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SOME ASPECTS OF CIVIL JURISDICTION OF FIRST AND APPEALS UNITS ON THE NEW CIVIL PROCEDURAL CODE OF UKRAINE

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SUMMARY

The questions arising in the institute of civil jurisdictionare, first of all, the issues of structural certainty of the entire judicia lsystem, both in the judiciary and in the legal certainty of the legislation. Procedural legislation should serve as a simple guide, both to the subject of appeal and to the court, so that judicial protection becomes an effective mechanism, and not an instrument by which a person can avoid responsibility.

That is why the institution of judicial jurisdiction, as the main and first prerequisite of the right to judicial protection, should be simple, logical and prevent misunderstandings in the process of implementing the right to a fair trial.

In this context, a study of the main stories in the institute of civil jurisdiction in the court of the first and appellate instance is being conducted in view of the adoption of the new Civil Procedure Code of Ukraine.

Key words: civil process, civil procedural code, jurisdiction, types of civil jurisdiction, simplified lawsuit, minor cases, order proceeding, separate proceeding.

НЕКОТОРЫЕ АПЕКТЫ ГРАЖДАНСКОЙ ЮРИСДИКЦИИ ПЕРВОЙ И АПЕЛЛЯЦИОННОЙ ИНСТАНЦИЙ ПО НОВОМУ ГРАЖДАНСКОМУ ПРОЦЕССУАЛЬНОМУ КОДЕКСУ УКРАИНЫ

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АННОТАЦИЯ

Вопросы, возникающие в институте гражданской юрисдикции, – это, прежде всего, вопросы структурной определенности всей судебной системы как в судоустройстве, так и в правовой определенности законодательства. Процессуальное законодательство должно служить простым поводырем как субъекту обжалования, так и суду, чтобы судебная защита стала действенным и эффективным механизмом, а не инструментом, с помощью которого человек может избегать ответственности.

Именно поэтому институт судебной юрисдикции, как основная и первая предпосылка права на судебную защиту, должен быть простым, логичным и предотвращать недоразумения в процессе реализаций права на справедливый суд.

В таком контексте и производится исследование основных новелл в институте гражданской юрисдикции в суде первой и апелляционной инстанции ввиду принятия нового Гражданского процессуального кодекса Украины.

Ключевые слова: гражданский процесс, гражданский процессуальный кодекс, юрисдикция, виды гражданской юрисдикции, упрощенное исковое производство, малозначительные дела, приказное производство, особое производство.

Problem statement. In conditions of the reformation and European integration processes that are going on in Ukraine, the question of updating civil procedural legislation has become relevant because the Draft Law «On Amendments to the Economical Procedural Code of Ukraine, the Civil Procedural Code of Ukraine, the Code of Administrative Justice of Ukraine and other legislative acts», which was registered on the 23 of March 2017, was adopted on the 3 October 2017.

Relevance of research. Since the Institute of Jurisdiction is a fundamental condition for the realization of the right to judicial protection, this article is an attempt to analyze proposed changes in the said below institution, in the context of approximation of Ukrainian legislation to international standards and in light of the updating of the procedural legislation of Ukraine.

According to Art. 6 of the Convention for the Protection of Human Rights and

Fundamental Freedoms («the Convention»), everyone has the right to a fair and public hearing of his case within a wise period by an independent and impartial tribunal established by law which resolves a dispute over his rights and obligations of a civil nature [1, p. 263]. In accordance with the practice of the ECHR under the notion of «court established by law», the rules of jurisdiction also apply. The following decisions of the ECHR should be mentioned in the justification of following positions: 1. In the Sokurenko and Strygunv Ukraine case of July 20, 2006, applications № 29458/04 and 29465/04, the court repeats that, the phrase «prescribed by law» extends not only on the legal basis of the very existence of the «court», but also the observance by such a court of certain norms that regulate its activities. 2. In the judgment in «Zand against Austria», the Commission expressed the view that the term «court established by law», in article 6, paragraph 1, provides for «the entire organizational structure of the courts, including matters relating to the jurisdiction of certain categories of courts [2]. That is, it should be noted that the right to judicial protection, as the power of the entity wishing to implement it, depends on certain preconditions, among which the primary is observance of the rules of jurisdiction.

State of research. The distinction of jurisdiction over cases is between different competent authorities and courts, which is the main practical problem encountered by courts, but also those who go to court to protect their rights, the question of the correct interpretation of jurisdiction has the same theoretical and practical value. The problem is exacerbated especially during the first period of the introduction of new legislative provisions.

This article introduces an attempt to combine the views of the main theorists in the civil process with regard to the concept and types of jurisdiction, and practitioners faced with the problems of separation different types of jurisdiction in the conduct of legal proceedings.

At the dissertation level, problems of the jurisdiction of civil, economic, and administrative courts were investigated, for example, L.S. Anokhina, S.S. Vasiliev, O.V. Kolisnik, M.I. Cherlennyakom and D.M. Shadur.

Questions of the jurisdiction of civil courts were the subject of scientific developments by the author's collectives of the Kharkiv Process and Law School under the general editorship of Professor V.V. Komarova [3, p. 183–233; 4, p. 172–187]. Hryhoriy Volosatiy paid attention to the concept of jurisdiction and jurisdiction in the textbook «Civil Process of Ukraine», who represented the Odessa School of Law, exploring the essence of concepts jurisprudence, competence and jurisdiction [5, p. 165–180]. In the light of the discussion of draft new procedural codes in Ukraine, since March 2017, discussion among scientists and practitioners about the provisions of the proposed changes is becoming relevant.

This research will be conducted taking into account the latest scientific and practical publications, in particular, D.Sc., professor, head of the department of civil law and the process of the National Academy of the Ministry of Internal Affairs of Ukraine Svetlana Bychkova «The new CPC of Ukraine: to be or not to be...» [6]; Doctor of Law, professor of the National School of Judges of Ukraine, judge of the Lviv Regional Administrative Court Volodymyr Kravchuk «Methods of Solving Jurisdictional Problems» [7], Candidate of Law, Associate Professor of the Civil Procedure, Judge, Secretary of the Plenum of the High Specialized Court of Ukraine On consideration of civil and criminal cases of Dmitry Luspenkik «What should be the ideal procedural code» [8], Candidate of Law, the representative of Ukraine in the Venice Commission Volodymyr Pylypenko «Evaluation Procedural Code of Ukraine» [9], etc.

The purpose of the article and the research – is to study the main changes in the institute of civil jurisdiction in the court of the first and appellate instances, which took place with the adoption of the new Civil Procedure Code of Ukraine (the CPC), taking into account the practice of the ECHR in interpreting the provisions of the Convention regarding the term «court established by law».

In accordance with the aim of the study, the following research objectives were set:

– to explore the concept of civil jurisdiction;

– to analyze some innovations of the civil procedural code of Ukraine concerning civil jurisdiction in the first and in the appellate instance;

– to submit proposals for improving the provisions of the civil procedural code of Ukraine regarding civil jurisdiction.

Presentation of the main material. For a fundamental study of this problem, one should stop on the definition of the concept of jurisdiction. The doctrinal concept of jurisdiction is not the purpose of this article, but to form the appropriate context from which the main changes in legislation will be investigated, the conclusion of such a concept should be considered extremely necessary.

Unfortunately, neither Chapter 2 nor other norms of the current CPC of Ukraine (till the introduction of the new CPC) do not contain the definition of civil jurisdiction, but use the term jurisdiction of the courts to consider civil cases. In the new CPC of Ukraine, civil jurisdiction, as well as in previous legislation, is interpreted through a range of cases that are subject to review in court. In contrast to previous legislation, the CPC in 2017 introduces the following classification of types of jurisdiction: substantive, subjective, instance and territorial (jurisdiction). This is a novelty of the current CPC, but it is not a definition of jurisdiction at the legislative level, therefore, in order to define the concept, such a term should be subjected to scientific analysis.

Many authors agree that the term civil jurisdiction has the same meaning as the subordination that was used by previous legislation [10, p. 29, 189]. Due to the fact that jurisdiction, as the authority for the consideration and resolution of disputes, is understood as the jurisdiction of the court, state bodies and bodies of local self-government, etc., it should be considered in a broad and narrow sense. In a broad sense, civilian jurisdiction should be understood as the powers of all state and non-state bodies, officials in the consideration and resolution of civil disputes. The notion of civil jurisdiction in the broadest sense, as well, should include the jurisdiction of the court, other state bodies for the consideration of civil disputes, notarial defense, etc. In the narrow – civil jurisdiction should be considered as the authority of courts for the consideration of civil cases under the rules of civil procedural law. Without going into a long discussion, it should be proposed to use the term «judicial civil jurisdiction» to determine the jurisdiction of the civil court. The introduction of such a term is appropriate since the provisions of exclusive

jurisdictional jurisdiction have already undergone changes at the constitutional level, art. 124 changed the exclusive nature of judicial jurisdiction, to alternative, in cases determined by law [11]. That is, it will provide an opportunity to separate the judicial jurisdiction from non-judicial forms of protection, and immediately specify its substantive component.

But, returning to the goal of the study, it should be emphasized that in the context of this article, civil jurisdiction (subordination) will be considered in the narrow sense, as the competence of courts for the consideration of civil cases, which are considered by the court according to the rules of the CPC of Ukraine, than separates from criminal, economic and administrative jurisdiction.

The first innovation in the institute of civil jurisdiction is its division into types: substantive and subjective jurisdiction (§ 1 Chapter 2 of the CPC), instantiation (§ 2 Chapter 2 of the CPC) and territorial (jurisdiction) (§ 3 Chapter 2 of the CPC). The caution is the introduction of the term «subject jurisdiction», since such a term implies the introduction of a «subjective qualification» when referring a case to civil jurisdiction, which is not seen in the content of the article. One can assume that the legislator under the term «subjective jurisdiction» points out p. 8: which states that the courts are considering cases on appeals against arbitral tribunals, the issuance of enforcement orders for enforcement of arbitral tribunals, the challenging of decisions of international commercial arbitration, as well as on the recognition and granting of permission to execute decisions of international commercial arbitration, foreign court, bearing in mind that the subjects of appeal contest in this case the actions of the relevant actors – the arbitral tribunal, International Commercial Arbitration and Foreign Courts. However, one should not agree with this position of the legislator, since the criterion of the subject, as the separation of competence in the consideration of cases, is essential in the division into types of court jurisdictions. So, according to Volodymyr Kravchuk: according to the subjective criterion, civil, economic and administrative jurisdictions are distinguished. Economic affairs arise between legal entities and entrepreneurs, as well as the creation and termination of legal entities (corporate disputes), and administrative – with the participation of the subject of power. All other cases are resolved in the order of civil proceedings.

It can be assumed that the legislator submits to the subject competence the special subjects, as well as the arbitration courts, the international commercial arbitration and the foreign court, in accordance with paragraph 8, but such a construction is rather complicated.

However, the introduction of the concept of subjective civil jurisdiction immediately recalls the criterion of the subject of power in administrative jurisdiction. Therefore, such a concept introduces more confusion in terminology. One must agree with Dmitry Luspenkik's opinion that the ideal procedural code should be characterized by a certain systemic, consistensy, interconnected and unified norms both in the Civil Procedure Code itself and in relation to other procedural codes [8].

In addition, it should be noted that in his work «Civil Procedure Course» Evgeny Vaskovsky noted that the department of each individual civil court is determined from three parties: a) the law specifies which categories of civil cases are subject to this type of court, that is, objective, substantive competence of judges, or tribal jurisdiction, jurisdiction according to the nature of cases; b) The law determines which of the procedural actions has the right to execute this court, that is, it defines its functions. This is a functional competence; c) The competence of each individual court is determined in relation to the space, limited to known parts of the state territory. Such a spatial delineation of the competence of judicial institutions is called personal or subjective competence, or jurisdiction [12, p. 29, 189]. There is a certain similarity between the classification of types of judicial civil jurisdiction, but the term «subjective» jurisdiction, the author, points out, taking into account the meaning of the personal jurisdiction of a particular territorial court, that is, territorial jurisdiction, which is understandable and logical.

The second innovation concerns the changing of the content of the order and the proceedings. Not touched on the issues that were the subject of discussion in scientific and practical circles [6, 9] with respect to such valuation categories as «the collection of small sums of money, as a criterion for cases to be considered in the writ order», «for which there is no dispute or its presence is unknown to the applicant «; «Minor cases», «cases of negligible complexity», since such concepts require legislative clarification or in the first months of the application of the Criminal Code of Ukraine, judicial explanations, I would like to propose the following considerations.

Not touched on the issues that were the subject of discussion in scientific and practical circles [6, 9] with respect to such valuation categories as «the collection of small sums of money, as a criterion for cases to be considered in the orderly order», «for which there is no dispute or its presence is unknown to the applicant»; «cases», «cases of negligible complexity», since such concepts require legislative clarification or in the first months of the application of the Criminal Code of Ukraine, judicial explanations, I would like to propose the following considerations.

So, in relation to the cases of ordering proceedings and the absence of a dispute or lack of information about its existence to the applicant. It seems that the abandonment of the applicant's right to indicate the lack of information about the existence of a dispute about the right – is the abandonment of space for abuse of procedural law.

Concerning introduction of classification of proceedings in general and simplified. So, according to Part 4 of Art. 19 of the CPC of Ukraine simplified proceedings is intended for consideration of minor cases, cases arising from labor relations, cases of small complexity and other cases for which the priority is a quick solution of the case. Also, without paying attention to the issues of valuation of «minor cases», we draw attention to the non-selective approach of the legislator in assigning all labor disputes to the category of minor cases, especially taking into account the criterion specified in paragraph 2, part 4 of Art. 18 of the CPC of Ukraine, which states that the general proceedings are intended for consideration of cases which, due to complexity or other circumstances, are not expedient to consider in a simplified proceeding. Such categories of cases as disputing dismissal (in all its variants – from changing the wording of the dismissal, payment for the time of forced absenteeism before resuming work), termination of an employment contract, etc. – is one of the most difficult categories of civil cases.

Regarding the instant of jurisdiction. Innovation, which causes a lot of remarks, was the granting of the appellate authority the power to consider civil cases, as courts of first instance.

The art. 23 of the Civil Procedure Code of Ukraine provides that all cases that are subject to a decision in civil proceeding should be considered by the local general courts as courts of first instance, except for cases determined by parts two and three of this article.

Part 2 of Article 23 of the CPC establishes that cases concerning appeals against decisions of arbitration courts, appeals against decisions of international commercial arbitration, and the issuance of enforcement orders for the enforcement of decisions of arbitral tribunals shall be considered by appellate courts as courts of first instance at the place of consideration of the case by an arbitral tribunal (at the location of arbitration).

This situation creates misunderstanding – why load the appellate courts with cases that were handled by the courts of first instance, and then the Supreme Court as the court of cassation, in which, according to Part 2 of Article 24 of the Civil Code of Ukraine, the Civil Code of Ukraine obliged to review in Appeal court decisions of appellate courts, adopted by them as courts of first instance.

There are still many outstanding issues that require further study at the Institute of Civil Jurisdiction, as well as the territorial issues, which would be more logical to name subjectual jurisdiction, but within the stated limits it is necessary to proceed to the specification of the obtained analytical provisions.

Conclusions. It is proposed to introduce a term such as judicial «civil jurisdiction», which is the competence of the court for consideration of civil cases in accordance with the rules of civil procedural law, in order to specify the place of civil jurisdiction in the system of protection of civil rights. Such a definition makes it possible to separate the civil jurisdiction of the court from the civil jurisdiction of other jurisdictions, and has a characteristic of the substantive competence component.

The term «subjective jurisdiction» has became critical. It raises comments, the introduction of subjective qualifications in the allocation of substantive jurisdiction, which, according to the content of Art. 19 CPK of Ukraine is not seen, but it resonates with the notion of the subject of power, as a criterion for the demarcation of civil and administrative jurisdictions.

It is inappropriate in the orderly procedure to leave the right of the applicant to indicate the lack of information about the existence of a dispute on the right, as it will lead to delaying the process through the application of the mechanism of ordering proceedings.

The logical classification of labor disputes into the category of «minor cases» does not seem logical, because of the presence in such a category of complicated entities for carrying out the proceedings and their requirements, the number of evidence and the prospects for changing claims.

It is unclear the innovations of the legislator on the consideration of cases at first instance by the appellate court on appeals against decisions of arbitration courts, the challenging of decisions of international commercial arbitration, the issuance of enforcement orders for the enforcement of arbitration awards, and it is proved that such a provision in the future may bring to the overload of the Supreme Court court as a cassation instance.

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УДК 347

СООТНОШЕНИЕ ЧАСТНЫХ И ПУБЛИЧНО-ПРАВОВЫХ НАЧАЛ В РЕГУЛИРОВАНИИ ГРАЖДАНСКОЙ ОТВЕТСТВЕННОСТИ ОРГАНОВ ГОСУДАРСТВЕННОЙ ВЛАСТИ

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АННОТАЦИЯ

Статья посвящена исследованию соотношения частных и публичных начал в регулировании гражданской ответственности органов государственной власти. В рамках статьи выделены особенности правовой природы ответственности органов государственной власти, подчеркнута необходимость установления единого подхода для всех субъектов частного права, а также сформулированы критерии разграничения правовой природы правоотношений по возмещению вреда, причиненного государству.

Ключевые слова: гражданско-правовая ответственность, охранительные отношения, частно-правовая сфера, публично-правовая сфера, государство.

CORRELATION OF PRIVATE AND PUBLIC LEGAL FOUNDATIONS FOR REGULATION OF THE CIVIL LIABILITY OF PUBLIC AUTHORITIES

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SUMMARY

The article is devoted to the correlation of private and public foundations in regulation of the civil liability of public authorities. The article highlights the peculiarities of the legal nature of the liability of public authorities, emphasizes the need to establish the same approach for all subjects of private law, and sets out the criteria for distinguishing the legal nature of legal relations for compensation of harm caused by the state.

Key words: civil-law liability, protection relations, private law sphere, public law sphere, the state.

Постановка проблемы. Необходимость установления правовой природы возмещения вреда причиненного органами государственной власти, связана с необходимостью определения места этого обязательства в системе права, а также необходимостью выяснения сущности этого понятия с целью внедрения эффективного регулирования в будущем и устранения существующих недостатков.

Состояние исследования. В отечественной научной литературе сформировались два подхода к определению правовой природы правоотношений по возмещению вреда, а именно частно-правовой и публично-правовой.

Частно-правовой подход (гражданско-правовой подход) определяет ответственность органов государственной власти как разновидность гражданско-правовой обязанности государства возместить вред независимо от сферы ее причинения. Этот подход рассматривает государство не как отдельного суверена защищенного иммунитетом, а в качестве юридического лица, которое имеет своих представителей – органы государственной власти и государственных служащих. Именно сужение иммунитета государства и бурное развитие идей прав человека обусловили популярность частно-правового подхода. Представителями этой теории