with its investigators and laboratories, while the defense must find its own investigative resources and finances. If an indictment is handed down by the grand jury, its proceedings, including the testimony and other evidence presented to it, are available to the defendant. Under civil law the adversary system works similarly, except that

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[4] Tigran Markosyan & Lilit Petrosyan, *General Legal Characteristics and Features of Obligatory Action*, Materials of the conference devoted to the 85th anniversary of the faculty of law of the YSU, 350 (2018).

[5] Հայաստանի իրավական տեղեկատվական համակարգ, Հայաստանի Հանրապետության Վարչական Դատավարության Օրենսգիրք, *available at* https://www.arlis.am/DocumentView.aspx?DocID=126308 (last visited Mar. 26, 2019).

[6] Հայկ Սարգսյան, Դատական քննության սահմանները մրցակցության և ի պաշտոնե քննության մոդելներում, ԵՊՀ իրավագիտության ֆակուլտետի ասպիրանտների և հայցորդների նստաշրջանի նյութերի ժողովածու, 269 (2014), (Hayk Sargsyan, *The Issues of Differences Concerning Judicial Proceedings During Adversarial and Ex Officio Hearings*, Materials of the session of the YSU Faculty of Law PhD students and applicants, 269 (2014).

[7] Encyclopedia Britannica, *available at* https://www.britannica.com/topic/adversary-procedure (last visited Mar. 26, 2019).

both plaintiff and respondent must prepare their own cases, usually through privately engaged attorneys.[8]

The inquisitorial procedure means that the participants are called upon to cooperate. It is not bound by the pleadings and evidence of the participants to the dispute.[9] This stands in contrast to the civil procedure where the parties are required to present their versions of the facts to the court. The main emphasis of the inquisitorial process is completeness, openness and neutrality of the establishment of the facts. However, as mentioned above, the participants are called upon to cooperate. The participants have to contribute to the fact-finding process, in particular in questions of fact to which they have easy access because they lie within their sphere. The procedure is flawed if the court does not comply with its duty to investigate the facts properly. The court may not request data or facts which are not within the sphere of knowledge or access of that particular party. Forms of evidence which can be taken by the court are documents, witnesses, experts and even direct evidence taken at the location. The court has to use all these methods of taking evidence fully. However, limits to the use of evidence are set by the principle of proportionality. It is, for instance, not necessary to call an official from abroad as witness in a trial concerning the granting of asylum.[10]

As far as the Republic of Armenia is concerned, the literal commentary of Article 3 of the APC shows that every natural and legal person has the right to apply to the AC if his/her subjective rights and freedoms are violated. At the same time administrative bodies (hereinafter referred to as “AB”) also have the right to apply to AC against another AB. Since the “ex officio principle” is designed for eliminating the factual inequality between the natural and legal persons and the public authority, when one AB is sued against another AB this entails that the AC has to play not the active, but passive role.

Summarizing the above-mentioned, we can state that "ex officio" principle is one of the key principles of administrative proceedings that endows the AC with an active role to eliminate the factual advantages between the natural and legal persons and the public authority, and to ensure the effective enjoyment of the rights of natural and legal persons through the implementation of activities that constitute the content of this principle.

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[8] Ibid.

[9] Martina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison*, 46 (2007).

[10] Ibid.

The paper studies two types of procedure-the adversarial and the inquisitorial. Since this paper is not designed to study all various issues concerning the component of "ex officio" principle, the scope of research will then be limited to studying only some elements of "ex officio" principle–require the evidence, the indication obligation, obtaining possible information on a specific case. Accordingly, the paper studies judicial practice of the Republic of Armenia concerning the application of the "ex officio" principle within the legislation. Afterward, parallels between Armenian legislation and international law will be drawn with a view to revealing gaps of Armenian legislation hindering proper implementation of that principle. Finally, the paper advances to making recommendations grounded on the analysis of relevant international and Armenian legislation. Followed by a bibliography listing all the sources used for the paper, the Conclusion will succinctly outline main findings of the research.

The paper literature is based on a comprehensive study of both Armenian and international legal framework, specifically enshrining types of procedures. The paper makes references to a vast array of research articles, scholarly papers as well as books by reputable agencies, authorities and world-acclaimed authors involved in legal field of examining the facts of the case "ex officio" issues. Certain legal instruments in terms of conventions, treaties and recommendations are as well cited in the paper. This topic has been touched upon by domestic authors (Lilit Petrosyan, Garegin Petrosyan) and foreign (mostly German) authors (Jorg Pudelka, Lars Brocker, Wolfgang Reimers et al).

The results of this paper can be a useful assistance of implementing necessary improvements in national laws and legislation with regard to the above-mentioned issues.

"…Administrative law can be understood as concrete Constitutional law…"

– Fritz Werner
The Former President of the German Federal Administrative Court

CHAPTER 1
Major Types of Procedure

In the legal literature there are two types of procedure-the adversarial and the inquisitorial.[11]

The adversarial procedure

The adversary procedure requires the opposing sides to bring out pertinent information and to present and cross-examine witnesses. This procedure is observed primarily in countries in which the Anglo-American legal system of common law predominates, although, beginning in the late 20th century, several other countries adopted aspects of the adversary system.[12]

In England the adversarial procedure applies to judicial review cases as well as to private law disputes. More specifically, when deciding on questions of fact or public policy in the course of an application for judicial review, the underlying facts on which an application is based are set out by the applicant and then are agreed by the parties.[13] Generally speaking the available forms of evidence are affidavit, cross-examination and interrogatories and discovery. Affidavits are sworn written statements and are usually the sole form of evidence for decisions in public law procedures. In order to speed up the proceedings under the Civil

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[11] See footnote 6.
[12] See footnote 7.
[13] Stanley Alexander de Smith, *Judicial Review of Administrative Action,* 15 (1995).

Procedure Rules, Part 54, no pleadings are allowed for the purpose of clarifying disputes relating to questions of fact.[14]

However, a recent decision by the Administrative Court[15] seems to suggest that the court could still receive oral evidence and order the cross-examination of witnesses in judicial review proceedings. Another decision emphasizes that "in some judicial review cases cross-examination is regarded not only as appropriate but also essential".[16] As to why it is essential, because the Article 6 requires the court to reach its own conclusions on the disputed issues of fact. It would be necessary for the court to resolve the other medical disagreements in order to reach a proper judgment on issues such as whether this treatment is necessary and proportionate having regard to its profoundly invasive effect upon the appellant's right to respect for his private life and dignity.[17]

Discovery of document is a procedure to ensure that documents in the possession or custody of a party are disclosed. In actions begun by writ, discovery is automatic and mutual and all parties must make discovery without having been ordered to do so by the court. Discovery consists of serving a list of documents on the other party. However, in practice the courts have only rarely used this procedure.[18] The reasoning behind this rather restrictive use of fact-finding procedures is to reduce the length of judicial review procedures and also to "minimize the pressure to disclose government documents".[19] It should be noted that English law does not contain a general duty to give reasons for administrative decisions. Despite exemptions, in statutes which contain the duty to give reasons for a decision made, this constitutes another obstacle to applicants in judicial review applications.

The burden of proof generally lies with the applicant. The maxim omnia praesumuntur rite esse acta *(Latin for all things are presumed to have been done rightly and with due formality unless it is proved to the contrary)* comprises the presumption that the authority's action was legal.[20] Therefore it is the applicant's duty to present such facts to challenge this presumption. As the above-mentioned restrictions of interlocutory procedures indicate, "any conflict between an applicant's and respondent's evidence normally has to be resolved in the

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[14] See footnote 9, p. 45.
[15] *R (G) v Ealing London Borough Council and others,* 2001 EWCA Civ1545.
[16] *R (Wilkinson) v Broadmoor Special Hospital Authority,* 2002 1 WLR 419.
[17] Ibid.
[18] See footnote 13, p. 176.
[19] See footnote 9, p. 45.
[20] William Wade & Christopher Forsyth, *Administrative Law,* 333 (1994).

respondent public body's favour, on the grounds that show applicant has failed to discharge the onus which he is required to satisfy to show that the respondent has acted unlawfully".[21]

These shortcomings in the fact-finding at trial stage have been criticized widely. In J. Griffith's view, the English have "an interventionist judiciary but a judiciary which is limited by procedures and practices designed to exclude certain sources of information and factual investigation without which the policy choices made by the courts – that is, their decisions – are inevitably less good than they could be".[22] In his turn J. Allison argues that "the judge who responds only to the proofs and arguments of the parties cannot ensure that relevant repercussions are considered or that affected parties other than the litigating parties participate in proceedings".[23]

The criticism results in a call for reforming the adversarial towards procedure which would involve a movement from the adversarial towards the inquisitorial system. The most famous suggestion comes from P. Birkinshaw: "The Director of Civil Proceedings would be empowered to initiate proceedings in the public interest, be of help to applicants and present evidence of the public interest to the court. However, this proposal has not yet been put into practice and such a development seems unlikely for the foreseeable future".[24]

The inquisitorial procedure

In law, one of the two methods of exposing evidence in court.[25]

Under the inquisitorial procedure, the pretrial hearing for bringing a possible indictment is usually under the control of a judge whose responsibilities include the investigation of all aspects of the case, whether favourable or unfavourable to either the prosecution or defense. Witnesses are heard, and the accused, who is represented by counsel, may also be heard, though he is not required to speak and, if he does, he is not put under oath.

At the trial the judge, once more, assumes a direct role, conducting the examination of witnesses, often basing his questions on the material in the dossier. Neither the prosecution nor the defense has the right to cross-examine, but they can present effective summations. The jury does not consult the dossier, instead relying on the facts brought out in the trial.[26]

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[21] See footnote 13.
[22] John Griffith, *Judicial Decision Making in Public Law,* Public Law , 564 (1985).
[23] John Allison, *The Procedural Reason for Judicial Restraint,* Public Law, 184 (1994).
[24] Patrick Birkinshaw, *Grievances, Remedies and the State,* 259 (1994).
[25] Encyclopedia Britannica, *available at* https://www.britannica.com/topic/inquisitorial-procedure (last visited Mar. 26, 2019).
[26] Ibid.

The inquisitorial system is typical of countries that base their legal systems on civil or Roman Law (especially in Germany).

In Germany in judicial review procedures of administrative decisions the inquisitorial procedure applies (Inquisitionsmacime).[27] Article 86 of the Law on Administrative Courts lays down that the court examines the facts of a case suo moto *(Latin for on its own motion)*: the participants are called upon to co-operate. It is not bound by the pleadings and evidence of the participants to the dispute. Similar to criminal proceedings or in proceedings in the finance or social courts and others the public interest in a correct decision requires an objectively correct and complete establishment of the facts which underline the decision.[28]

This stands in contrast to the civil procedure where the parties are required to present their versions of the facts to the court. The main emphasis of the inquisitorial process is completeness, openness and neutrality of the establishment of the facts. However, as mentioned above, the participants are called upon to cooperate. The participants have to contribute to the fact-finding process, in particular in questions of fact to which they have easy access because they lie within their sphere. The procedure is flawed if the court does not comply with its duty to investigate the facts properly. The court may not request data or facts which are not within the sphere of knowledge or access of that particular party. Forms of evidence which can be taken by the court are documents, witnesses, experts and even direct evidence taken at the location. The court has to use all these methods of taking evidence fully. However, limits to the use of evidence are set by the principle of proportionality. It is, for instance, not necessary to call an official from abroad as witness in a trial concerning the granting of asylum.[29]

The similar situation is in the Netherlands. A. Verbung and B. Schueler found that *“Administrative law judges, therefore, now view it as their task to give, during hearings, preliminary judgments. For instance, a judge could say: 'The burden of proof rests on the Minister, the defendant, but the way I look at it now, I think the Minister has brought up enough material to uphold his decision, unless you, the plaintiff, can give us some more information, and support that with some kind of evidence' Of course this judge has to phrase*

[27] See footnote 9, p. 46.
[28] Ibid.
[29] Ibid.

this kind of statement carefully, because he should prevent himself from sounding partial to one side or the other".[30]

We must take into account the fact that before General Administrative Law Act entered into force (1994), the legislator's idea was that fact-finding should be the courts' responsibility. It was up to the administrative courts to find the truth as proved by the facts. That is why administrative law judges have an impressive set of instruments at their disposal to be used in the process of establishing the truth, e.g. they can order an examination of witnesses, appoint a judicial expert or have a court inspection of the premises. This is at least the way the legislator perceived this judicial task; one might ask whether the jurisprudence of that time supported that view. Therefore it was not surprising that right from the very beginning in 1994, the way administrative courts dealt with fact-finding evolved quite differently from what the legislator foresaw. Producing evidence became the primary responsibility of the parties involved, while the courts, instead of using their own fact-finding instruments, limited themselves to an assessment of the evidential value of the parties' efforts. That is how an *inquisitorial* system evolved into an *adversarial system.* In other words, an investigation-based system developed into a party-driven fact-finding system.[31]

In France while the administrative courts had been established, the central question lay in whether the administration law separate from private law. The fairness of proceedings before the administrative court is guaranteed by a number of general principles or rules of the trial. These include the principle of equality of arms, the reliability of proceedings etc. The inquisitorial trial before an administrative judge is the first guarantee of the equality of arms.[32]

According to the general rule of proof which applies in civil procedure, the burden of proof rests upon that party for which the proof of a fact is beneficial. However, this principle can only be applied destructively in judicial review procedures. Here the burden of proof rests upon that party which has more access to the relevant facts and information. The aggrieved citizen has to present all facts truthfully and name sources of evidence which are in his sphere and which are accessible to him. The court has to ensure that the authorities disclose all facts and produce evidence within their sphere.[33]

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[30] Andre Verbung & Ben Schueler, *Procedural Justice in Dutch Administrative Court Proceedings*, 10 Utrecht L. Rev. 56, 59 (2014).
[31] Ibid.
[32] Hugo Flavier & Charles Froger, *Administrative Justice in France: Between Singularity and Classicism,* 3 BRICS L.J. 80, 101 (2016).
[33] See footnote 9, p. 46.

CHAPTER 2

Adversarial Principle in the RA Administrative Procedure

APC is the procedural form of realization of material and legal norms of administrative liability, new legal procedure, where the principle of competition gains a special importance. Although this is not enshrined in the APC, it was read in many of its norms emphasizing the active role of the participants in the proceedings.[34] Indeed, the legal position of the parties in the administrative proceedings is determined on the basis of the principle of competition. Thus, procedural remedies for law enforcement are determined on the one hand by the administrative bodies and officials, and on the other hand, by natural and legal persons. In other words, the equality of the participants of administrative proceedings does not exist in the administrative law (which means that there is factual inequality between the participants of the administrative proceedings).

The adversarial system in the administrative proceedings has the following features:

[34] Գարեգին Պետրոսյան, Մրցակցության սկզբունքը վարչական դատավարությունում, Կանթեղ գիտական հոդվածների ժողովածու, N 3, 2011, էջ 244, (Garegin Petrosyan, *The Principle of the Competition in the Administrative Proceedings,* Kantegh the collection of scientific articles N 3, 245 (2011).

First, the right to administrative proceedings should first of all regulate the extent to which the scope of cases the administrative proceedings involve. Otherwise, who and in what category of cases may apply to the court in the proceedings under consideration. The answers to these questions are provided in Article 3 and 10 of the APC, from which stems, that the AC is subject to the law of the public (citizen vs state) and not of private (citizen vs citizen) legal relations. During the investigation of these cases the court verifies the legality of the actions (omissions), decisions and individual or normative acts adopted by state bodies, local authorities and their officials.

In all these disputes, the driving force of the proceedings is the disputes arising out of governmental or other administrative-legal relations (administrative, financial, tax, etc.) which have public legal significance. In all these disputes the court resolves a dispute arising from administrative-legal relations. Where citizens and administrative bodies before the court proceedings were in administrative, financial, tax, customs relations, where the parties were not equal, then the dispute over administrative law in the case of dispute over administrative law and applying to a court, the citizen and the AB become completely equal competent parties and begin to compete with equal procedural opportunities.

Second, in the administrative proceedings, as a rule, the ABs are the bearers of public power, they have no advantage over a citizen who has the status of plaintiff or respondent in the AC. That is why the burden of proof of the essential circumstances for the settlement of the case is distributed equally. Specifically: Article 29 of the APC stipulates that *"If after having examined all the evidence, there is still evidence that remains unaffected, then the side burdened with the proof of that fact bears its negative consequences …"*[35]. At the same time, the entire administrative trial is carried out on the basis of the equality of the parties (Article 6).

Meanwhile, the legislator maintaining the basic rule of competition principle, to help the so-called "weak side" has made some deviations from the basic principle of competition. Specifically: The second part of Article 29 of the APC stipulates that *"The burden of proof bears`*

1) the administrative body by the litigation suit, which has adopted a mediating administrative act with regard to the facts underlying it,

[35] See footnote 5.

2) the administrative body by the obliging suit, in respect of the facts that served as the ground for refusing the acceptance of the requested administrative act, and the natural or the legal person in respect of facts substantiating the adoption of a favorable administrative act.

3) the administrative body by the performance of the action suit, in respect of the grounds for rejecting the action to be performed or showing inaction, and a natural or legal person with regard to favorable facts for him/her.

This peculiarity is due to the nature of the case, because public interest prevails over private interests and the judgments made thereby have special public and state significance.

Third, all types of judicial procedure are endowed with formal powers which are aimed at ensuring the active role of both sides and competition. It should be noted, however, that the court is endowed with more active role in the procedure. Here the court reveals the essential facts to the case and decides upon them not only based on the participants' demands and objections, but also "ex officio." The court indicates the facts which bear great significance in resolving the dispute. It is required from participants to put forward evidence of the existence or absence of facts when needed. The court is not constrained by the proofs, mediations, proposals, pleadings and objections presented by the participants in the administrative procedure, and takes adequate measures on its own initiative to obtain available and accessible information on the facts necessary for resolving the case. The court indicates the formal mistakes in the suit and suggests specifying the unclear suit claims, replacing the inaccurate claims with appropriate ones, differentiating between the basic and derivative claims and replenishing insufficient factual data. The court also requires the submission of the necessary facts to clarify and evaluate all the indispensable proofs (Article 5).

While establishing this competence, the court is prohibited to realize any consulting activity. In particular, it has no right to counsel one of the parties unilaterally on the choice of the set of tactics in the procedure.

Fourth, the APC adversarial principle does not state what may be considered as negligence. Such partial settlement of the case does not proceed from Article 6 of the APC. Moreover, its regulation entails that the settlement involved is nothing more than adversarial full-pledged trial. On the basis of factual equality, the requirement of Article 6 on the establishment of administrative procedure is not an end in itself. It is primarily aimed at securing the "right to be heard" of all the parties which was established by the judiciary

system in Ancient Rome.[36] It means having the right to get writs of the time and the place of the proceedings, representing the circumstances of the case, being informed about the circumstances filed by the competitor and expressing oneself about them, expressing one's position on the circumstances which the court revealed or took into account on the basis of the circumstances and proofs.

It should also be noted that there are some authors who see the inquisitorial aspects of an adversarial system. This idea was recently explored by D. Phillips. The latter noted that *"... some contributors to the Review argue that the interests of justice justify a right of defense by ambush as a protection against abuse of public authority. To the extent that the prosecution may legitimately wish to fill possible holes in its case once issues have been identified by the defence statement, I can understand why, as a matter of tactics, a defendant might prefer to keep his case close to his chest. But that is not a valid reason for preventing a full and fair hearing on the issues canvassed at the trial. A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculpate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles. Equally untenable is the suggestion that defense by ambush is a permissible protection against the possibility of dishonesty of police and/or prosecutors in the conduct of the prosecution... a criminal justice process .. cannot sensibly be designed on a general premise that those responsible for law are likely to break it. In those cases where, unfortunately, the police or other public officers are dishonest, the criminal trial process itself is the medium for protection and exposure[37]".*

In France[38] the adversarial principle naturally remains central in the administrative procedure. It is a general principle of law and is the essence of equality of arms, of the rights of defense and, more generally, the reliability of the trial.[39]

[36] Ани Давтян, *Гражданский процесс в Германии и странах СНГ*, Изд. Наапет, 86-87 (2000).
[37] David Phillips, *The Inquisitorial Aspects of an Adversarial System,* 42 Med. Sci. & L., 98 (2002).
[38] France has been a pioneer in rapidly developing a complete model of administrative justice. The advanced nature of French administrative justice, in the early 19th century,' has therefore produced a 'remarkable export product.
[39] See footnote 32.

The adversarial principle, while being the essence of judicial proceedings, is not limited to it. It is common knowledge that this principle is also applied before independent administrative authorities owing to the application of Article 6 (1).[40] But it is obviously before the court that this principle has been acclaimed. It applies in the context of preliminary proceedings, with the disclosure of the case file to the official subject to disciplinary sanctions, for example.[41] At the litigation stage, it results in the obligation to submit briefs to the parties and the court shall transmit them any item of additional information received. If information filed by a party is subject to confidentiality, and in particular medical confidentiality, the court will not consider evidence of which the other party has no knowledge." This naturally raises difficulties as regards the war on terror." Lastly, this also constituted grounds for France's condemnation by the ECHR in respect of the inability of the parties to know the meaning of the *rapporteur public's* conclusions, which justified the adoption of the Decree of 7 January 2009." The adversarial principle is subject to restrictions in the context of emergency proceedings."[42]

To sum up the aforementioned, we may state that the administrative procedure promotes an initiative for creating conditions and engaging in real competition in addition to the free and unconstrained competition of the parties, legally reserved by the court. In administrative proceedings, the independent and impartial court organizes and administers the trial, establishes conditions for proper investigation of the proofs and actions aimed at securing the settlement of the case and clarifies the rights and obligations of the participants to the proceedings. It ensures the conditions under which the free competition of parties is provided during the investigation, reveals the scope of facts which are essential for the proper settlement of the case, and, if needed, supports parties in the realization of their rights, specifically with regard to getting evidence. It also ensures the legal equality of the parties, which is a guarantee of fair, legitimate and well-grounded judgments. Thus, the principle of competition which lies on the basis of administrative proceedings, makes this type of trial competitive comprising inquisitorial elements, that is to say the “game” or “hybrid” trial.

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[40] CE, 3 December 1999, Didier, Rec. at 399; Cass., 5 February 1999, COB c/Oury, No. 97-16.441.

[41] See footnote 32.

[42] In certain cases the judge can do without, especially "When the application is not urgent or if it is clear, in the light of the application, that it does not fall within the jurisdiction of the administrative court, that it is inadmissible or unfounded". Similarly, cf., Art. L.5: "Certain requirements flow from the fact that both parties are represented; if the case is urgent, these former requirements will be adapted to those of the urgent situation."

CHAPTER 3

The Implementation of "Ex Officio" principle in the Administrative Procedure

Administrative justice is one of the youngest branches of law not only in the Republic of Armenia, but also in the post-Soviet region. Two Administrative Procedural Codes have been adopted in the Republic of Armenia by this branch of law for the last nine years of its existence.[43] At the same time, the two codes were stipulated by the principle of examining the facts of the case "ex officio". Nevertheless, this principle is one of the principles that has been almost undeveloped in the administrative proceedings and raised some of the most problematic issues in the law enforcement practice.[44]

Experts studying the principle of examining the facts of the case "ex officio" point out that this principle implies the "active role" of the AC .

G. Osborne argues that an inquisitorial approach requires the judge to be actively involved in a case from an early stage of proceedings.[45] H. Ragnemalm maintains that administrative courts normally investigate more actively when there is a greater element of public interest in the decision appealed against.[46] In M. Damaska's view, the adversarial mode is usually contrasted with the "inquisitorial" mode, in which litigation is structured less as a contest between litigants and more as an official inquiry. The author is contrasting active role of decision maker in interrogating witnesses in non adversary mode of proof taking with its passive role in adversary mode.[47] V. Flango contends that the "ideal" role of the judge as neutral arbiter was developed in the adversary system, and while it is still relevant for conducting trials, it is not appropriate for misdemeanor, small-claims, and other high-volume courts, and certainly not for problem-solving courts. Judges' roles need to be taken into account during judicial selection.[48] Problem solving courts require judges to be more active,

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[43] See footnotes 3 and 5.

[44] Lilit Petrosyan, *General Legal Characteristics of the Principle of Examining the Facts Of the Case Ex Officio,* Materials of the session of the YSU Faculty of Law PhD students and applicants, 287 (2018).

[45] Gillian Osborne, *Inquisitorial Procedure in the Administrative Appeals Tribunal - A Comparative Perspective*, 13 Fed. L. Rev. 166 (1982).

[46] Hans Ragnemalm, *Administrative Appeal and Extraordinary Remedies in Sweden*, Scandinavian Studies in Law, 216 (1976).

[47] Mirjan Damaska, *Presentation of Evidence and Fact Finding Precision*, 123 U. Pa. L. Rev. 1099 (1975).

[48] Victor Eugene Flango, *Judicial Roles for Modern Courts*, *available at* https://www.ncsc.org/sitecore/content/microsites/future-trends-2013/home/Monthly-Trends-Articles/Judicial-Roles-for-Modern-Courts.aspx (last visited Mar. 26, 2019).

less formal, and personally engaged with each offender, which creates a tension of the traditional role of the judge as a detached, neutral arbiter.[49]

The concept of equality of arms is largely used in French positive law. Jurisprudence is quicker to resort to it, probably given the influence of the ECHR, which has held that the principle of equality of arms "is one aspect of the broader concept of a fair trial before an independent and impartial tribunal."[50] Under ECHR law, the principle of equality of arms has mostly been applied in law enforcement, and criminal law in particular. In administrative proceedings, the idea that innervates this principle consists in ensuring that the frequent imbalance between the parties does not lead to an unbalanced treatment of the case where the administration would be preferred. The inquisitorial trial before an administrative judge is the first guarantee of the equality of arms.[51]

While the European Union (EU) Member States' administrative courts agreed to that European law should prevail over national law, the primacy of EU law, as interpreted by the European Court of Justice (ECJ), and the acceptance of ECHR case law, are now assured overall. The influence of these two European sources has caused significant changes to EU Member States' administrative justice.

Dutch practice: J. J. van Dam & J. A. R van Eijsden come to the conclusion that the principle of judicial passivity in cases involving civil rights and obligations freely entered into by the parties entails that additional pleas on points of law cannot require courts to go beyond the ambit of the dispute defined by the parties themselves nor to rely on facts or circumstances other than those on which a claim is based. The Dutch Supreme Court therefore decided to stay proceedings and referred to the ECJ for preliminary ruling. The Supreme Court asked whether the Dutch Lower Court was obliged to consider of its own motion whether a measure of domestic law is compatible with EC law, even where the party to the proceedings with an interest in application of those provisions has not relied upon them.[52] Continuing their research they note that the ECJ judged that where, by virtue of domestic law, courts must raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding

[49] Ibid.
[50] ECHR, Delcourt, Application No. 2689/65, 17 January 1970, pt. 27.
[51] See footnote 32.
[52] J. J. van Dam & J. A. R van Eijsden, *Ex Officio Application of EC Law by National Courts of Law in Tax Cases, Discretionary Authority or an Obligation?,* 18, EC Tax Review, Issue 1, 20 (2009).

rules of EC law are concerned. This is the general application of the principle of equivalence to a domestic procedural rule as outlined in the previous paragraph, and as frequently applied by the ECJ in numerous cases. However, in this judgment the ECJ stretched the scope of this principle even further. The ECJ stated that if a national court has discretionary authority to apply domestic law of its own motion, it is transformed onto an obligation if it concerns EC law. **Hence, a domestic discretionary power to apply law ex officio means an obligation from an EC law perspective.**[53]

An administrative judge may not be an arbitrator, such as a civil court judge. Its role is to maintain the principle of competition, taking into account the real inequality of participants in public law relations.[54]

The most famous proposal in this context stems from C. Petrova: "The procedural status of the administrative court can be characterized as "an active" if the court operates on its own motion "ex officio".[55]

The fixing of the principle of examining the facts of the case "ex officio" implies the "active role" of the AC, otherwise the realization of the mentioned principle seems impossible in the administrative proceedings. It should be noted that the "active role" of the AC expresses the peculiarities of public law, in particular the AC, examining the dispute between participants of public legal relations, "eliminates" actual inequality between natural or legal person and AB.[56]

The content of the principle of examining the facts of the case "ex officio" is the integrity of the following actions by the AC on its own initiative for a comprehensive, complete and objective investigation of the administrative case:

- the information needed to resolve the case and to obtain evidence,
- indicating formal mistakes in the claim, unclear claims requirements, false claims submitted by the plaintiff,
- appointment of expertise on his own initiative,
- replacement of improper defendant, involvement of third persons on his own initiative,

[53] Ibid.
[54] Надежда Салищева, *Административное Судопроизвоства Требует Кодификации,* Российская правовая газета «Эж-юрист» N 12, 15 (2003).
[55] Чистякова Петрова, *Проблема Активности Суда в Гражданском Процессе РФ*, Дисс. к. ю. н., (2003).
[56] See footnote 34.

- taking measures to secure the claim.

To reveal the content of the principle of examining the facts of the case “ex officio”, it is important to apply the frame of this principle.

Thus, a group of legal experts points out that public authorities have wide opportunities for the protection of their rights and legitimate interests, so the court is obliged to carry out its governing function with a view to protect **“the weak side”** in the proceedings.[57]

Another group of authors thinks that, despite the inquisitorial nature of the administrative proceedings it is called not only implementation an administrative review, but also a **defense function**.[58]

Armenian theorists have also made a similar position.[59]

We think that the above-mentioned theoretical conclusions allow us to come to the following conclusion: the AC has applied the principle of examining the facts of the case “ex officio” in a number of cases-indicating formal mistakes made by the ABs, pointing out formal errors made in the claim, false actions, uncertain claims etc., this support function of the court should be extended **exclusively to natural or legal persons**.

According the Article 3 of the APC

1. Every physical or legal person has the right to apply to administrative court (AC) in accordance with this code, if he/she/it considers that administrative or real acts of state or local self-government bodies or their officials:

1) violated or created an imminent threat of violation of his/her rights and freedoms prescribed by the Constitution, international treaties, statutes or other legal acts of the Republic of Armenia, including when:

a. the enjoyment of those rights and freedoms have been prevented by obstacles;

b. necessary conditions for the enjoyment of those rights and freedoms have not been ensured, when such conditions must have been ensured in accordance with the Constitution, international treaty, statute or other legal act of the RA;

2) an unlawful obligation has been imposed on him/her/it;

3) administrative liability has been unlawfully imposed on him/her/it.

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[57] Татьяна Андреева, Анна Зайцева, *Принцип Состязательности в Новом Арбитражном Процессуальном кодексе РФ,* Вестник ВАС СФ, N 12, 68 (2002).
[58] Анна Тюрина, *Функция Защиты в Административно-юрисдикционном Порцессе,* 26 (2009).
[59] See footnote 44.

The literal commentary of these norms shows that every natural and legal person has the right to apply to the AC if violated his/her subjective rights and freedoms.

At the same time ABs also have the rights to apply to AC against another AB. The point reads as follows:

- *“Administrative bodies or officials have the right to apply to administrative court against another administrative body on competency disputes, if it cannot be solved in a superior order*
- *State and local self-government bodies or officials v. administrative body when due to its administrative acts, actions or omissions the rights of the state have been violated or may be directly violated.”*

As far as the practice of filing a suit against each other in AC is concerned, we come to the conclusion that it does not make any difference for the AC whether the plaintiff is a natural person, a legal person or an administrative body. The AC “indifferently” performs the same actions against both administrative bodies and individuals.

For instance, the AC returned “the Gyumri community against the RA Real Estate Cadastre Committee case” claim (administrative case number ՎԴ5/0473/05/13), indicating the mistake and giving time to the aforementioned administrative body to correct it[60].

Meanwhile, the practice study reveals that AC does not play an active role with regard to citizens. On the contrary, showing undue passivity it creates obstacles for citizens in exercising their right to judicial protection.

Thus, citizens frequently face difficulties in filing a suit in the AC in compliance with the APC requirements. The AC often returns the natural persons' claim by simply noting that the present claim is not to be found in the 4 claims enumerated in APC (Rescissory action, Action for compelling administrative acts, Action for compelling real acts, Action for recognition).

Such behavior was manifested by AC in the administrative case number ՎԴ/7126/05/15, when Julieta Danielyan, a physical person had applied to the AC against

[60] Գյումրի համայնքն ընդդեմ Կադաստրի թիվ ՎԴ5/0473/05/13 գործով ՀՀ վարչական դատարանի 14.11.13 թվականի «Հայցադիմումը վերադարձնելու մասին» որոշում:

Shengavit administrative district.[61] Suchlike behavior was also manifested in the administrative case number ՎԴ/6438/05/15.[62]

We consider that the AC played "a passive role" instead of playing "an active role". This viewpoint is grounded for by the fact that the AC did not take into account that the plaintiffs are physical persons and it did not indicate the preferable claim type. Meanwhile, in case of filing a wrong claim, the person cannot reach the desirable legal results. The most effective way to protect a person from the encroachment of power is the right to appeal to court. The right choice of the claim in the administrative proceedings, the negative consequences for a person when submitting a proper claim, and the passive role of AC in such circumstances undermine the right of the person to judicial protection.[63]

The RA Court of Cassation, in its judgment of 22.04.16, stated the same legal position, in which it mentions that *"according to the prinicple of examining the facts of the case "ex officio", the active role of the court is expressed by the duty of the AC in assisting the trial participants to perform certain procedural actions"*[64].

The study of the international experience also comes to prove the truthfulness of our viewpoint. Thus, in the Federal Republic of Germany indicating is the responsibility of the court to clarify the plaintiff the potential problems, unfavorable consequences of the chosen suit and to offer the plaintiff a proper claim.[65]

Since the "ex officio principle" is designed for eliminating the factual inequality between the natural and legal persons and the public authority, when one administrative body sued against another administrative body these means that the court has to play not the "**active"**, but **"passive role"**.

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[61] Ջուլիետա Դանիելյանը ընդդեմ Շենգավիթ վարչական շրջանի թիվ ՎԴ/7126/05/15 գործով ՀՀ վարչական դատարանի 25.12.15 թվականի «Հայցադիմումը վերադարձնելու մասին» որոշում:

[62] Աստղ Աբգարյանը ընդդեմ Քաղաքաշինության նախարարություն թիվ ՎԴ/6438/05/15 գործով ՀՀ վարչական դատարանի 27.11.15 թվականի «Հայցադիմումը վերադարձնելու մասին» որոշում:

[63] Լիլիթ Պետրոսյան, Գործի փաստական հանգամանքներն ի պաշտոնե *(Ex officio)* պարզելու սկզբունքի իրացումը վարչական դատավարությունում ոչ պատշաճ հայցատեսակ ներկայացնելիս, ԵՊՀ իրավագիտության ֆակուլտետի ասպիրանտների և հայցորդների 2016թ. նստաշրջանի նյութերի ժողովածու, 445 (2017):

[64] ՀՀ վճռաբեկ դատարանի թիվ ՎԴ/4315/05/14 վարչական գործով 22.04.2016 թվականի որոշում:

[65] Code of Administrative court procedure (Article 86), 19.03.1991, Germany.

CONCLUSION

By completing the study of the subject matter, we can draw the following conclusions:

- the adversary procedure requires the opposing sides to bring out pertinent information and to present and cross-examine witnesses. This procedure is observed primarily in countries in which the Anglo-American legal system of common law predominates, although, beginning in the late 20th century, several other countries adopted aspects of the adversary system,
- under the inquisitorial procedure, the judge assumes a direct role, conducting the examination of witnesses, often basing his questions on the material in the dossier. The inquisitorial system is typical of countries that base their legal systems on civil or Roman Law (especially in Germany),
- this stands in contrast to the civil procedure where the parties are required to present their versions of the facts to the court. The main emphasis of the inquisitorial process is completeness, openness and neutrality of the establishment of the facts. According to the general rule of proof which applies in civil procedure, the burden of proof rests upon that party for which the proof of a fact is beneficial. However, this principle can only be applied destructively in judicial review procedures. Here, the burden of proof rests upon that party which has more access to the relevant facts and information. The aggrieved citizen has to present all facts truthfully and name sources of evidence which are in his sphere and which are accessible to him.

- the administrative procedure promotes an initiative for creating conditions and engaging in real competition in addition to the free and unconstrained competition of the parties, legally reserved by the court. In administrative proceedings, the independent and impartial court organizes and administers the trial, establishes conditions for proper investigation of the proofs and actions aimed at securing the settlement of the case and clarifies the rights and obligations of the participants to the proceedings,
- it ensures the conditions under which the free competition of parties is provided during the investigation, reveals the scope of facts which are essential for the proper settlement of the case, and, if needed, supports parties in the realization of their rights, specifically with regard to getting evidence. It also ensures the legal equality of the parties, which is a guarantee of fair, legitimate and well-grounded judgments. Thus, the principle of competition which lies on the basis of administrative proceedings makes this type of trial competitive comprising inquisitorial elements, that is to say the "game" or "hybrid" trial,
- the AC has applied the principle of examining the facts of the case "ex officio" in a number of cases-indicating formal mistakes made by the ABs, pointing out formal errors made in the claim, false actions, uncertain claims etc., this support function of the court should be extended exclusively to natural or legal persons,
- since the "ex officio principle" is designed for eliminating the factual inequality between the natural and legal persons and the public authority, when one administrative body sued against another administrative body these means that the court has to play not the "active", but "passive role".

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Աշոտ Աբգարյանը ընդդեմ Քաղաքաշինության նախարարություն թիվ ՎԴ/6438/05/15 գործով ՀՀ վարչական դատարանի 27.11.15 թվականի «Հայցադիմումը վերադարձնելու մասին» որոշում:

Գյումրի համայնքն ընդդեմ Կադաստրի թիվ ՎԴ5/0473/05/13 գործով ՀՀ վարչական դատարանի 14.11.13 թվականի «Հայցադիմումը վերադարձնելու մասին» որոշում:

Ջուլիետա Դանիելյանը ընդդեմ Շենգավիթ վարչական շրջանի թիվ ՎԴ/7126/05/15 գործով ՀՀ վարչական դատարանի 25.12.15 թվականի «Հայցադիմումը վերադարձնելու մասին» որոշում:

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