

Reform of Civil Procedural Legislation of Ukraine and Problems of its Implementation

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New rules for transferring the case from one court to another are being investigated, the conclusion on expanding the competence of the court on this issue is substantiated. The most problematic requirements for the content of the claim, which are not provided with legal and organizational mechanisms, are considered.

Particular attention was paid to the problem of implementing “cassation filters”, which have undergone additional changes since the main reform strengthens them. It is proved that this problem is closely related to another one – the problem of defining a certain legal concepts, substantiates a significant expansion of the scope of judicial discretion in determining the grounds for cassation appeal in a particular case.

The article considers the possibility of referring to the decisions of the European Court of Human Rights as the sources of civil procedural law of Ukraine. The problem of administering justice under martial law received separate consideration.

It is concluded that the evaluation of the effectiveness of judicial reform involves its critical consideration by both science and practice, generalization and analysis of law enforcement practice will provide grounds for a final assessment of the quality of reform.

Keywords: civil proceedings, lawyer monopoly, territorial jurisdiction, jurisdiction, cassation filters, sources of civil procedural law, ECtHR decisions, martial law.

Civilinio proceso reforma Ukrainoje ir jos įgyvendinimo problemos

Straipsnyje nagrinėjamos naujos bylos perdavimo iš vieno teismo kitam taisyklės, pagrindžiama išvada dėl teismo kompetencijos išplėtimo šiuo klausimu. Nagrinėjami problemiškesni ieškinio turiniai keliami reikalavimai, kurių nėra numatyti teisiniai ir organizaciniai mechanizmai.

Ypatingas dėmesys skiriamas „kasacinių filtrų“ diegimo problemai, kuri po pagrindinės reformos patyrė papildomų pakeitimų. Įrodyta, kad ši problema glaudžiai susijusi su kita – teisinių koncepcijų, pagrindžiančių reikšmingą teismo diskrecijos ribų išplėtimą nustatant kasacinio skundo pagrindus konkrečioje byloje, problema.

Straipsnyje svarstoma galimybė Europos Žmogaus Teisių Teismo sprendimus pripažinti Ukrainos civilinio proceso teisės šaltiniais. Teisingumo vykdymo karo padėties metu problema buvo nagrinėjama atskirai.

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Daroma išvada, kad vertinant teismų reformos veiksmingumą būtina kritiškai atsižvelgti tiek į mokslą, tiek į praktiką, o teisėsaugos praktikos apibendrinimas ir analizė ateityje suteiks pagrindą galutinai įvertinti reformos kokybę.

Pagrindiniai žodžiai: civilinis procesas, teisininkų monopolija, teritorinis teisingumas, jurisdikcija, kasaciniai filtrai, civilinio proceso teisės šaltiniai, EŽTT sprendimai, karo padėtis.

Introduction

Six years have passed since the start of the great judiciary reform in Ukraine, but even today some issues remain relevant. Its characteristic feature is the systemic complex nature, and the need for it was caused by the need to address the problems of the judiciary, related to the need to improve the judicial process itself.

The aim of the study is to highlight the most pressing issues of civil procedural law related to judicial reform in Ukraine (2016–2017) and analyze the impact of novelties of civil procedural law on the development of civil procedural science in Ukraine, including the view of judicial practice.

The purpose of the study led to the following **tasks**:

- provide a general description of judicial reform;
- to analyze the lawyer's "monopoly" on representation in court;
- to investigate changes in the rules for transferring a case from one court to another according to the provisions of judicial reform;
- determine new requirements for the content of the statement of claim;
- analyze the "cassation filters" established by CPC of Ukraine.

The object of research is public relations related to the implementation of civil proceedings.

Knowledge of the problems of civil proceedings cannot happen without the use of general scientific methods. It is general scientific methods in combination with other methods and means of study that allow to obtain reliable, substantiated results of scientific research. The method of dialectical analysis is directly used in covering the problems of civil justice in terms of determining the current state of judicial reform in our country, new tasks for the judiciary and civil justice, assessing the effectiveness of justice in civil cases, opportunities for improvement through optimization of judicial procedures and rules.

The method of systematic analysis allowed, first of all, to highlight the characteristic features of the novelties of civil procedural law; the formal-logical method was used to determine the terminology, concepts and categories used, which formed the basis of the study, which not only clarified the content of the conceptual-categorical apparatus of research, but also helped to establish the true meaning of individual concepts; comparative law research method contributed to the understanding of the novelties of civil procedural law from the standpoint of the approaches to them in the civil procedural doctrine and judicial law enforcement practice.

Research on certain aspects of judicial reform has been the subject of analysis by both scholars and legal practitioners (judges, lawyers), who mostly expressed their views at numerous conferences and roundtables on judicial reform, such as the All-Ukrainian Scientific and Practical Internet Conference. Yu. S. Chervony "Reforming civil procedural law in the context of integration processes in Ukraine", held in Odessa on December 18, 2020, the III International Scientific and Practical Conference "Modern Challenges and Current Issues of Judicial Reform in Ukraine", held in Chernivtsi on October 24–25, 2020, etc.

At the same time, given the short time that has elapsed since the enshrinement in civil procedural law of novelties that affect the revision of established doctrinal approaches or the formation of new concepts and categories introduced by the legislator, in particular the procedural position of a lawyer

in civil proceedings to the statement of claim, conditions of change of territorial jurisdiction, grounds of cassation appeals against court decisions, the place of ECHR decisions among the sources of civil procedural law, scholars have studied in fragments and covered only some aspects of these legislative novelties, which is explained by the process of formation of judicial practice. At the same time, despite the fact that the jurisprudence is only developing, the relevance of this study is quite high as it allows to highlight certain aspects of civil proceedings in their dynamics and to outline further ways to develop scientific theory.

The main content

As a result of the study, some novelties of civil procedural legislation were identified and analyzed.

1. General characteristics of judicial reform in Ukraine

On June 2, 2016, the Verkhovna Rada of Ukraine adopted the Law of Ukraine “On Amendments to the Constitution of Ukraine (on Justice)” and the new Law of Ukraine “On the Judiciary and the Status of Judges”, which aimed to reform the judiciary. Regarding changes in the judiciary, the most significant and most discussed in the circles of experts were:

- optimization of the judiciary – return to the three-level instance construction of the system of general courts: the first level – local courts, the second – the courts of appeal, the third – the Supreme Court. Before the reform, there was another level – higher specialized courts, which took place between the courts of appeal and the Supreme Court. This level has been canceled: the Supreme Specialized Court of Ukraine for Civil and Criminal Cases, the Supreme Commercial Court of Ukraine and the Supreme Administrative Court of Ukraine;
- change in the structure of the Supreme Court which includes: the Grand Chamber of the Supreme Court; Administrative Court of Cassation; Commercial Court of Cassation; Criminal Court of Cassation; Civil Court of Cassation;
- reducing the number of local courts;
- introduction of a lawyer’s “monopoly” on the representation of interests in court.

Also within the framework of judicial reform, the Laws of Ukraine “On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and Other Legislative Acts”, “On Ensuring the Right to a Fair Trial”, “On the High Council of Justice” and others, which changed the procedure of civil proceedings in Ukraine.

It is necessary to dwell on the Law of Ukraine “On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts” of 03.10.2017, № 2147-VIII, as this Law, in its content, set out in its new version three procedural codes, in which the procedures for consideration and resolution of issues referred to the jurisdiction of courts have undergone significant changes.

2. Some novelties of the Civil Procedure Code in the new edition

In the field of civil proceedings, as a result of updating the content of the Civil Procedure Code of Ukraine (hereinafter – the CPC of Ukraine) (changes came into force on December 15, 2017) the following novelties were introduced.

First, according to Art. 60 of the CPC of Ukraine, a representative in court may be a lawyer or legal representative, except for representation in disputes arising from employment, as well as cases in minor

disputes, where the representative may be a person who has reached eighteen years of age, has civil procedural capacity, except persons who, according to Art. 61 GIC of Ukraine cannot be representatives.

That is, the norm of the CPC of Ukraine reflects the norm of the Constitution of Ukraine regarding the representation of another person in court exclusively by a lawyer (Part 3 of Article 131-2 of the Constitution of Ukraine).

At the same time, the application of this provision of the CPC of Ukraine on representation exclusively by lawyers must take into account paragraph 16-1 of Section XV of the Transitional Provisions of the Constitution of Ukraine, according to which representation exclusively by lawyers in the Supreme Court and courts of cassation is carried out from January 1, 2017; in the courts of appeal – from January 1, 2018; in the courts of first instance – from January 1, 2019.

Representation of state authorities and local self-government bodies in courts exclusively by prosecutors or lawyers is carried out from January 1, 2020. In proceedings initiated before the entry into force of the Law of Ukraine “On Amendments to the Constitution of Ukraine (on Justice)” (until June 2, 2016), representation in court is carried out according to the rules in force before its entry into force – before adoption in relevant cases final court decisions that are not subject to appeal.

Such a legislative novella has provoked a great wave of criticism from legal professionals and scholars. Thus, the special literature emphasized the general theoretical approaches to restricting the right of access to court and pointed out the impossibility of applying a law that worsens the human situation compared to that which existed before the entry into force of this law (*Advokats’ka monopolija...*, 2016).

However, referring to the law, it can be argued that this general principle is not violated. Thus, according to Part 4 of Art. 3 of the CPC of Ukraine, a law that establishes new responsibilities, cancels or restricts the rights due participants in the trial, or restricts their use, has no retroactive effect. In turn, Art. 8 of the Constitution of Ukraine, stipulates that the Constitution of Ukraine has the highest legal force, laws and other regulations are adopted on the basis of the Constitution of Ukraine and must comply with it, and its rules should be applied as rules of direct action. Therefore, representation in the courts of first instance is carried out exclusively by lawyers from January 1, 2019 and not contradicts the Basic Law of Ukraine. At the same time, when considering a particular case in court, the principle of validity of the rules in time and the date of opening the relevant proceedings should be correlated: norms that came into force after the opening day do not have retroactive effect. If the representative in court before the entry into force of the norms of the new version of the Civil Procedure Code of Ukraine was not a lawyer, but a lawyer, this person continues to perform the functions of a representative in a civil case.

Another argument not in favor of the “lawyer’s monopoly” is that it contradicts the legal nature of the representation of a legal entity, affects the cost of judicial protection (*Advokats’ka monopolija...*, 2016).

One could agree with such a position, if not for Part 3 of Art. 58 of the Code of Civil Procedure of Ukraine, according to which a legal entity, regardless of the order of its creation, participates in the case through its head, member of the executive body, another person authorized to act on its behalf in accordance with law, statute, regulations, employment agreement (contract) (self-representation) legal entity), or through a representative.

In addition, the law gave the right to a party, a third party to participate in the meeting in person (the representation itself), which does not deprive it of the right to have a representative in this case.

Negative attitude in professional circles to the introduction of a “lawyer’s monopoly” prompted the development of the Draft Law of Ukraine “On Amendments to the Constitution of Ukraine (on the abolition of the lawyer’s monopoly)” (register No. 1013 of 29.08.2019). In accordance with the existing

procedure in Ukraine, a bill amending the Constitution of Ukraine is subject to mandatory examination by the Constitutional Court of Ukraine. In the conclusion of the Constitutional Court of Ukraine of 31 October 2019 № 4-v / 2019 the draft Law on Amendments to the Constitution of Ukraine (concerning the abolition of the lawyer's monopoly) (Reg. № 1013) was recognized as meeting the requirements of Articles 157 and 158 of the Constitution of Ukraine. Based on this conclusion, the Committee on Legal Policy of the Verkhovna Rada of Ukraine recommended to the Verkhovna Rada of Ukraine, submitted by the President of Ukraine as urgent, the draft Law on Amendments to the Constitution of Ukraine (abolition of the lawyer's monopoly), register № 1013 of August 29, 2019, which was finally adopted as a law. Pursuant to the Resolution of the Verkhovna Rada of Ukraine "On Preliminary Approval of the Bill on Amendments to the Constitution of Ukraine (on Abolition of the Lawyer's Monopoly)" of January 14, 2020 № 434-IX, Resolution 485-IX of February 4, 2020, this bill was included as an urgent on the agenda of the third session of the Verkhovna Rada of the IX convocation. However, this bill was not adopted despite all the necessary constitutional procedures. Much later, according to the Resolution Verkhovna Rada of Ukraine "On the Agenda of the Seventh Session of the Verkhovna Rada of Ukraine of the Ninth Convocation" of February 15, 2022 № 2035-IX, this bill was withdrawn by the initiator, by the President of Ukraine.

Second, the rules for transferring a case from one court to another have changed. Thus, the previous edition of the Code of Civil Procedure of Ukraine in accordance with Art. 115 in case of filing a claim in violation of the rules of territorial or exclusive jurisdiction, the court in deciding on the initiation of proceedings returned the statement of claim to the plaintiff due to the fact that the case is not subject to this court, obliging the plaintiff to apply to the appropriate court. Also in accordance with paragraph 4 of Part 3 of Art. 121 of the Code of Civil Procedure of Ukraine (previous version) lack of jurisdiction was determined as one of the grounds for returning the application. The court had the right to transfer the case to another court only after the opening of the proceedings, before the beginning of the proceedings, only in cases when violation of the rules of jurisdiction was revealed after the opening of the proceedings. Usually this situation arose due to the plaintiff's mistake and required re-payment of the court fee for filing a statement of claim to the appropriate court. In addition, based on case law, the court did not always establish in the decision to return the statement of claim in which other court should the case be filed, which caused the plaintiff additional difficulties in the absence of reliable information about the registered residence of the defendant.

After the reform of civil procedural law in accordance with Art. 185 of the Code of Civil Procedure of Ukraine in the list of grounds for the return of the statement of claim no longer contains such grounds as not the jurisdiction of the case to a particular court.

If the case belongs to the territorial jurisdiction of another court, according to Art. 31 of the Code of Civil Procedure of Ukraine, the court transfers it to another court. The transfer of the case under the established jurisdiction is carried out on the basis of the relevant decision no later than 5 days after the expiration of the term for its appeal, in case of filing a complaint – no later than 5 days after leaving it unsatisfied. In addition, in cases where the court accepted the case for its proceedings in compliance with the rules of jurisdiction, if during the consideration of the case it became subject to another court, such case is considered by the court that accepted it for its proceedings. If there have been changes in the composition of the defendants, as a result of which the case belongs to the exclusive jurisdiction of another court, such a case is transferred to another court.

Thus, according to Art. 32 of the Code of Civil Procedure of Ukraine disputes between courts about jurisdiction are not allowed. The case must be brought before the court to which it was sent.

Thus, with the introduction of new rules on the transfer of a case from one court to another, the problem of incorrect determination of the proper court by the plaintiff is solved.

Third, new requirements have been set for the content of the statement of claim. Thus, in addition to the standard (usual) requirements for the statement of claim, according to Art. 175 of the Code of Civil Procedure of Ukraine statement of claim must also contain: information about the pretrial measures of dispute resolution, if any, including cases when the law provides for a mandatory pretrial procedure for dispute resolution; an indication that the plaintiff or another person has originals of written or electronic evidence, copies of which are attached to the application; preliminary (approximate) calculation of the amount of court costs incurred by the plaintiff and which he expects to incur in connection with the case; confirmation by the plaintiff that he has not filed another claim (claims) against the same defendant (defendants) with the same subject and on the same grounds.

In practice, the biggest problem with the entry into force of this provision of the Code of Civil Procedure of Ukraine was the provision by the plaintiff of an approximate calculation of court costs that the plaintiff expects to incur through the proceedings. This led to the fact that in the first year of the new version of the Code of Civil Procedure of Ukraine, the courts left the claims without motion and gave a deadline to eliminate deficiencies, believing that the lawsuits lack the appropriate wording and information.

This legislative amendment is of a practical nature, since the statement of claim must indicate the approximate calculation of the plaintiff's legal costs. If such a court calculation is not provided, the court has the right to refuse to reimburse the party for its legal costs. The exception is the court fee paid, and the parties are not limited in the ability to prove any other actual amounts after the results of the case. The court has the right to oblige the parties to pay a predetermined amount on the court's deposit.

In practice, the statement of claim before the list of annexes usually states that the plaintiff has incurred legal costs in connection with the proceedings. To this amount is added the court fee, legal aid, the price of postal items, etc. However, all costs must be documented.

There are also practical difficulties in confirming by the plaintiff that he has not filed another claim(s) against the same defendant(s) with the same subject matter and on the same grounds, as the plaintiff usually indicates that he did not apply to another court with a similar claim.

If such an allegation is not true, it can be used as evidence of the plaintiff's abuse of his rights. The existence of simultaneous filing of several similar lawsuits for the purpose of abuse of rights, gives grounds for the court to apply appropriate measures of procedural coercion in order to prevent the creation of unlawful obstacles to the administration of justice.

In addition, paragraph 6 of Part 4 of Art. 185 of the Code of Civil Procedure of Ukraine enshrines the right of the court to return the statement of claim to the plaintiff in cases where the plaintiff filed in the same court another claim (claims) against the same defendant (defendants) with the same subject and on the same grounds, and in respect of such claim (claims) the issue of initiating proceedings in the case under consideration, no decision has been made to open or refuse to initiate proceedings in the case, return the statement of claim or leave the claim without consideration.

If the proceedings on a similar claim have already been opened, the consequence of the repeated filing of a similar claim will be a refusal to open proceedings in accordance with paragraph 3 of Part 1 of Article of the 186 Code of Civil Procedure of Ukraine. This rule has been in force before (paragraph 3, part 2 of Article 122 of the Code of Civil Procedure of Ukraine in the previous version).

Despite the legislator's desire to resolve this issue in a normative way, the question remains how the court will be able to determine at the time of the proceedings whether the claim in another case was filed by the plaintiff with the same subject and on the same grounds, without having direct access to the statement of presented to another court. To some extent, this issue can be solved by the Unified Judicial Information and Telecommunication System.

The fourth novelty of the Code of Civil Procedure of Ukraine concerns the installation of “cassation filters”. The Constitution of Ukraine enshrines among the basic principles of justice the provision of the right to appellate review of cases and in cases specified by law – to cassation appeal of court decisions (paragraph 8 of Part 1 of Article 129 of the Constitution of Ukraine). A similar normative provision exists both in the Law of Ukraine “On the Judiciary and the Status of Judges” (Part 1 of Article 14) and in Part 1 of Article 17 of the Code of Civil Procedure of Ukraine. That is, the cassation review of court decisions is extraordinary, it does not happen in every case. Access to the court of cassation is limited, to obtain it a person must overcome the restrictions provided by procedural law – the so-called procedural filters.

The need to establish “cassation filters” is due to the European integration processes in which Ukraine is a participant.

Thus, the Committee of Ministers of the Council of Europe, in its Recommendation on the implementation and improvement of systems and procedures for appeal in civil and commercial matters № R (95) 5 of 07.02.1995, recommended that Member States take measures to determine the range of issues to be excluded on the right to appeal and cassation, to prevent any abuse of the appeal system; complaints to the court of third instance should be filed primarily in those cases that deserve such consideration (Article 7).

Also in paragraph 1 of Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms: everyone has the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which shall decide on his civil rights and obligations *res judicata* (judgment of the European Court of Human Rights in *Brumărescu v. Romania* (Case of *Brumărescu vs Romania*) (Application № 28342/95), *Naumenko vs Ukraine* (application no. 41984/98), *Joffre de la Pradel vs France* (*DeGeouffre de la Pradelle vs France*) of 16 December 1992, *Zubac vs Croatia* (*Zubac vs Croatia*) (application no 40160/12).

According to court representatives, “cassation review filters” are a mandatory element of self-limitation of the Supreme Court’s jurisdiction, otherwise the court of cassation as an extraordinary stage of the process will become an ordinary (ordinary) procedural activity (Luspenik, 2022).

Yes, Art. 389 of the Code of Civil Procedure of Ukraine, in the wording of 03.10.2017, the possibility of appealing the decisions of lower courts, as a basis for cassation appeal, associated with the incorrect application by the court of substantive law or violation of procedural law. It should be noted that such a basis for reviewing the decisions of the cassation instance was provided in the Code of Civil Procedure of Ukraine, even before the large-scale judicial reform. At the same time, the expected effect – a reduction in cassation appeals, did not happen.

On February 8, 2020, the Law of Ukraine of January 15, 2020 № 460-IX “On Amendments to the Commercial Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine to Improve the Procedure of Judicial Cases” came into force procedural filters “of accessibility to cassation appeal of court decisions. The introduction of “procedural filters” is aimed at giving the decision of the court of cassation the highest legal and social significance for further law enforcement in the state, and consolidating the internal procedural capacities of the judicial system

Therefore, according to Art. 389 of the Code of Civil Procedure of Ukraine grounds for cassation appeal of court decisions are incorrect application by the court of substantive law or violation of procedural law only in the following cases:

- 1) if the appellate court in the appealed court decision applied the rule of law without taking into account the conclusion on the application of the rule of law in such legal relations, set out in

the Supreme Court ruling, except in the case of the Supreme Court ruling on deviation from such conclusion;

- 2) if the appellant reasonably substantiated the need to deviate from the conclusion on the application of the rule of law in such legal relations, set out in the decision of the Supreme Court and applied by the appellate court in the contested court decision;
- 3) if there is no opinion of the Supreme Court on the application of the rule of law in such legal relations;
- 4) violation by the court of certain norms of procedural law, for example, consideration of the case by an unauthorized court, failure to examine the evidence collected in the case and other grounds enshrined in Part 1, 3 of Art. 411 of the Code of Civil Procedure of Ukraine.

The established “procedural filters” force to analyze in detail the conclusions of the Supreme Court at the stage of resolving the issue of filing a cassation appeal and positively affected the cassation appeals themselves, which together with the Supreme Court decisions became more structured and clear.

And although Art. 389 of the Code of Civil Procedure of Ukraine connects the grounds of cassation appeal with the conclusion of the Supreme Court on the application of law, the current civil procedural law does not contain a definition of “legal opinion of the Supreme Court”. Therefore, it is not clear which position from the decision of the Supreme Court should be applied – the legal norm alone or in combination with others; conclusion on such a rule in the general sense or on its application in a specific situation.

In addition, Art. 10 of the Code of Civil Procedure of Ukraine, which determines the sources of law according to which the court hears cases, does not contain information about the imperative nature of legal opinions of the Supreme Court, their advantages over other sources, and does not contain provisions which conclusion should be applied by courts of first and appellate instances: opinion of the panel of the Supreme Court, the chamber, the joint chamber or the Grand Chamber of the Supreme Court. Such shortcomings have been repeatedly pointed out by legal lawyers (Manojlenko, 2022).

Given these legal gaps, the Supreme Court in its decision of 18.03.2019 in case № 917/778/18 notes that legal norms and case law should be applied in the way they are most obvious and predictable for participants in civil traffic in Ukraine.

The current version of the Code of Civil Procedure of Ukraine also does not determine the algorithm of court actions in case of contradiction of two legal conclusions of the Supreme Court with each other, which has repeatedly become the basis for differences in law enforcement. In this case, there is a precedent. Thus, according to the position of the Grand Chamber of the Supreme Court, courts in resolving identical disputes must take into account the last legal position of the Grand Chamber (the relevant legal opinion of the Supreme Court was reached in the decision of 30.01.2019 in case № 755/10947/17).

There is no regulation in the current Code of Civil Procedure of Ukraine on determining the conclusion of the Supreme Court as a basis for cassation appeal to be applied: the conclusion of the Supreme Court, which is valid at the time of filing a cassation appeal or at the time of legal relations (dispute between the parties). In particular, the Supreme Court in its decision of 18.03.2019 in case № 917/778/18 notes that when deciding on the possibility of appealing a court decision in the presence of different legal positions of the Supreme Court on the same issue should take into account the peculiarities of the law the time of filing the cassation and the time of the dispute. That is, the Supreme Court did not provide an answer to this question.

A separate problem of law enforcement elements of case law in Ukraine is the lack of systematization of legal conclusions of the court of cassation, which is also noted by practicing lawyers (Manojlenko, 2022).

One of the significant shortcomings of the current Code of Civil Procedure of Ukraine is the existence of relatively defined concepts that expand the scope of judicial discretion, which, in particular, includes such a concept as “similar legal relations”, which also does not contribute to the quality of law enforcement and protection of rights. Thus, according to the legal positions of the Supreme Court, court decisions in such legal relations are such decisions where the subjects of the dispute, the grounds of the claim, the content of the claims and the facts established by the court are similar, and the same is substantive legal regulation of disputed legal relations. Such an understanding of “similar legal relations” was set out, in particular, in the decisions of the Grand Chamber of the Supreme Court of June 26, 2018 in case № 2/1712/783/2011, of July 4, 2018 in case № 522/2732/16-ts, of 19 May 2020 in case № 910/719/19, dated 23 June 2020 in case № 696/1693/15-ts. In order to avoid further interpretations of this concept and create a well-established case law, it would be appropriate to supplement the Code of Civil Procedure of Ukraine with the relevant norm.

Another evaluative concept is provided in paragraph 2, part 2 of Art. 389 of the Code of Civil Procedure of Ukraine, which is referred to the court. The ground for departing from the Supreme Court’s opinion is a matter of understanding of the term “reasonableness”. According to paragraph 7 of the Transitional Provisions of the Code of Civil Procedure of Ukraine, in case of deviation from the opinion of the Supreme Court of Ukraine, the case is sent to the Grand Chamber of the Supreme Court. Thus, it is still at the stage of opening cassation proceedings there is a need to determine the “validity”, “motivation” and “similarity of legal relations”. And these are all concepts that are not defined in the law and today are freely interpreted by the judiciary, which does not exclude the possibility of certain abuses on its part, and this against the background of significant distrust of the population.

The norms of the Code of Civil Procedure of Ukraine, in addition to the above mentioned, contain many other subjective evaluation concepts. These are, first of all, the following: the criteria for classifying cases as insignificant in terms of their insignificant complexity and, accordingly, the possibility of consideration in simplified proceedings; that of the excessive amount of evidence in terms of providing evidence to other participants in the case and taking them into account by the court; classifying the case as such that is fundamental to the formation of a unified law enforcement practice; criteria for establishing a significant public interest or exceptional importance for the parties to the case when deciding on the possibility of opening cassation proceedings, etc.

The above shows that the updated version of the “cassation filters” has significant shortcomings that affect law enforcement practice. Experts have suggested numerous options for improving civil procedural law by making appropriate changes, as the correct understanding of the grounds for cassation appeals against court decisions is directly related to the exercise of the right of access to justice.

At the same time, the Supreme Court points out that too formalized application of “cassation filters” can lead to violations of the right to a fair trial and access to justice. That is why, when applying cassation filters, the Supreme Court must take into account, *inter alia*, the following:

- imperative nature of procedural law;
- tasks and basic principles of commercial litigation;
- Articles 6, 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Judgment of the Supreme Court of 21 December 2020 in case № 910/14846/19).

Notwithstanding the above-mentioned approaches formed by case law, it is necessary to resolve the issue of criteria of expediency and sufficiency of normative regulation. The issue of finding a balance between regulation and the limits of judicial discretion is one of the most complex, requiring both theoretical and practical approaches. Thus establishment of such balance is not invariable, and under the influence of various factors – political, social, legal, economic – can change. Today, this balance of

solved problems in relation to certain legal concepts tends to judicial discretion. Time will tell whether it will have real advantages over regulation.

However, based on the prognostic function of legal science, in the civil procedural doctrine there are many approaches to solving problems, which are also not characterized by unity in the exchange of these procedural phenomena. For example, Art. 17 of the Law of Ukraine “On Enforcement of Judgments and Application of the Case Law of the European Court of Human Rights” of 23 February 2006 № 3477-IV stipulates that when considering cases the courts apply the Convention for the Protection of Human Rights and Fundamental Freedoms of 04.11.1950 and the case law of the Court of Human Rights (ECHR) as a source of law. The possibility of applying the case law of the European Court of Human Rights in resolving disputes was officially established in 2006, when the Law of Ukraine “On Enforcement of Decisions and Application of the Case Law of the European Court of Human Rights” was adopted. However, the practice has become especially widespread only in the last few years.

This is partly due to the fact that references to practice have become a “fashionable” trend among judges and lawyers. However, according to many scholars, a much more serious impetus for the active application of the ECHR practice in litigation has been the practical need for an expanded legal interpretation of legal norms. The Constitution of Ukraine and the Code of Civil Procedure of Ukraine declare the principles of civil proceedings, among which the main ones are: the rule of law, the principles of legality, equality of participants in the process, adversarial proceedings, transparency and openness. However, the Ukrainian legislation contains almost no interpretation of these principles. In the process of considering the case, the substantiation of the parties’ positions is not of a formal nature and is considered by the court only as an evaluative judgment. Another thing is the conclusions made by the European Court of Human Rights. The court’s interpretation of the general principles of the administration of justice has the status of a source of law. With more resources, the party has more opportunities, and the correct application of practice allows to significantly expand the tools of protection of interests, especially when national regulation is incomplete or the issue is not regulated by the legislator at all (Bragins’kij, 2022).

Civil procedural law and the practice of its application have influenced the field of research to clarify the legal nature of such sources of civil procedural law as the Convention itself and the ECHR Decision. Recognizing that the case law of the ECHR is used only within the scope of the Convention, which belongs to the sources of civil procedural law, and that the decision of the ECHR is a special kind of judicial precedent, scholars disagreed on the possibility to classify of ECHR to the sources of civil procedural law. Some scholars believe that the case law of the European Court of Human Rights is a source of civil procedural law, but not a source of civil procedural law (Stojanova, 2017). Others rightly believe that the ECHR’s decision is not a source of civil procedural law, but is seen as a standard of human rights, including the exercise of the right to a fair trial (Pavljukovec’, 2022).

Ukrainian civil procedural doctrine explores many other problematic issues caused by significant updates of civil procedural legislation and the process of forming judicial practice in the consideration and resolution of civil cases. At the same time, Russia’s military aggression against Ukraine has made its adjustments. Thus, martial law was imposed on the territory of Ukraine in accordance with the Decree of the President of Ukraine № 64 / 2022 of February 24, 2022. Formally, the imposition of martial law does not affect the judicial process. In particular, in accordance with Art. 10 of the Law of Ukraine “On the Legal Regime of Martial Law” of May 12, 2015 № 389-VIII stipulates that courts may not cease to exercise their powers. In turn, Art. 26 of the said Law stipulates that justice in the territory where martial law is imposed is administered only by courts. At the same time, it is prohibited to reduce or speed up any form of martial law. However, in practice it is extremely difficult to ensure the smooth operation of the courts during the war.

The State Judicial Administration of Ukraine and the Council of Judges of Ukraine have adopted a number of important decisions and recommendations to resolve certain issues related to the work of courts under martial law. Particular attention is drawn to the recommendations made on the work of court staff remotely; to the possibility of postponing cases in connection with hostilities and the possibility of considering cases by video conference, using any other technical means, including their own, as well as the possibility of considering cases in absentia (Council clarification judges of Ukraine from 02.03.2022). At the same time, access to the Unified State Register of Court Decisions was temporarily suspended during martial law, which prompted the court to postpone the session. In mid-June 2022, access to the Unified State Register of Court Decisions was restored.

Conclusion

Therefore, the reform of civil procedural legislation cannot be considered complete only in view of the adoption of relevant regulations and amendments to existing legislation. The search for effective legal solutions must go through a stage of critical reflection on these novelties by both science and practice. It is law enforcement practice, its generalization and analysis that will provide the basis for the final assessment of quality of the reform, will determine the vectors of further improvement of legislative regulation. Moreover, the main criterion for assessing this quality should be the effectiveness of guarantees for the protection of human rights, its ability to freely and fully exercise their right to protection and access to justice.

Bibliography

- Advokats'ka monopolija: shho pro ce dumajut' juristi? (2016). *Zakon i biznes* [online]. Available at: <https://radako.com.ua/news/advokatska-monopoliya-shcho-pro-ce-dumayut-yuristi>
- Bragins'kij, P. (2022). *Praktika zastosuvannya precedentiv ESPL v civil'nomu procesi* [online]. Available at: <https://webcache.googleusercontent.com/search?q=cache:NSaWUzh1y10J:https://radako.com.ua/news/praktika-zastosuvannya-precedentiv-iespl-v-civilnomu-procesi+&cd=2&hl=uk&ct=clnk&gl=hu&client=avast-a-1>
- Luspenik, D. (2022). *Kasacijni fil'tri u civil'nih spravah: problemni pitannya sudovogo pravotlumachennja ta pravozastosuvannya* [online]. Available at: <https://sud.ua/ru/news/blog/171319-kasatsijni-filtri-u-tsilvilnikh-spravakh-problemni-pitannya-sudovogo-pravotlumachennja-ta-pravozastosuvannya>
- Manojlenko, K. (2022). *Oskarzhennja obmezhenoj dij* [online]. Available at: <https://zib.com.ua/ua/>
- Pavljukovec', T. (2022). Rol' ta misce rishen' ESPL v ukrains'kij sudovij sistemi [online]. Available at: <https://everlegal.ua/rol-ta-mistse-rishen-espl-v-ukrayinskiy-sudoviy-systemi>.
- Stojanova, T. (2017). *Praktika evropejs'kogo sudu z prav ljudini jak dzherelo civil'nogo procesual'nogo prava Ukraini. Tradicii ta novacii juridichnoj nauki: minule, suchasnist', majbutne: mater*. Mizhnar. nauk.-prakt. konf. (m. Odesa, 19 trav. 2017 r.). U 2-h t. T. 2. Vidp. red. G. G. O. Ul'janova. Odesa: Vidavnicij dim "Gel'vetika", 667–669.

Reform of Civil Procedural Legislation of Ukraine and Problems of its Implementation

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S u m m a r y

The aim is to highlight the most pressing issues of civil procedural law, after the judicial reform in Ukraine in 2016–2017. The object of research is public relations related to the implementation of civil proceedings. It is noted that the result of the reform was the updated judicial system of Ukraine and civil proceedings. The lawyer's "monopoly" is analyzed, which received wide discussion in academia and among practicing lawyers, whose opinions were divided.

New rules for transferring the case from one court to another are also investigated, the conclusion on expanding the competence of the court on this issue is substantiated. The most problematic requirements for the content of the claim, which are not provided with legal and organizational mechanisms, are considered.

Particular attention was paid to the problem of implementing “cassation filters”, which have undergone additional changes since the main reform strengthens them. It is proved that this problem is closely related to another one – the problem of defining a certain legal concepts, substantiates a significant expansion of the scope of judicial discretion in determining the grounds for cassation appeal in a particular case.

The article considers the possibility of referring to the decisions of the European Court of Human Rights as the sources of civil procedural law of Ukraine. The problem of administering justice under martial law received separate consideration.

It is concluded that the evaluation of the effectiveness of judicial reform involves its critical consideration by both science and practice, generalization and analysis of law enforcement practice will provide grounds for a final assessment of the quality of reform.

Civilinio proceso reforma Ukrainoje ir jos įgyvendinimo problemos

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S a n t r a u k a

Straipsnyje aptariami aktualiausi civilinio proceso teisės klausimai, kylantys po Ukrainos 2016–2017 m. teismų reformos. Tyrimo objektas – su civilinio proceso įgyvendinimu susiję visuomeniniai santykiai. Pažymima, kad reformos rezultatas – atnaujinta Ukrainos teismų civilinio proceso sistema. Analizuojamas teisininkų „monopolis“, apie kurį plačiai diskutuojama mokslo bendruomenėje ir praktikuojančių teisininkų, jų nuomonės skiriasi.

Taip pat nagrinėjamos naujos bylos perdavimo iš vieno teismo kitam taisyklės, pagrindžiama išvada dėl teismo kompetencijos išplėtimo šiuo klausimu. Nagrinėjami problemiškesni ieškinio turiniui keliami reikalavimai, kuriuos įgyvendinant nėra numatyta teisinių ir organizacinių mechanizmų.

Ypatingas dėmesys skiriamas „kasacinių filtrų“ diegimo problemai, kuri po pagrindinės reformos patyrė papildomų pakeitimų. Įrodyta, kad ši problema glaudžiai susijusi su kita – teisinių koncepcijų, pagrindžiančių reikšmingą teismo diskrecijos ribų išplėtimą nustatant kasacinio skundo pagrindus konkrečioje byloje, problema.

Straipsnyje svarstoma galimybė Europos Žmogaus Teisių Teismo sprendimus pripažinti Ukrainos civilinio proceso teisės šaltiniais. Teisingumo vykdymo karo padėties metu problema buvo nagrinėjama atskirai.

Daroma išvada, kad, vertinant teismų reformos veiksmingumą, būtina kritiškai atsižvelgti tiek į mokslą, tiek į praktiką, o teisėsaugos praktikos apibendrinimas ir analizė ateityje suteiks pagrindą galutinai įvertinti reformos kokybę.

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