HISTORICAL TRADITIONS OF UKRAINIAN CIVIL PROCEDURE

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Summary

This article examines the historical traditions and features of national model of civil procedure, which was formed on territory of Ukrainian lands under significant influence of European sources of law, from time of Kievan Rus', the Polish-Lithuanian period and Hetmanate to contemporary time. The analysis allows to conclude that there are similarities of European and Ukrainian models of civil procedure that could eventually lead to further approximation and integration of Ukraine into a Genuine European area of Justice.

Key words: civil procedure, models of civil procedure, sources of civil procedure, approximation of procedural systems.

Аннотация

В статье исследуются исторические традиции и особенности отечественной модели гражданского процесса, которая сформировалась на территориях украинских земель под существенным влиянием европейских источников права со времен Киевской Руси, Польско-Литовского периода и Гетманщины до современного периода.

Ключевые слова: гражданский процесс, модели гражданского процесса, источники гражданского процесса, сближение процесуальных систем.

Thematic justification. The modern national idea of civil litigation as a form of implementation of the judiciary is caused by traditional approaches that were historically formed in Ukraine. European direction of development and Western values always dominated in the scientific and public opinions in Ukraine, but long-term being a part of various empires left its imprint on legal culture and sense of justice of Ukrainian society. Similarly the globalization of Civil Procedure, as reasonable emphasizes V. Komarov, cannot negate the distinctive character of national procedural systems specific to its historical development, doctrinal views, state of court practice and other factors, and does not eliminate no less important scientific problems of national Civil Procedure identity [1, 20].

Problem Statement. The current return of our country to European integration orienting points, in our opinion, determines need to intensify foundations and historical traditions of national models of Civil Procedure research. This will provide an opportunity to find the most effective ways of reforming the current legislation specific to European standards of civil procedure, and in order to integrate further to common European legal space.

Status of research. Research of historical foundations of civil justice in Ukraine is complicated by small number of scientific papers devoted to this subject. Among it we should mention work of J. Padoha «The courts and litigation in Old Ukraine», published in 1990, its subject is «history of Ukrainian judiciary» [2], which signifies judicial system, namely organization of courts and court proceedings, that is order in which are held legal actions (process) directed on establishment of rights of individuals, their protection and implementation.

Other sources that provide an opportunity to determine traditional features of civil proceedings should include historical monuments: so that in times of Kievan Rus X−XIV centuries was issued the «Rus'ka Pravda» (Russian Justice) of XI-XII centuries; in the Polish-Lithuanian period XIV − 648 centuries. The main sources of law include Lithuanian Statutes, Magdeburg Law, «Saxon Mirror» (Speculum Saxonum), Chelmno Law; in the period of Hetmanate 1648−1781 years were prepared «Laws, according to which is judged the Little Russian people» or Ukrainian Cossack Code of 1743; in the Austrian-Russian period of the second half of XVIII − beginning of the XX century were used Austrian Code of 1895 and Russian Statutes of 1868 [3; 4; 5].

Therewith, the main goal **and task** of article are not historical but ontological and epistemological knowledge of phenomena and processes in formation of national civil procedure model to determine its place among procedural law of modern European countries. This historical analysis enables us to identify inherent describing significant features and to suggest what factors influenced their formation that provides an opportunity to have a more balanced approach to reforming of modern civil process and to determine prospects for approximation of national and European Civil Procedure models.

Presentation of main material. Courts of Kievan Rus period X−XIV c., were secular and spiritual (ecclesiastic), that meets the general European trends. The secular court was court of Prince, which did by him as «the Highest Judge in region», to whom belonged the judiciary, and duty to judge citizens was considered as main duty of the lord [2, 11]. Public court or People's court first appeared as exclusive judicial body which then existed in parallel, and then was completely replaced by princely court [2, 12]. The People's Assembly or «viche», was government, to which belonged quite broad powers to conclude agreements with Prince to his assignment to position, and control of his activities, in particular judicial [6, 168−169]. Civil cases that were under jurisdiction of spiritual court, these cases were property cases between married couple, inheritance and others [2, 14].

The main source of Kievan Rus' law – «Rus'ka Pravda», is compilation of common law of XI−XII centuries, which had a huge impact on development of law on Ukrainian territory. It contains provisions relating to organization of judiciary: «Broaden Rus'ka Pravda» has on various testimonies about 120 articles on procedural law (provisions of witnesses, ordeal; sample of water and iron, on svod (face-to-face interrogation), legally self-care, etc.) [5].

The Process of time was oral competition between disputed parties before court, on which took part an entire community or its representatives – «the best people» who controlled penalty order and established outcome of proceeding. Therewith, the presence of parties and witnesses by court provided immediacy

of justice and a formalism of procedural actions that was available, but, as indicated by J. Padoh, it is believed that, not too strict [2, 41].

Thus, the basic principles of civil procedure in period of Kievan Rus were immediacy, adversary nature; jurisdiction was defined by law.

During the Polish period in Ukraine at end of XV century Ukrainian lands became a part of crown Poland and Polish administration was implemented [8, 87]. At this time were formed county (zemskyi), secular (myrskyi), podkomorskyi courts and viche courts that become higher appellate body [2, 16]. On territories of Duchy of Lithuania, were city, country and spiritual courts.

The main sources of civil procedural law of this time were Lithuanian Statutes and german law or Magdeburg Law.

The Lithuanian Statutes or Statute of Grand Duchy of Lithuania [4], which are basic code of law of Grand Duchy of Lithuania. Rus' and Samogitia were published in 1529, 1566 and 1588. Thay were in use in territory of Ukraine in Kyiv, Podolia and Volyn provinces almost until the 19 th century. The effect of these statutes was terminated by a decree of Senate on June 25, 1840 for territories of Left-Bank Ukraine and they were replaced in 1843 by the Code of Laws of Russian Empire.

The Statute included basic regulations of state, civil, family, criminal and procedural law. Thus, to procedural law had been devoted a large part of Third Lithuanian Statute, Chapter 4, 9, and from 11 to 14, by their provisions was governed procedure before Court [4, 78].

The process of that time was called «postupok pravnyi» («legal action») and it relied on principles of legality, recognized by substantive law, id est established by law, which courts had to follow [2, 47]. At this time there is a gradual change of main sources of procedural law − from customary law to law as rendered by supreme local authorities act.

The sources of procedural law of this period should also include «The Saxon Mirror» and Chelmno Law or Kulm Law, roots of which date back to Roman and European legal traditions.

The Saxon Mirror or Speculum Saxonum, that was applicable on Ukrainian territory for a quite long time can also be refered to German law, which was a German medieval compilation of legal norms and customs of 1230s, which later became foundation of Roman and canon law, and common law of German regions [9, 120]. In Ukraine mainly Polish translations of this source were used, many provisions of which are represented in «Laws by Which the Little Russian People Are Judged» [10].

Chelmno Law or Kulm Law is a compilation of legal norms that were widely used in Prussia in 13 th to 15th centuries. It is based on Chelmno or Kulm charter and privileges of Teutonic Order which regulated relationship between citizens and Teutonic Order. It also included part of regulations of Magdeburg and Flemish law [11].

The importance of these sources is that in future their provisions were codified in outstanding work of philosophical and legal thought «Laws by Which Little Russian People Are Judged» 1743. Amendment of state and political system has also led to formation of a new judicial system and drafting of one of first European constitutions.

During the 17th and 18th centuries in Ukraine Hetmanate was formed. It was a republic of elected bodies − the Military Council, Hetman was head of executive department of government and elected courts, regimental city and General Court as highest court [6, 91; 12, 168−169].

In 1710, the legal structure and «Covenant and the Constitution of the rights and liberties of the Zaporizhia army»1 or Orlyk Constitution [13] was created where it was first represented main provisions of independence of judiciary in Ukraine. It was an independent legislative and executive judiciary headed by General Court which was highest judicial body.

At same time «Laws by Which the Little Russian People Are Judged» [10] or Ukrainian Cossack Code [2, 73, 81] were preparing, they were the result of fifteen years codification of feudal serfdom legal standards.

«Laws…» was a work result of Commission created according to imperial decree in 1728. The Commission codified law rules contained in Lithuanian Statute, Chelmno Law, Saxon Mirror and Ukrainian standarts of common law bringing them closer to valid Russian legislation [14]. But sources, that were the basis of «Laws…» are of significant importance bringing them closer to European traditions of law.

Chapter 7, for instance, contained provisions about «courts and judges and other persons who belong to the court, and about content of judicial procedure in judicial institutions». Chapter 8 set out provisions for « petitioner and respondent, also on a lawsuit or on trial lawsuit and evidence, on decrees and verdicts, on appeals and fines: as well as for those convicted of an incorrect claim, and those whose convictions are unjust» [10].

Through these provisions of compilation almost all stages of the judicial process were settled, such as decisions in civil and criminal cases, appeals to them in higher courts, the legal status of plaintiff and defendant, and order of proof in cases and forensic evidence. The distinction between civil and criminal processes was also of importance: in criminal cases investigative principle of process dominated, whereas in civil cases it was the adversarial nature of cases as well as possibility of a peaceful settlement of a dispute.

The main feature of process in Hetmanate scientists considered its unity for all layers of society and almost all courts [2, 73].

The adversarial nature of process was defined by mutual rights and obligations of parties: «Every defendant must be in court interrogated verbally, according to petition of petitioner, especially for each point, and while previous points are not cleared, the following are not to be questioned ...». (The order, in art. Magdeburg Law: On judges and justice, № 34. Saxon Mirror № 3) (paragraph 5, art. 12, Chapter 7).

The enforceable right of sides to settle amicably is of great importance: «And if during investigation and judicial proceedings controversial parties want to settle amicably, it is allowed to do so» (paragraph 12, Art. 12 chapter 7).

Despite fact that compilation did not enter into force, its importance for further development of legal science was great because it reflected provisions of traditional legal being, sources of Ukrainian law of time. Later it has become subject of numerous research and has been used to study law by generations of Ukrainian lawyers.

At end of XVIII−XIX centuries judiciary system of Ukraine has been rebuilt following example of judiciary system of Russian Empire, in particular General Court has become a permanent body with appointed and paid officials whose activities are supervised by Prosecutor of Little

Russian College. This, of course, has led to abuse and the transformation of judiciary system to arbitrariness in state-government institutions with such distinctive features as corruption, dependence on administration, formalism etc [6, 270−281].

The reforms in Russian Empire over 60-70 years during the 19th century were result of a variety of social and economic factors, among which one of most important is abolition of serfdom in 1861 which freed huge numbers of peasants who accounted for about 80% of total population. The abolition of serfdom freed most of population out of so-called informal home court of landlords, who had right only to small offences judgment but in fact executed judgement in all cases as serfs were judged by state court very seldom [15, 67]. From that time all cases were went before General Court.

Judicial reform in 1864 is considered to be one of most consistent reforms − due to this reform, the judicial system and procedure for criminal and civil proceedings in courts were substantially changed.

After long preparation on November 20, 1864 following drafts of in judicial statutes were approved – the Establishment of Court Places, the Regulation of Civil Procedure, the Regulation of Criminal Proceedings, and Regulation of Penalties Imposed by Magistrates [15]. For example, Regulation of Civil Procedure was considered by State Council for two years in order to take into account complexity of search for an effective model for proceedings in absence of established legal traditions and abolition of serfdom [15].

The creation of an independent judiciary enabled implementation and development of main provisions of Statute of Civil Procedure, the provisions of which were revolutionary for time. In first place, this is establishment of two major orders of justice, overall and reduced, which significantly influenced reduction of duration of trials by simplifying the procedure of its proceedings. Secondly, the basic derivations or principles of civil proceedings recognized competitiveness, transparency and their oral nature. There was adjudication of cases on their merits in only two instances and a judicial review only in case of violation or misapplication of law.

In this Statute, jurisdiction of the courts was extended to «all kinds of disputes about civil rights». It separated judicial and administrative authorities: [T]he restoration of justice in case of a dispute according to legally enacted order is first and foremost duty of government; for this purpose there are legal places and for its functioning rules must be set to ensure as much as possible discovery of truth (Art. 2 of Statute) [5].

The undoubted achievement of this reform was declared in Statute of basic principles of justice. It provided for election of magistrates and jurors; independence and irremovability of judges; presumption of innocence; equality of all before law, regardless of status; publicity, oral nature and adversarial character of judicial process; and free evaluation of evidence by court. However, the pre-reform legislation contained inquisitorial elements of proceedings, such as closed court hearings, written proceedings, formal evaluation of evidence, the inequality of parties and their dependence on status in society.

For purposes of this study, a report by M.I. Mitilino in 1913 is of interest [16]. He was a private-docent of Kiev University of St. Vladimir, and report was about 50th anniversary of judicial reform. In his work, he notes first of all positive results of reform, showing its success with specific examples that helped to achieve its purpose of creating a unified court to replace individual systems of courts for nobility and serfs. It was a simplification of a vast and often confusing system of level arrangement retrial as before reform there could be up to 12–13 instances. In addition, there was clear differentiation of legal jurisdiction and its separation from administrative one, whereas before reform one case could be reviewed in court and in various administrative places.

An improvement of institution of court jurisdiction had essential importance as before reforms determination of an appropriate court relied on numerous and often contradictory rules, and depended on individual officials and bodies.

The reform of written civil procedure was also important due to fact that during its existence it had become the basis of corruption and abuse in courts, emphasizing participation of court clerks in these processes [5].

The value of these outstanding sources of law for development of a modern civil process can not be overestated. Thus prerequisites for a competitive, open and transparent civil proceedings, which were initiated in «Laws ..» and the Statute of Civil Procedure were repeatedly mentioned in works of modern proceduralists [17, 18]. Dissolution of Russian Empire and development of a new state-political system led to fundamental changes in organization of the judiciary and of legal proceedings in territories of Ukrainian lands. It is obvious that the CPC of 1924 in comparing with Statute of 1864 limited optionality of civil procedure and its adversarial nature. The purpose of civil proceedings in accordance with Art. 5 CPC was to determine validity of rights and relationships between litigants, and so task of court in resolving dispute on civil law was to find out not apparent truth, but substantive truth [18, 22], that, in our opinion, distorted litigation: it distracted litigation from true kernel of matter, which embodied traditional public perceptions of fair justice.

There were several codifications of civil procedure during development of domestic civil proceedings in Ukrainian Soviet Socialist Republic [20]. The most significant was reform of 1950-60-ies, which resulted in adoption of Civil Procedure Code of USSR in 1963 [21].

Shurely, traditions of domestic civil procedure kept remains of Soviet period of development, but it is necessary to understand a fundamental change in paradigm of social development, which took place in early 1990 s. Ukraine returned to its normal direction of development and started to return age old values inherent in national and pan-European legal tradition.

Development of independent state was connected with need to establish and ensure proper functioning of judicial system and effective administration of justice, as it is basis of a normal existence and sustainable development of modern state and society.

In 1995 Ukraine became thirty-seventh member country of Council of Europe, whose task is adoption of united democratic legal principles on whole European continent, and on July 17, 1997 Ukraine ratified Convention for Protection of Human Rights and Fundamental Freedoms [20]. Thus our government undertook a number of international obligations and recognized jurisdiction of European Court of Human Rights, that is of utmost importance for the development of an effective system of civil justice.

Ukraine is an integral part of pan-European processes, in particular, creation of a unified legal space and system of justice. Aspirations of our country regarding

European integration led to increased cooperation with EU, in particular in field of adaptation of European law, which is one of indispensable and necessary conditions for EU accession.

Civil Procedure Code of Ukraine – it is only codified act of civil procedure law containing provisions that reflect modern paradigm of development of Ukrainian society was accepted on March 18, 2004 and entered into force on September 1, 2005. Development of Code lasted quite a long time, that was due to fundamental changes in structure of civil proceedings − proceedings in cases arising from administrative relations had been allocated to administrative legal proceedings.

At same time, scientists have noted on numerous issues related to latest codification of civil procedural law. So, as the I.S. Yaroshenko notes, there are a number of problems associated with proper delineation of civil, administrative and economic jurisdiction, as change in volume of a sphere of Code's regulation led to incorrect determination of jurisdiction, but in general, problem goes to wrong definition of subject of civil procedure codification, based on subject matter and subject of legal regulation [21, p. 402].

In new CPC the right of sides to settle an amicable agreement at any stage of civil proceedings is provided. Participation of court in settlement of agreement is reduced to clarifying consequences of such decisions, checking credentials of representatives and compliance of terms of settlement agreement with law to check that it does not violate rights, freedoms and interests of other persons not involved in case.

In new CPC was also change of direction of civil procedural law − where active role of the court in civil proceedings and in directing process to establish truth in case are replaced by adversarial principles and a passive role of court as an impartial arbitrator in case. The right of court to request evidence in case is valid only for cases of special proceedings.

The permanent search for best ways of reviewing judicial decisions led to creation of a unique system level arrangement of revision of judicial decisions in Ukraine: there were changes in Civil Procedure Code of Ukraine 1963, which were made in 2001 regarding new forms of appeal review of court judgments and this led to adoption of CPC and introduction of amendments in instance structure of courts of civil jurisdiction by Law of Ukraine – «About the Judicial System and Status of Judges» in 2010. The system of appeal review of court judgments and determination of special procedural legal status of Supreme Court of Ukraine were changed by Law of Ukraine «On ensuring the right to a fair trial» adopted on February 12, 2015 [22].

Conclusion. It is important to note that modern civil procedure law is gradually returning to its traditional European roots, as evidenced by following provisions. In Civil Procedure Code of Ukraine of 2004 presents tangible impact of provisions of civil procedural law, which are achievement of traditional public perceptions on implementation of justice.

Historical development proves that domestic model of civil procedure is rather peculiar, it can not be regarded to Romano-canonical or general systems of civil procedure but it is worth to identify it in System of pan-European tradition of civil procedure.

There is no saying with certainty about direct influence of Roman law on Ukrainian law, but analysis of historical law works, which were a source of civil procedural law, suggests that they were borrowed indirectly through major European legal sources.

Understanding of pan-European legal foundation comes in useful on further reform of domestic procedural law, and experience in reforming of legal institutions of civil procedural law in other countries, in particular, EU legislation will positively impact on development of modern science and doctrines of domestic civil procedure law.

Thereby, the domestic model of civil procedure as a form of European civil process is suitable for further approximation and harmonization of civil process which are taking place in European countries. It will certainly be a empowering experience for further reform of civil procedural law of Ukraine and will become key to effective cooperation in regard to future Ukraine's membership in European Union.

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WARRANTIES OF RIGHTS AND FREEDOMS IN THE JUVENILE DETENTION

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Summary

The article investigates the guarantees of the rights and freedoms of minors in the application of preventive measures in the form of detention. It is proved that in the selection of a preventive measure such as detention, there is a range of additional guarantees concerning juveniles, which is implemented by introducing into the general conditions the application of a preventive measure that is connected with minors psycho-physiological development. As a result of the study, the conclusions offer their own list of these additional warranties that are applied to minors.

Key words: minor, preventive measure, detention, guarantees of minors rights and freedoms.

Аннотация

В статье исследуются гарантии прав и свобод несовершеннолетних при применении меры пресечения в виде содержания под стражей. Обосновывается, что в отношении несовершеннолетних, при избрании им меры пресечения в виде содержания под стражей, существует комплекс дополнительных гарантий, который реализуется путем внедрения в общие условия применения меры пресечения в виде содержания под стражей особенностей для его применения, связанных с психо-физиологическим развитием несовершеннолетнего. Как результат исследования, в выводах предложен собственный перечень этих дополнительных гарантий, которые применяются к несовершеннолетним.

Ключевые слова: несовершеннолетний, мера пресечения, содержание под стражей, гарантии прав и свобод несовершеннолетних.

Problem statement. The data generalization of courts of law of the first instance and appellate courts (as of 01. 06/01. 07. 2013) shows that 3 846 defendants, including 48 minors (persons who have committed offenses in juvenile age) were held in detention centers in custody and were considered by the courts for more than 6 months [1].

Moreover, according to the report of the General Prosecutor of Ukraine on the work of the prosecutor for 12 months in 2014 during the supervision of compliance with the laws by bodies that conduct investigative operations and pre-trial investigation by prosecution where the suspect, accused juvenile was found 16 times and the information of criminal offenses was determined and included to the record that had not been done before; 212 resolutions about terminating the proceedings were canceled; 7 resolutions about restoring the pre-trial investigation were passed; 2095 written instructions were given. 325 requests for the use of detention as a preventive measure to minors were sued to the court in 2014. 47 times the requests were denied by the investigating judge [2].

The quantitative indicators are relatively small, but the presence of at least one statistic speaks of the need to establish additional guarantees for minors who have their own physiological and psychological characteristics, typical age level of life, etc. The results also show that the order of detention application to minors as a preventive measure is not without its faults. That's why the study is relevant as far as it investigates the guarantees of rights and freedoms during the application of detention for juveniles.

Research condition. The research of guarantees of human rights and freedoms in the application of preventive measure such as detention is found in the works by V.G. Goncharenko, Y.M. Groshev, O.V. Kaplin, O.P. Kuchynska, E.D. Lukyanchykova, V.T. Malyarenko, V.O. Popelyushka,