ppi 201502ZU4645
Esta publicación científica en formato digital es continuidad de la revista impresa
ISSN-Versión Impresa 0798-1406 / ISSN-Versión on line 2542-3185Depósito legal pp
197402ZU34

CUESTIONES POLÍTICAS

Instituto de Estudios Políticos y Derecho Público "Dr. Humberto J. La Roche"
de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia
Maracaibo, Venezuela

Vol.39 *Nº 70*
2021

Cuestiones Políticas Vol. 39, Nº 70 (2021), 915-932
IEPDP-Facultad de Ciencias Jurídicas y Políticas - LUZ

Influence of legal principles on justice

DOI: https://doi.org/10.46398/cuestpol.3970.56

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Abstract

The objective of the article was to determine the essence and legal implementation in Russia of principles such as: independence of the judiciary, relative truth, contradictory nature, legal certainty of judicial acts and discretion. In the countries of the Roman-Germanic legal order, it is no coincidence that legal principles are of great scientific and applied importance. The presence of a certain system of procedural principles makes it possible to assess the existence of justice in the country, the stability of a judicial decision and the fairness of judicial acts. Thus, the principles of the law directly affect the level of legality in each state. Currently, some procedural principles give rise to a discussion in Russian doctrine about their essence and content. The topic is presented from the point of view of general scientific methods (systems analysis, structural and functional, historical), the method of theoretical analysis, specific scientific methods (comparative jurisprudence, technical and legal analysis, concretization, interpretation). The theoretical basis was cognitive theory. It is concluded that the principle of the independence of the judiciary is not fully operational in the Russian Federation.

Keywords: principle of independence of the judiciary; principle of relative truth; adversariality; principle of legal certainty for judicial acts; principle of judicial discretion.

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Recibido el 14/07/2021 Aceptado el 22/09/2021

Influencia de los principios legales en la justicia

Resumen

El objetivo del artículo fue determinar la esencia y la implementación legal en Rusia de principios tales como: independencia del poder judicial, verdad relativa, naturaleza contradictoria, certeza jurídica de los actos y discreción judiciales. En los países del ordenamiento jurídico romano-germánico, no es casualidad que los principios jurídicos sean de gran importancia científica y aplicada. La presencia de un determinado sistema de principios procesales permite evaluar la existencia de justicia en el país, la estabilidad de una decisión judicial y la equidad de los actos judiciales. Así, los principios de la ley afectan directamente el nivel de legalidad en cada estado. Actualmente, algunos principios de procedimiento dan lugar a una discusión en la doctrina rusa sobre su esencia y contenido. El tema se expone desde el punto de vista de los métodos científicos generales (análisis de sistemas, estructural y funcional, histórico), el método de análisis teórico, los métodos científicos específicos (jurisprudencia comparada, análisis técnico y jurídico, concretización, interpretación). La base teórica fue la teoría cognitiva. Se concluye que el principio de la independencia del poder judicial no es plenamente operativo en la Federación de Rusia.

Palabras Clave: principio de independencia del poder judicial; principio de verdad relativa; adversarialidad; principio de seguridad jurídica de los actos judiciales; principio de discrecionalidad judicial.

Introduction

The principles of law are the subject of research not only in the general theory of law but also in sectoral legal sciences. The concept of "principle" has a theoretical meaning of Latin origin, meaning "foundation", "beginning". The principles of each branch of law constitute the quintessence, reveal its essence, are a criterion that individualizes the branch within the legal system.

In modern legal doctrine, great emphasis is placed on studying the principles of both common law and civil procedural law, since the latter directly affect the administration of justice. The importance of legal principles in procedural law can hardly be overestimated. First, these principles act as guarantees for the delivery of a lawful, justified and fair court decision. The principles of civil procedure are the principles of rational legal proceedings, are predetermined by the very essence of the adversary proceedings, cannot be replaced by any other guidelines without distorting the essence and objectives of the process (criminal or civil law).

Having emerged based on the scientific views on the role and significance of the judiciary, the principles become important prerequisites for the further development and improvement of civil procedural legislation. At the same time, the composition of the principles of one branch of law is not an amorphous, unchangeable category. In the course of its development, epochs, constitutions, and the goals of the state change. Therefore, at each specific stage of development, adjustments are made to the composition of the principles. For example, after the 1864 reform, the principle of concentration of evidence was enshrined in the Russian civil procedure. At present, such a principle does not exist in the judicial process in Russia, despite the scientific judgments on the need to enshrine it.

1. Methods

During the study, we used general scientific methods of cognition, including the principles of objectivity and the systematic approach. Along with the general scientific methods of cognition, one applied the specific scientific methods: theoretical analysis, comparative jurisprudence, technical and legal analysis, concretization, interpretation and the historical cognition method. The methodological basis of the study is the method of the cognitive theory.

2. Results

Civil procedural principles are the normatively established fundamental principles of civil procedural law that determine the structure of the process, its nature and methods of carrying out legal proceedings in civil cases. The principles of law aggregate the views of the legislator on the nature and content of modern legal proceedings, permeate all civil procedural institutions and determine the structure of the civil procedure which ensures the delivery of lawful and justified decisions. Thanks to the principles of law, it is possible to conclude whether there is justice in a particular state.

Since the principles are some basic guidelines for lawmaking and law enforcement agencies, at present it is impossible to imagine the administration of justice without the principles of humanism, fairness, legality and democracy. The principles of civil procedural law give the latter some structural completeness, aggregate concentrate the legislator's views on the nature and content of legal regulation of legal proceedings in civil cases, and seem to represent the structural basis of the branch of law. The scholar G.L. Osokina (2006) rightly believes that the principle is at the same time the idea that was formed as a result of scientific, professional and

mass (everyday) notion of the ideal model of the branch of law, comparing the principle with a "working tool" for regulating public relations.

The principle of the independence of the judiciary has a long history. Thus, before the 1864 judicial reform in Russia, the court could not start the trial without a precise and clear law, and if there was no such law, then the court was obliged to turn to the governor, who reported this to the Governing Senate. The interpretation of the Senate was also applied in case of contradictions in legislation. The decisions of the court on state matters were subject to confirmation by the governor. Thus, the court did not have full autonomy in administering justice. Only after 1864, as a result of judicial reform, the court in Russia acquired the status of an independent state institution and became independent of the executive and legislative branches.

In modern Russia, this principle is enshrined in the Constitution of the Russian Federation and means that in administering justice, judges are independent, subject only to the Constitution and federal law (Part 1 of Art. 120 of the Constitution). The independence of the judiciary is the most important principle of justice. Justice can only be administered by an independent court.

Judges should try and resolve civil cases in conditions when outside influence is impossible. Any interference in the activities of judges in the administration of justice should not only be prohibited in the form of a declaration, but, most importantly, the state should establish a mechanism for implementing this principle. In Russia, the independence of the judiciary is enshrined in a number of constitutional norms (Art. 120–124 of the Constitution of the Russian Federation), specified in the norms of legislation on the judicial system of the Russian Federation. At the same time, over the past 30 years, not three but four branches of power have developed in Russia, and the fourth power, the presidential one, dominates the other three including the judiciary. Moreover, the amendments to the Constitution of the Russian Federation (adopted in 2020) actually neutralized the principle of the independence of the judiciary. Granting the President of the Russian Federation from 2020 the right to remove any judge from office, up to the judge of the Constitutional Court of the Russian Federation, puts all judges in the Russian Federation under the control of the presidential power, and this is a direct violation of the principle of independence of the judiciary.

The positive law of Russia establishes that any outside influence on judges, interference in their activities by any state bodies, local authorities and other bodies, organizations, officials or citizens is unacceptable and is punishable according to administrative and criminal legislation. Judgments about the factual circumstances of the case, the reliability of the evidence, the rights and obligations of the parties should be the convictions of the

judges themselves, and not external judgments imposed on them by other persons. As indicated in the literature, in civil law processes, when one of the parties in the court is a state body, in 80 percent of cases the decision will be made in favor of the state (Svirin and Shestov, 2020).

In 2013, Art.8 of the Civil Procedure Code was supplemented with a new part 4, which states that information about extra-procedural appeals from some subjects to judges must be made public and brought to the attention of the participants in the process by posting on the official website of the court. However, such information by itself is not considered as a basis for challenging a judge.

Therefore, despite the system of guarantees for the independence of the judiciary enshrined in the law, there is currently an unsolved problem of the independence of the judiciary from the presidential power in Russia. Moreover, in literature, one is promoting the opinion of some researchers about establishing responsibility for scandalizing justice, because according to the authors of the publications, unfounded criticism of the court causes contempt of the court and infringes on judicial independence (Momotov *et al.*, 2019). If one accepts the expressed opinion as true, then in Russia it will probably be impossible to criticize the court in the media at all, since the wording "unfounded criticism" which is open to interpretation will deprive one of the very possibility of expressing one's opinion about the court.

The principle of relative truth is still controversial in the doctrine. After 1917, the principle of "objective truth" was promoted in the Russian civil procedure, which followed from the Marxist-Leninist dialectics and the principle of procedural activity of the court.

At the same time, the term "truth" is a philosophical category. In philosophy, truth is understood as the equivalence of the content of knowledge with its subject. Philosophers distinguish the following types of truths: ontological, objective, logical, absolute, relative, and formal.

What is objective truth and can it be achieved in court? Objective truth consists in comprehending the essential characteristics of an object. A true judgment is a judgment which correctly reflects objective reality. However, truth, having objective content, is nevertheless subjective in form, and therefore, it is relative to the form and, thus, cannot be objective a priori.

In different countries, both in doctrine and in jurisprudence, there are different approaches to the truth that must be established in court. Thus, in common law countries, the court establishes relative truth. In the countries of the Romano-Germanic legal system, approaches to establishing the truth in court vary. In Israel and in many Arab countries, the judge must necessarily reach the truth in the case, even if the parties did not present sufficient evidence, if the truth is not reached, then the decision does not comply with religious principles.

In any case, the process of establishing the truth is associated with the knowledge of the factual circumstances of the case. The process of cognition in court includes not only the establishment of facts with which the parties associate the emergence, change or termination of their rights and obligations but also a legal assessment of the facts established by the court. The dispute between the parties in litigation commonly comes down to the establishment or denial of facts that have legal significance in the case. The court establishes the facts based on the evidence presented to the court. Consequently, the truth in civil proceedings should be understood as the judge's correct judgment on the factual circumstances of the case based on the evidence presented to the court. Moreover, the court must give a legal assessment to the investigated circumstances. A legal assessment of actual circumstances is subjective in form or relative to the form of the knowledge entrusted.

The legislation on civil proceedings provides for a list of evidence with the help of which factual circumstances are established, the procedure for their presentation and calling, and the rules for assessing evidence. In the interests of achieving the truth, the duty of the court to guide the civil process is established as its guarantee.

In ancient Rome, there was a formula: Err are humanum Est (and judges are people too). The judges base their decisions only on the evidence provided by the litigants. The court is not entitled to collect evidence in favor of any party. Consequently, the truth comprehended by the court is not objective, but relative (relative to the evidence presented by the parties).

The question of the truth in court is currently the subject of debate. The principle of objective truth is opposed to the principle of formal or relative truth.

The principle of objective truth was enshrined in the Soviet civil procedure. Thus, A.F. Kleinman (1954) wrote that this principle is an expression of Lenin's theory of cognition in the process of implementing socialist justice. The scholar K.S. Yudelson (1956) also noted that the achievement of objective truth in the civil process was due to the leading role of the dictatorship of the working class, the alliance of the working class with the peasantry, the absence of antagonistic classes and class struggle. With the adoption of the Civil Procedure Code in 2002 in Russia, the court was deprived of the initiative in collecting evidence but only partially, since a certain amount of initiative remained with the court when the court collects evidence on its own initiative (for example, appoints an expert examination). This ambivalent position of the legislator gave rise to conflicting judgments in doctrine about the truth that should be reached in court.

We believe that the principle of information reliability plays a serious role in the development of the principle of relative truth. The reliability of information as a principle of information law and legal requirements is enshrined in Clause 6 of Art. 3 of the Federal Law "On Information, Information Technologies and Information Protection". Today one can talk about this principle as an interdisciplinary one (Svirin *et al*., 2021). At the same time, the legislator does not directly determine what the reliability of information is, the reliability criteria are not established, and it is also not determined whether it is possible to establish reliability criteria in relation to a particular area, and at what level it is possible to disclose information reliability criteria.

The civil procedure legislation of the Russian Federation, like other procedural branches, establishes reliability as one of the requirements for evidence. Thus, part 3 of Art. 67 of the Civil Procedure Code of the Russian Federation establishes that "the court shall assess the referability, admissibility and authenticity of each piece of proof separately" (Bespalov,2020). At the same time, it is not legally disclosed, which implies the determination of the reliability, which particular truth should be established. Whether or not the court has doubts about the reliability of the evidence is a key factor, which indicates the relativity of the truth established during the assessment of evidence in the process.

The principle of relative truth is closely related to the principle of adversariality.

The study of the history of the Russian judicial process allows one to conclude that already in the ancient Russian state, the judicial process was based on the principle of adversariality. For example, according to Russian Pravda or Pskov Judicial Charter (first half of the 15th century), the parties had the key roles in the trial. In this regard, V.O. Klyuchevsky (1908: 256) wrote, "The court appears to be an indifferent spectator or passive chairman rather than the head of the case". However, in the 1497 Sudebnik, the process already combined both the adversarial principle and the investigative principle. Only in 1864, the adversarial principle was again implemented in the Russian civil procedure, and the investigative principle was rejected, which was quite a natural phenomenon, since, according to E.V. Vaskovsky (1914: 155):

> The investigative principle forces the court to abandon the role of a calm contemplator of the combat of the parties and intervene in the procedural struggle, and such interference is harmful and dangerous. Helping one side, the court risks losing its composure, impartiality, objectivity and becoming an assistant to one of the parties. The adversarial principle opens up scope for the independence of the litigants and encourages them to show personal initiative and energy.

The reformers of law in the 19th century (notably, M.M. Speransky) defended the idea of an adversarial process. Moreover, the discussions

around adversariality were of applied importance. It is not enough to simply textually enshrine adversariality in a normative act. One had to give this principle certain substance, only then the principle would become a working tool in law enforcement, and especially in judicial practice. Therefore, legal scholars in the 19th century tried to give adversariality a certain amount of transparency. In 1919, T. Yablochkov (1919: 2) wrote, "...the wording and theoretical development of the doctrine of the "adversariality" of the civil procedure has already celebrated its centenary". However, the researchers failed to reach a meaningful consensus.

By that time, the essence of adversariality had been developed by German lawyers. In the code of the Prussian trial (dated July 6, 1793), the concept of adversariality was enshrined which meant a competition of independent subjects of the process before a judge. German scholars have formulated the main features that characterize adversariality:

- nemo judex sine actore.
- nemo invitus ad agendum cogitur.
- ne procedat judex exoficio.
- ne cat judex ultra petita, judex secundum allegata et probate judicare debet.
- non secundum conscientian, judici fit probation.

These features later determined the emergence of the principle of "passivity of the court and the exclusive activity of the parties to the process" in the foreign doctrine. By the way, this principle began to be used in practical jurisprudence already in the 18th century.

After 1917, during the Soviet period of Russian history, the adversarial principle was enshrined textually in the procedural code, however, in essence and content, the principle should have been called the principle of the "active role of the court". Moreoevr, the principle of adversariality in its essence was often equated to the disposition principle. In view of this, T. Yablochkov (1919: 11) noted, "Although lawyers opposed the adversarial principle to the disposition principle from the outside, but this difference does not go further than the outside. All of them declare the adversarial principle to be the reverse side of the disposition principle".

According to the existing legislation in the Soviet period, the adversarial principle was seemingly neutralized by the principle of objective truth, when the court was obliged, not being limited by the evidence presented by the parties, to take all measures provided by law to establish the actual circumstances of the case, i.e. the court was obliged to collect evidence on its own initiative. Therefore, it can be said that in the Soviet period there was a principle of quasi-adversariality, a discrepancy between the textual

consolidation and the semantic content of the adversariality. Therefore, the content of this principle is of great importance, the boundaries beyond which it would be possible to assert that the adversarial principle is violated or, on the contrary, not violated.

After 2002, in the doctrine of civil procedure, the concept prevailed according to which a certain role is assigned to the court in the interests of ensuring the legality in the implementation of the adversarial principle. Therefore, there is currently no "pure" adversariality in Russian civil proceedings where the court would play a passive role in the process, and the process would be reduced to a "free play of the litigants".

The court determines what circumstances are relevant to the case and which of the parties should prove them. The court has the right to invite the participants in the case to submit additional evidence, checks the relevance of the evidence presented to the case under consideration, finally establishes the content of the issues on which an expert opinion is required, can appoint an expert examination on its own initiative if it is impossible to correctly resolve the case without the expert opinion.

According to some researchers (for example, D.Ya. Maleshin), the Civil Procedure Code of Russia establishes a kind of combination of initiative of the parties and the activity of the court. Therefore, there seems to be a principle of limited adversariality in place (Maleshin, 2011). However, in science there are different perspectives on this issue. Some scholars insist on the need to strengthen the role of the court in collecting evidence, while others, on the contrary, defend the pure principle of adversariality.

According to Yu.F. Bespalov (2020), the adversarial principle applies only to the persons participating in the case, and the court manages the process, fixes the limits of such leadership. Since the court always manages the entire process (and not only in the implementation of adversariality), it can be assumed that the court is excluded from the adversarial principle, and therefore does not have the right to demand any evidence.

It seems to us that the process should be built on the principle of pure adversariality, and the intervention of the court is permissible insofar as it does not contradict the postulates of the parties' independence and procedural economy. This rule should apply only in the civil law process. In administrative proceedings, the court should not be deprived of the opportunity, on its own initiative, to send letters rogatory and requests to obtain evidence, since the litigants in an administrative dispute are not equal subjects.

Adversariality in civil procedure should have the following features:

1. The court should not go beyond the requirements of the parties.
2. The court should not seek and take into account facts and evidence that are not presented to the court by the parties.

3. The parties are given the right to compete before the court regarding the merits of their case.
4. The adversary nature allows the court to come to a conviction about the right of the litigants to the degree of certainty that is necessary for an error-free solution of the case.
5. The adversarial principle is also based on the obligation of the court to properly notify the persons involved in the case about the time and place of the trial. If any person was not properly notified about the process, he was not able to present evidence to substantiate his claims or objections, and therefore, in this case, the adversarial principle was violated. Thus, the content of the adversarial principle is: proper notification of the persons participating in the case about the time and place of the process; representation to all participants in the process to freely give explanations, present evidence, and file petitions for the demand for evidence.

The adversarial principle is also based on the obligation of the court to properly notify the persons involved in the case about the time and place of the trial. If any person was not properly notified about the trial, the person was not able to present evidence to substantiate their claims or objections, and therefore, in this case, the adversarial principle was violated. Thus, the content of the adversarial principle is proper notification of the case participants about the time and place of the trial; enabling all participants to freely give explanations, present evidence, and file petitions for the discovery of evidence.

The European Court of Human Rights (1993) under one of the aspects of the adversarial principle understands the rule according to which "every party to civil proceedings should have the opportunity to present his case to the court in circumstances which do not place him at a substantial disadvantage vis-à-vis the opposing party". However, the cited judicial norm itself, in turn, has some uncertainty, since the norm deals with a reasonable opportunity to present one's version. In this case, we also cannot outline reasonable boundaries of the adversarial principle since the boundaries depend on the judicial discretion and, therefore, are implicit.

The principle of legal certainty in the Russian doctrine is the least developed. Proceduralists practically do not attach importance to the principle of legal certainty in their works, which, in our opinion, undeservedly remains outside the boundaries of scientific research in the doctrine of law. Meanwhile, it is quite obvious that this principle is inherent in all procedural branches of law, which makes the principle intersectoral. The content of the principle of legal certainty is quite extensive.

On the one hand, the content of the above principle is enshrined in paragraph 9 of Art. 391-9 of the Civil Procedure Code of the Russian

Federation. The importance of this principle in the trial is noted in the Resolution of the Supreme Arbitration Court of the Russian Federation dated 20 Nov. 2012 No. 2013/12 in which the highest judicial body noted that the recognition of the prejudicial significance of a court decision, being aimed at ensuring the stability and binding nature of the court decision, excluding a possible conflict judicial acts, assumes that the facts established by the court during the trial of one case, pending their refutation, are accepted by another court in another case, if the facts are important for the resolution of the case. Thus, prejudicialness serves as a means of maintaining the consistency of judicial acts and ensures the operation of the principle of legal certainty (Supreme Arbitration (Commercial) Court of the Russian Federation, 2012).

We believe that the principle of legal certainty means that a court decision must comply with the uniformity of court practice which is formed in the decisions of the country's highest court. Thus, the decisions of the Plenum of the Supreme Court of the Russian Federation set out the legal positions of the highest court, fill gaps in law, and contain comments on the practice of applying a particular norm of positive law. For example, the Supreme Court of the Russian Federation, in its Resolution No. 8 dated 31 Oct. 1995, as amended on 6 Feb. 2007, formulated a legal position that if the applicable law or other normative act of the constituent entity of the Russian Federation contradicts the federal law adopted on issues that are under the jurisdiction of Russia, or the joint jurisdiction of the Russian Federation and the subject of the Russian Federation, then, based on the provisions of part 5 of Art. 76 of the Constitution of the Russian Federation, the court must make a decision in accordance with federal law. If there are contradictions between the act of the subject of the Russian Federation and the Russian Federation, adopted on issues related to the jurisdiction of the subject, the act of the subject of the Russian Federation shall be applied (Supreme Court of the Russian Federation, 1995).

The principle of legal certainty has a very broad substantive aspect but researchers have not yet developed a uniform opinion. The scholar Yu.S. Taranets (2018) reduces the essence of the principle of legal certainty to clarity and non-inconsistency of normative legal acts. O. A. Egorova and Yu.F. Bespalov understand the content of the principle of legal certainty as the compliance of judicial acts of Russian courts with the positions of the European Court of Human Rights. However, this point of view is not indisputable and contradicts both the legal positions of the Supreme Court of the Russian Federation and the European Court of Human Rights.

For example, the Resolution of the Plenum of the Supreme Court dated 27 Jul. 2013 No. 21 "On the application by courts of general jurisdiction of the Convention for the Protection of Human Rights and Fundamental Freedoms dated 4 November 1950 and the Protocols thereto" indicates that

if the court's decision was executed at the time when the judgment of the European Court became final, in which it was established that when making this decision the provisions of the Convention or the Protocols thereto were violated, the cancellation of such a decision on a new circumstance in connection with the said judgment of the European Court prevails over the principle of legal certainty. From the above context, it is clear that the legal positions of the European Court are not included in the content of the principle of legal certainty. We believe that the principle of legal certainty should be considered only in conjunction with the legal positions of the highest court of Russia and with the legal positions of the Constitutional Court of Russia.

A completely different interpretation of the principle of legal certainty is given by the European Court of Human Rights which defines it as (res judicata) the inadmissibility of reconsideration of a once resolved case, the impossibility of either party to demand a final judgment only for a second hearing and to receive another court decision. The reconsideration should not be seen as a disguised appeal in the presence of two perspectives on the case. Moreover, the higher court has the right to reconsider the case only to correct an error. In view of this, S.I. Knyazkin (2020: 322) notes, "...legal certainty is associated with the finality of a judicial act. And the criterion for the finality of a judicial act is its coming into legal force". However, it is difficult to agree with such a concept since the court's decision comes into legal force after the appeal, and in Russia there are still three verification instances (two cassation courts and judicial supervision) after that. Therefore, such a large number of verifying instances of court decisions in Russia undoubtedly violates the principle of legal certainty of a judicial act.

The principle of judicial discretion, like the principle of legal certainty, is a subject of discussion in the doctrine.

The question of the possibility of judicial discretion attracted the attention of researchers as early as the 19th century and provoked intense discussions among scholars of jurisprudence. At the beginning of the 20th century, in European countries, researchers substantiated the idea of "free choice of law", the essence of which boiled down to expanding judicial discretion. However, to date, the issue of the limits of judicial discretion has not been resolved either in Russia or in other European countries.

The legal term "discretion" is quite often found in normative legal acts regulating private and public legal relations in the form of direct or indirect consolidation. The norms of civil law stipulate that the subjects of civil legal relations exercise their powers by their own will, in their interest and, at their discretion, i.e. the legislator identifies discretion as an element of the legal personality of a person in substantive law.

Discretion from the point of view of the Russian language is the freedom to choose something, therefore, due to the disposition in private law, discretion exists objectively, organically woven into the legal instruments of private law. Moreover, discretion is an integral part of the existence of private legal relations. Therefore, in private substantive law, discretion is used quite often and this is primarily due to the fact that in private legal relations there are many evaluative categories. In this sense, the positivist understanding of law for private relations is narrow and needs to be overcome with the help of such an instrument as discretion.

Since the discretion used by the subjects of law for the emergence, change or termination of legal relations is an evaluative category, this often provokes a legal conflict between them, which is subsequently transferred to the court for resolution, which should also launch the mechanism of discretion but only the judicial one. According to M.N. Ilyushina (2018), judicial practice, within the framework of judicial discretion, tries to streamline the use of evaluative categories as much as possible, which, in fact, is aimed at the stability of civil turnover. However, it is difficult to agree with this conclusion since if at first in the substantive law the parties act at their own discretion, then the judge decides the issue at their own discretion, then a relevant question arises: where is the law here? What should be used to predict a court decision, what are the limits of such discretion?

Naturally, judicial discretion is derived from and follows discretion in private law. Meanwhile, the legal natures of discretion in private law and in procedural law are different. In civil procedural law, this refers the discretion of a judge when making a decision, and some researchers raise this mechanism to the rank of a principle of procedural law. I.A. Pokrovskii (1998) rightly pointed out that discretion is the right to more freely interpret, complete and even correct the law in accordance with the requirements of justice and the dictates of the judicial conscience. However, such a formula of discretion can only be applied if judicial acts are recognized as a source of law, otherwise it will lead to chaos and unpredictability in the delivery of judicial verdicts.

In fact, in the Russian process, judicial discretion is the discretionary power of the court when the court is granted the right of discretion, i.e. choice of judicial opinion. However, this should not mean that the court can act as the court pleases. The court is obliged to use the right granted to it in accordance with the purpose of justice, subject to the limits of discretion. The principle of discretion gives the court freedom, but the freedom must be limited by the framework, i.e. must have a limit.

We believe that judicial discretion is a principle of procedural law, despite the fact that it is not textually enshrined in procedural norms, but the principle has a semantic meaning and follows from many articles of

the procedural law. As it is known, there are two ways to consolidate the principles of law: textual and semantic. The principle of judicial discretion was enshrined in semantic form in the procedural codes of the RSFSR of 1922 and 1964, where it was stated that the court made a decision based on its socialist sense of justice. Thus, already in the Soviet period, the principle of judicial discretion was enshrined in Russian procedural law.

In civil law as well as in other private branches of law, in contrast to public law, discretionary action applies to any person exercising their powers by their own will and in accordance with their interests. Judicial discretion applies only to the court which has the right to varying opinions on certain issues. At the same time, the uncertainty of the content and essence of "discretion" in the norms of positive law and the vagueness of its limits lead to the fact that discretion in private law then tries to make up for the court in the framework of the civil process also by including the mechanism of judicial discretion. However, as pointed out by D.B. Abushenko (2015), the inability to resolve this issue guided by legal means leads to numerous discussions and recommendations in the academic literature. In view of this, the judicial discretion should be limited by strict framework (limits). Unfortunately, such limits are not established in the norms of positive law, therefore, judges, based on their own subjective limits of discretion, often give different interpretations of the same norm of law, actually changing its meaning and content.

The limits of judicial discretion are extremely complex, and not unequivocally defined in the doctrine. Thus, V.I. Chernyshev pointed out that the primary role in resolving this issue belonged to the formation of legal consciousness and legal culture. Judges should not be "officials in justice", and the activities of the court should not undermine faith in justice or generate legal nihilism in the minds of people (Chernyshev, 2005: 218). It is important that the judicial discretion does not turn into arbitrariness. The guarantee of inadmissibility of judicial arbitrariness, it would seem, is the norms of law that form the boundaries of judicial discretion. However, in this case, we know that many norms of private law contain disposition principles, are vague and full of uncertainty. In view of this, V.A. Vaipan (2020: 6) writes,

> If doubts arise about the correctness of the perception of norms due to the ambiguity, uncertainty of their provisions, the identification of systemic contradictions in law, etc., it becomes necessary to interpret legal prescriptions based on their objective goals and content, identify the true meaning of the norms to prevent socially unfair actions (inaction) in the process of their implementation.

Since judicial discretion borders on judicial arbitrariness, the attitude to this principle of law is not unambiguous, from complete rejection to its full approval. Such a diversification of opinions occurs due to the peculiarities of the understanding of law and the different attitudes of researchers to

legal phenomena, due to which the term discretion can take on different meanings.

In jurisprudence, there are two movements in terms of judicial discretion. According to some researchers (I.A. Pokrovskii, G.F. Shershenevich, etc.), there can be no judicial discretion since the latter does not comply with the law and is arbitrary. Therefore, the interpretation of the law by the judge should be only explanatory, nothing can be added or subtracted. A judge must strictly follow the dictates of the law, being an executor of the law, and judicial practice cannot be a source of law. According to another point of view, it is not possible to completely exclude judicial discretion, and in some cases discreation is even useful. In foreign literature, judicial discretion is also compared with freedom in decision-making (Garner and Black, 2009).

In English law, there is a term "abuse of discretion" when the court did not exercise its right to judicial discretion and did not make an informed decision. The imperfection of the law, its incompleteness, the impossibility of foreseeing everything in advance on the part of the legislator create fertile ground for judicial discretion. As S.A. Muromtsev (1877: 15) points out, "The presence of gaps is objective, in this case the court together with jurisprudence creates independent norms that govern vital interests". S.A. Muromtsev (1877: 43) proceeds to say that a judge, in addition to interpreting, criticizing and developing positive law, is also engaged in independent creativity, based on science and judicial practice. H. Hart (1994) adheres to the same position, emphasizing that judges need discretion to fill in dangerous gaps. According to L.N. Berg (2007), judicial discretion is applied at all stages of law enforcement, from clarifying the factual circumstances of the case to drawing up a decision.

It seems to us that in order not to reduce the discretion to arbitrariness, it must be assessed using the legal method, based on the general, objective and constant essence of law. However, it should be noted that since any activity has an element of arbitrariness, then in this case it is not impossible. It is clear that judicial discretion can correct the shortcomings of legal regulation and be aimed at protecting the violated right. Therefore, judicial discretion should be considered not as an end but as a means of achieving the goal of legal proceedings.

Conclusion

As a result of the study, the following conclusions were made:

1. The principle of the independence of the judiciary is not fully operational in the Russian Federation. According to the Russian Constitution, not three but four powers have developed and are

operating. The judiciary is separate from the executive and legislative branches but is controlled by the presidential power.

2. In modern civil proceedings in Russia, in contrast to the Soviet civil procedure, by virtue of the adversarial principle, the court establishes not an objective truth but a relative one. The truth established in the judicial process is relative since the court receives information and draws conclusions on the basis of the evidence presented to the court by the parties, i.e. the truth is related to the ability of the parties to convince the court that they are right.

3. The civil law process must be based on the principle of pure adversariality. The court should be deprived of the initiative to collect evidence. The intervention of the court is permissible only if assistance is provided to the parties to the extent that it does not contradict the postulates of procedural independence and activity of the parties. This rule should apply only in the civil law process. In administrative proceedings, the court should not be deprived of the opportunity, on its own initiative, to send letters rogatory and requests to obtain evidence, since the litigants in an administrative dispute are not equal subjects.

4. The essence of the principle of legal certainty lies in the fact that a court decision must comply with the uniformity of judicial practice which is formed in the acts of the highest judicial body of the country. This principle is currently not valid in the Russian Federation, which leads to conflicting decisions in similar cases even in the same court in the Russian Federation.

5. The principle of judicial discretion is not enshrined in the procedural law of Russia. At the same time, "discretion" as a legal mechanism is quite often used in private law. In the procedural doctrine, there are discussions about the implementation of this principle in the judicial process. The consolidation of this principle has both positive and negative sides. On the one hand, the court, using judicial discretion, fills in the gaps in the law which makes it possible to administer justice. On the other hand, judicial discretion determines judicial arbitrariness. Therefore, before introducing this principle into the process, it is necessary to formulate its limits which the court will not have the right to cross.

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UNIVERSIDAD DEL ZULIA

CUESTIONES POLÍTICAS

Vol.39 Nº 70

Esta revista fue editada en formato digital y publicada en octubre de 2021, por el ***Fondo Editorial Serbiluz, Universidad del Zulia. Maracaibo-Venezuela***

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