INDIVIDUAL PROBLEMS OF UNIFICATION OF PROCEDURAL TERMINOLOGY
(on the example of legislation of Ukraine)

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SUMMARY

In this scientific article the problem of unification of terms being used by the legislator has been considered based on analysis of the current Civil procedural code, Commercial procedural code and the Code of administrative proceedings of Ukraine. As a result, there have been distinguished the approaches for procedural terminology to be unified within relevant branches of law.

Keywords: unification, procedural terminology, branch of law, the institution of law.

РЕЗЮМЕ

В научной статье на основании анализа действующих Гражданского процессуального и Хозяйственного процессуального кодексов Украины, а также Кодекса административного судопроизводства Украины рассмотрена проблема унификации используемых законодателем терминов. В результате выделено направления, по которым должна унифицироваться процессуальная терминология в пределах соответствующих отраслей права.

Ключевые слова: унификация; процессуальная терминология; отрасль правая; институт права.

Statement of the problem. Unification of law is one of the most important trends in the development of legislation. This trend can be performed in various forms, one of which is bring to the inner semantic unity and coherence of legal terminology. The development of relevant issues is an important area of scientific inquiry, because effectiveness of improving the legal regulation of social relations in general depends on the effectiveness of the solving of these issues.

V. Babaev, E. Belyanevych, V. Bobrik, A. Gratsianov, S. Khyzhnyak and other scientists have dedicated their works to the issue of law unification. Basically, scientists have drawn their attention to the formulation of the concept of unification, separation of its features, types and forms, established the role of law unification in the development of the legal system. There have been also discussed in the legal literature the issues of unification of terminology of the normative-legal acts as from a general theoretical point of view, and with regards to the specific subject of legal regulation of certain areas of law (private international, land, etc.).

Relevance of the research topic. But the question of unification of procedural terminology still remains unsolved. Although its consideration is extremely important, and there is an urgent need in solving the existing problems in this context. In particular, it is confirmed with the fact that the branch procedural sciences, in its majority, is developing quite slowly in Ukraine, and legislative work on the reform of procedural legislation to a considerable degree remains without sound scientific support [3, p. 95].

The purpose of this article is to identify the areas of unification of procedural terminology within the civil procedural law, commercial procedural law and administrative proceedings.

Exposition of basic material of research. As V. Babaev noted the demand of unification of procedural terminology is caused by reasonable necessity of uniform application of the basic normative-legal acts [2, p. 141]. And, indeed, any form of unification assumes primarily the elimination of ambiguity of the words and phrases in the law-making procedure, their anachronism and vagueness in order to use in the text of regulation the uniform, universal terminology that is an integral part of unification cycle and largely reflects its legal nature [4, p. 118]. However, the same understanding and interpretation of procedural terms always results in their identical legal application, and therefore – its identical legal realization in normative-legal acts in which the procedural terms find their external representation.

Thus, the unification of procedural terminology is a system of means, techniques and methods by which terminological unity and internal consistency of procedural terms is ensured, and as a result, the uniformity of application of the law norms in which procedural terms found their consolidation.

Based on this, the unification of terminology within the procedural branches of law is necessary for: 1) elimination of the differences between procedural terms and, consequently, between the normative-legal regulations in which they are fixed; 2) ensuring the uniform application of the law; 3) improving the quality of and efficiency, ensuring clarity and accessibility of procedural law in general.

Within this scientific exploration, we focus on the problem of unification of procedural terminology within the three branches of law: civil procedural law, commercial procedural law and administrative proceedings.

The subject and method of legal regulation of specified branches of law lead to the use of the identical procedural terminology in the relevant legal provisions, in which the key areas of unification should be:

1) use of the same terms to describe the same phenomena and legal institutions within the same branch of law.

Recently, legislators are not very concerned to give the same legal phenomena or institutions only one title, and often use similar words or phrases to name them within one branch of law. It can be clearly traced when amending the existing normative-legal regulations.

In particular, after introduction of the amendments to part 2 of art. 35 of Civil procedural code of Ukraine the same members of civil process received two similar names – «third parties who do not claim independent requirements concerning the subject of the dispute»[1] and «third parties who do not claim independent requirements on the subject of the dispute».

In paragraph 8 of part 1 of art. 3 of Code of administrative proceedings of Ukraine the following phrase is fixed «an administrative appeal is filed» and in art. 104 of the same Code the term «bringing of an administrative appeal» is used.

After the addition of the Civil procedural code of Ukraine in the art. 158-1 a new term appeared – «a party of the court proceeding» (part 6 of this article). Although the question remains: what legislators meant by it? Because earlier in the Civil procedural code of Ukraine there are used three phrases that can be correlated with the specified term, «a party of the civil process», «a person participating in the case» and «persons present in the courtroom».

As the last example shows, the use of different terms complicates the perception of legal norms, and as a result – their application in practice. Therefore the internal inconsistency of procedural terminology of the normative-legal regulations must be overcome by its unification.

In this regard, we cannot agree with the opinion appeared in the legal literature that the using of various synonyms in normative regulations is appropriate in order to avoid the tautology [4, p. 124–125].

One of the requirements put in legal theory to legal norms is their accuracy and certainty, which excludes the use of the synonyms to describe the same phenomena and legal institutions in text of normative-legal regulations. At the same time the use of identical clear legal terms not only improves a clear statement of the law norms, but also provides complete legal definitions, facilitates their perception and subsequent application;

2) use of the words and phrases which are identical by its lexical form for description of the identical phenomena and institutions in various procedural branches of law.

Here is an example. In the Civil procedural code of Ukraine the start of civil legal proceedings is connected with the legal fact the opening of proceedings of the case (art. 122 of Civil procedural code of Ukraine). A similar provision is found in the art. 107 of Code of administrative proceedings of Ukraine. Meanwhile, commercial procedural law names the similar legal fact differently – namely, as bringing cases in the Commercial Court (art 2 of the Commercial procedural code of Ukraine). Thus, in the various procedural branches of law the identical legal facts, with which the procedural law binds the identical legal effects, are indicated by the phrases with different lexical form, namely «the opening of proceedings of the case» and «bringing a case».

The above example is not unique. In the outlined branches of law, there are other identical procedural institutions that are named differently by the legislator: to provide evidence (art. 133 Civil procedural code of Ukraine, art. 73 of Code of administrative proceedings of Ukraine) and preventive measures (section V-1 of Commercial procedural code of Ukraine); proceedings before the court hearing (chapter 3, section III of Civil procedural code of Ukraine), preparatory proceedings (chapter 2, section III of Code of administrative proceedings of Ukraine) and preparation of the materials for consideration in the first instance (section IX of Commercial procedural code of Ukraine); appeal proceedings (chapter 1, section V of Civil procedural code of Ukraine, chapter 1, section IV of Code of administrative proceedings of Ukraine) and reviewing of judgments in appeals (chapter XII of Commercial procedural Code of Ukraine) and others.

Thus, this approach in unification logically results from the previous one: using the same terms to describe the same phenomena and legal institutions within the same branch of law these identical legal phenomena and institutions in all areas of procedural law should be equally named. Thus the corresponding lexical form must be absolutely identical for ensuring of the optimum unification in all relevant branches of law;

3) ensuring of the uniform interpretation of the meaning of identical by the lexical form procedural terms in different procedural branches of law. It should be noted that the main feature of this interpretation should be clear compliance with the content of the nature of the displayed phenomenon.

Let us focus on the institution of separate decisions. Thus, in accordance with part 1 of art. 211 of Civil procedural code of Ukraine a separate decision is to be resolved by the court when violations of the law have been determined during proceedings and the reasons and conditions which caused this violation have been indicated. A similar legal norm is in the part 1 of art. 166 of Code of administrative proceedings of Ukraine, although without indication on the necessity to distinguish the reasons and conditions that caused the violation. At the same time, the part 2 of the same article contains a provision under which the court may also, if necessary, resolve a separate decision on presence of the grounds for consideration of the issue of bringing to the responsibility the persons whose decisions, acts or inactions are recognized illegal. In this case the Commercial Court, as follows from part 1 of art. 90 of Commercial procedural code of Ukraine has the right to resolve a separate decision not only in the situation when a fact of law violation is ascertained during the proceedings, but also when defects in the operation of the enterprise, institution, organization, government or other authority are defined.

Thus, the term «a separate decision» although is used by legislators in different procedural branches of the law in the same lexical form, but has a slightly different meaning, and therefore – different interpretations. In this regard, there is need in unification of appropriate procedural institute in the above areas;

4) the use of the uniform defined procedural terminology, which construction should be based on unified concept, specifying the general properties of the legal nature of the regulated generic phenomena.

A number of requirements are set for dictionary definitions in the science dealing with terms. These definitions should: contain only the essential features of the concept; to be proportionate to the concept, systemic (i.e. reflect verbally specific and type relations in the system of the terms), short and clear; to be expressed in accordance with the norms and rules of the language. However, the definition should not be tautological [6, p. 70].

These requirements can be put forward to legal definitions as well. Moreover, as it is observed in the legal literature, legal definitions should adequately reflect the nature of the phenomenon that is defined, based on a consensus in the legal relationship and to be discursive, that is located in a specified logical «bind» with previous widely accepted definitions, fundamental definitions of current legislation [5, p. 72–73].

Procedural legislation of Ukraine contains definitions that are both duplicated and not, in its various branches.

Among all the definitions of the most common is the determination of evidence, which is with minor variations duplicated in all three branches being analyzed (part 1 art. 57 of Civil procedural code of Ukraine, part 1, art. 69 of Code of administrative proceedings of Ukraine, part 1 art. 32 Commercial procedural code of Ukraine). Besides, in the provisions of the Commercial Procedure Law (part 2, 3 art. 21 of Commercial procedural code of Ukraine) and Administrative Justice (paragraphs 8, 9, part 1, art. 3 Code of administrative proceedings of Ukraine) the definitions of the parties – the plaintiff and the defendant, are fixed with some tonal differences.

However, some definitions, although they are universal, are reflected only in one codified act. So only part 1, art. 101 of Code of administrative proceedings of

Ukraine contains a fixed definition of procedural terms.

These examples indicate that the unification of procedural definitions should be aimed not only at ensuring of uniform reflection of their content in different branches of law, but also at regulation of their distribution within these branches of law;

5) saving the peculiarities of a general form as well as the content of individual special procedural terms taking into account specific nature of the subject and method of legal regulation of each branch of procedural law.

Along with the terms which are identical both in content and in their form, each procedural branch of law has special terms used to refer to those legal phenomenon or institutions that differ by their specific legal nature within its subject and method of legal regulation. Thus, in particular the writ and special proceedings (section II, IV of Civil procedural code of Ukraine) are these type institutes and relevant terms of for the civil procedural law. In commercial procedural law a special institute of precourt settlement of disputes is stipulated as a special procedure (chapter II Commercial procedural code of Ukraine). Short proceeding is a specific procedure for solving the disputes in administrative justice (art 183-2 of the Code of administrative proceedings of Ukraine).

The appropriate special terms reflect the characteristics of individual procedures for handling and resolving the cases within each specific procedural law, and as a result are not subjects of internal semantic coherence;

6) use the same terms to refer to procedural fictions, assumptions, which by using technical and legal method are announced to be existing and become compulsory through their consolidation into the law.

V. Babaev notes that fiction does not reflect the objective truth of legal relationships that must be regulated, but only fix an artificial model of events in ascertaining of different legal facts [1, p. 28]. Fictions are not common in the national legislation: they are used only in exceptional cases, like inconsistency of a legal form and social content of regulatory provision [4, p. 123].

As a rule, these are fictions that cause the appearing of procedural legal relationships. Thus, in accordance with part 2 art. 121 of Civil procedural code of Ukraine, if the plaintiff pursuant to the court decision in due time fulfils the requirements stipulated in articles 119 and 120 of the Civil procedural code of Ukraine, and pays the amount of court fee, the claim is considered as filed on the day of its initial submission to the court. A similar provision contains part 3 art. 111-20 of Commercial procedural code of Ukraine. The Code of administrative Proceedings of Ukraine in the legal norm of part 2 of art. 108 stipulates that if the plaintiff eliminates the defects of the claim within the period stipulated by the court, it shall be considered as filed on the day of its initial submission to the Administrative Court.

While the content of specified procedural fiction in all three branches of the law is identical, the form of fiction is different, which in this case requires to be unified. F.e. Civil procedural code and Commercial procedural code of Ukraine use the term «due term» to determine the period within legal norm. Meanwhile, in the Code of administrative proceedings of Ukraine the phrase «period stipulated by the court» is used by legislator to designate the identical institution, which is meant, by the way, in all three cases.

The procedural fictions that cause the termination of the legal relationship are less common. For example, in part 4 art. 254 Code of administrative proceedings of Ukraine it is stipulated that if the appeal period is renewed, it is considered that the resolution or court decision did not enter into force. In the norms of commercial procedural and civil procedural law this correspondent fiction is not present. Although, we believe that this norm can be used for regulation such civil procedural relationships as law analogy (part 8 art. 8 of Civil procedural code of Ukraine).

For the above reasons, in this aspect the unification of terminology of procedural fictions should be aimed not only at bringing to the internal consistency of their form, but also to ensure the placement and arrangement of legal norms in which these fictions are reflected, in all procedural branches of law in which they should be applied;

7) ensuring of the use of a unified terminology of procedural prejudgements – facts ascertained by other decision that became into force.

Prejudicial connection of the decisions in civil, commercial or administrative cases is explained with a situation when the same facts may cause different legal consequences. For example, the fact of damage may be included in the subject to be proved in the administrative case, which aims to appeal unlawful actions of the authorities, and in the civil case with the main purpose during consideration and resolution to compensate the losses caused by such unlawful acts.

Procedural prejudgements is reflected in the norms of civil procedural and commercial procedural law as well as administrative proceeding law. F.e. in accordance with part 2 of art. 35 of Commercial procedural code of Ukraine the facts ascertained by the decision of the Commercial Court (other body that considers commercial disputes), except those facts ascertained by a court of arbitration, while considering one case shall not be proved again when other disputes are being resolved with participation of the same parties. In addition, the judgment of the civil case, which came into force is mandatory for commercial court on the facts ascertained by the court and relevant to the dispute (part 4 art. 35 of Commercial procedural code of Ukraine). In the Code of administrative proceedings of Ukraine (part 1 art. 72) and the Civil procedural code of Ukraine (part 3 art. 61) this norm is distinguished slightly differently: the circumstances ascertained by the court decision in administrative, civil or commercial case, which came into force shall not be proved when considering other cases with participation of the same person/s related to these circumstances.

In these legal norms not only different procedural terminology is used – these norms differ by their content. Namely in Commercial procedural code of Ukraine two terms are used: «the facts ascertained by a decision» and «the facts ascertained by the court and which are relevant for the solving of the dispute». Meanwhile, in the norms of Civil procedural code of Ukraine a different phrase is used to determine the identical concept – «the circumstances ascertained by court decision.» The difference in the content of the above provisions is that unlike the Civil procedural code of Ukraine and Code of administrative proceedings , the Commercial procedural code of Ukraine does not contain the mandatory requirement regarding participation of the same person/s, related to the circumstances ascertained, during case consideration. Thus in part 2 of art. 35 of Commercial procedural code of Ukraine necessity in participation of the same parties in the corresponding case is fixed, and in part 3 of the same article it is pointed out that prejudicialness of the facts depends on whether they have importance for resolving the dispute.

Based on the specified above, the terminology of procedural pre-justices is a subject of unification in the context of their form and content of the relevant provisions.

Conclusions. The comparative analysis of procedural terminology within the branches of civil procedural, commercial procedural law and administrative justice allowed us to conclude that the main directions of the unification of this terminology should be:

1) use the same terms including procedural fictions, including the defined proce-

dural terminology and procedural prejudgements, to determine the same legal phenomenon and institutions within a single, and all procedural branches of law;

2) saving the peculiarities of a general form as well as the content of individual special procedural terms taking into account specific nature of the subject and method of legal regulation of each branch of procedural law.

The conclusions made in this research and the suggestions determine only in general the main directions of the appropriate unification, providing prospects of further scientific studies.

[1] Incidentally, the same name is used in all other articles of the Civil procedural code of Ukraine, where a person involved in the case is mentioned.

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РЕАЛИЗАЦИЯ ПУБЛИЧНОСТИ ВЛАСТИ: ЗАЯВЛЕНИЯ ПРЕСС-СЕКРЕТАРЯ ПРЕЗИДЕНТА

В. СОГОМОНЯН

SUMMARY

In any society there exists a specific psychological and social factor, as a necessity of adequate reaction on the side of authorities. In a certain meaning, it is this necessity that has conditioned the appearance of the genre of «the statement of the press-secretary of the government bodies». This specific genre, which, in spite of the brevity of the text, represents itself at the given moment as tge fubal description of the policy of the acting authority on these or other questions.

РЕЗЮМЕ

В любом обществе существует особый психологический и социальный фактор, как потребность в адекватном реагировании со стороны власти. В некотором смысле, именно эта потребность обусловила появление жанра «заявление пресс-секретаря органа власти». Это специфический жанр, который, несмотря на краткость текста, представляет собой окончательные на данный момент описания элементов политики действующей власти по тем или иным вопросам.

Репортерская ремарка «...заявил пресс-секретарь» уже давно стала неким «окаменевшим» словосочетанием, постоянным атрибутом рассказов журналистов о выступлениях президентского споксмена. Это вполне обоснованно, так как *заявления* пресс-секретаря - один из стержней работы споксмена, первичный продукт его деятельности в плане политического информирования, образно выражаясь – его «язык». Если разобрать содержание пресс-конференций, брифингов и интервью и др. на составляющие единицы, то таковыми наряду с чисто информационными спотами окажутся именно завления. Ограниченные по объему, и поэтому представляя из себя тексты, предложения в которых несут максимальные смысловые нагрузки, заявления пресс-секретаря президента - это *окончательные на данный момент описания элементов политики* действующей власти по тем или иным вопросам.

Все это делает создание текстов заявлений сложным процессом, требующим особых знаний и навыков. В каком-то смысле, это напоминает создание афоризмов, где упущенный, или наоборот – использованный не к месту компонент речи может исказить смысл или свести на нет эффективность сказанного. Ошибка, сделанная в заявлении и давшая повод к неправильному истолкованию позиций власти, может стать серьезной проблемой общеполитического масштаба, а качество заявлений вообще является индикатором качества всей конкретной политической команды, ведь понятно, что пресс-секретарь является в лучшем случае лишь соавтором заявления.

Если попытаться описать глубинные смыслы, заключенные в заявлениях в подавляющем большинстве случаев, то можно привести следующую классификацию: обозначение информированности президента («*...главе государства доложено о случившемся», «...проинформированы, владеем ситуацией»*); совершенное императивное действие (*«...даны соответствующие поручения», «... подписал указ; назначил/освободил/принял/провел»*); обозначение готовности/не готовности к действию (*«... готовы к установлению дипломатических отношений без каких-либо предварительных условий», «..не будем вновь обсуждать...»*); эмоциональное состояние/выражение убеждения, побуждающее/не побуждающее к действиям как субъекта, так и объекта (*«...озабочены случившимся и имеем такую позицию по этому вопросу/надеемся на разъяснения», «президент убежден/считает, что...»*); призыв/команда к действию (*«...ожидаем/требуем объяснений в связи с инцидентом», «Президент потребовал скорейшего выяснения всех обстоятельств дела»*); констатация факта/разъяснение, («*... соответствует/не соответствует действительности», «...на самом деле...»*) и, наконец, оценка (*«...считаем неуместным», «...расцениваем*