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CONCILIATION PROCEDURES IN THEIR RELATIONSHIP WITH SCIENTIFIC CATEGORIES OF CIVIL PROCEDURE

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The subject of the paper is conciliation procedures as a phenomenon of the modern civil process.

The purpose of the article is to confirm or disprove hypothesis that the relations arising between the participants of judicial conciliation procedures are procedural legal relations. It leads to the expansion of the subject of legal regulation of civil procedural law.

The research was carried out with use of main scientific methods (analysis, induction and deduction), special (statistical) method as well as the method of interpretation of the legal acts. The main results and scope of their application. The paper shows the theoretical development of the matter of the relationship of the concept of "conciliation procedures" and such categories as "civil procedure", "civil procedural form", "civil procedural legal relations". The solution of this scientific problem has fundamental theoretical and methodological significance for substantiating the place of conciliation procedures in the civil process system. Given the trend of strengthening of the private law elements of the civil process, the author advocates the need to revise the traditional approaches of the definition of the concepts of "civil procedure" and "civil procedural legal relations". The author supports the point of view of the possibility of the existence of not only vertical (between court and trial participants), but also horizontal (between participants in the process) procedural legal relations. From this point of view, the relations arising between the participants of judicial conciliation procedures can be attributed to procedural legal relations. The author also joins the position of those scholars who advocate a broad understanding of civil proceedings as a combination of various judicial procedures, not all of which should correspond to the signs of civil procedure form.

Conclusions. Entrusting the court with the function of reconciliation in civil and economic cases substantially changes the established concept of civil procedure as an exclusively jurisdictional process. So the subject civil procedure is not only the competitive activities of private dispute parties on proving a certain evidential composition required by the court to enforce the law and a resolute the dispute. On this basis, the author puts forward a thesis on the expansion of the object of legal regulation of civil procedural law.

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1. Introduction

It is necessary to agree with M. S. Nakhov that having adopted the law on mediation and having made the corresponding changes in material and procedural acts, the legislator has set before scientists rather difficult and multidimensional task – to bring under the constructed norms doctrinal provisions of procedural science [1]. On the agenda – the solution of questions about the ratio of conciliation procedures with the concepts of "legal proceedings" and "civil procedure»; about possibility of reference of the public relations arising between participants of the conciliation procedures organized by court to the category of civil procedural legal relations; about legitimacy of qualification of actions for reconciliation of the parties performed by the intermediary involved for these purposes as procedural [2; 3].

According to A.V. Treshcheva and T. S. Taranova, the nature of conciliation procedures differs significantly from the law enforcement activity of the court, which makes the content of the proceedings, which does not allow to include such procedures, even if organized by the court when considering the case, to the number of civil procedural relations [4; 5]. A similar approach can be traced in the works of G. V. Sevastyanov [6] and M. E. Morozov [7], which substantiate the concept of private procedural law (the right of alternative dispute resolution). In the works of T. V. Sakhnova [8; 9] and M. S. Fokina [10; 11] judicial conciliation procedures, on the contrary, are positioned as a kind of civil procedural legal relations.

Resolution of the controversial issue of the nature of conciliation procedures initiated by the court during the proceedings (referring them to the number of procedural or non-procedural), requires the analysis of a complex theoretical problem – the relationship of the concepts of "procedure", "process", "trial", "justice", "proceedings", "procedural form", "procedural attitude".

2. On the question of notions

The legal science of the Soviet period was characterized by the opposition at the theoretical and methodological level of the concepts of "procedure" and "process". Due to the specificity of the court as a body administering justice, the concept of "civil procedure" was introduced as a set of essential rules and guarantees that determine the special status of judicial protection. As a result, the use of the term "process" in relation to the court's activities has become sustainable, and the term "procedure" in relation to non-judicial activities. For example, E. V. Slepchenko defines judicial activity as "public law enforcement activity carried out by the court in procedural form, i.e. within the framework of a special legal procedure". According to the author, other legal procedures applied by administrative bodies, arbitration courts and other organizations do not possess such qualities [12].

The doctrine has also developed a broader approach to the concept of "procedure", according to which it refers to the activities of not only the court, but also other jurisdictional bodies. The main feature that distinguishes the process from the procedure, according to scientists who adhere to this approach, is the nature of jurisdictional activities as aimed at protecting the law. As pointed out by A. V. Yasinskaya-Kazachenko, procedural relations differ from the procedural topics that encompass the activities of the judicial body engaged in the protection of subjective rights based on the application of legal norms [13]. A similar point of view is held by A. N. Manukovskaya, which justifies the possibility of singling out an independent branch of law – labor procedural law governing social relations arising during the consideration of labor disputes by various authorized state bodies (the author separates the relevant norms from the substantive and procedural norms of labor law) [14].

In modern legal literature, the opposition between the concepts of "process" and "procedure" is softened. The view that the procedure is an integral part of any jurisdictional process (including a judicial process), forming its basis, has become widespread. In the science of administrative law, the procedure is considered as the content of the administrative-procedural form, as the primary element, the totality of which forms the internal structure of the process (R. N. Marifkhonov [15]; E. A. Degtyareva [16]). N. I.

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Gromoshina, based on the theory of regulatory and protective material relations, substantiates the concept of "procedural procedure" as a procedure aimed at the implementation of the protective material relations. Depending on the subject, which carries out the legal function, the author divides the procedural procedures into judicial and non-judicial [17].

At the same time, the view remains stable that the activities of the court are characterized by a special procedural form, which is characterized by the regularity of the legislation, a high degree of guarantees, the possibility of judicial review. This creates a certain theoretical complexity in determining the nature of writ proceedings and other simplified procedures that do not fully meet the criteria of civil procedural form [18]. For example, L. A. Terekhova justifies the legality of the inclusion of these procedures in the boundaries of civil proceedings is to treat them as "proximity justice", which is due to deferred procedural guarantees [19, p.109].

With regard to civil procedural legal relations, the procedural doctrine is dominated by the view that the court is a mandatory participant. This approach is based on the ideas of the German jurist XIX V. O. Bulova that procedural relations are not private, but public, so that their subjects are the court and the parties [20]. A number of authors consider the civil process as a system of procedural relations between the court and each individual participant in the process. Others (M. A. Gurvich, V. P. Mozolin, K. S. Judelson) argue that procedural attitude is a unified, multi-actor and complex, representing the system of elementary relations that are classified into basic, additional and auxiliary [21; 22, p. 46; 23]. Nevertheless, the possibility of the existence of procedural relations between the participants of the process is denied – it is argued that the participants in the process have procedural rights and bear procedural obligations only in relation to the court, even when their procedural actions are externally addressed to each other [22, p. 66; 23, p. 56-67; 24, p. 10-47; 25]. An alternative point of view was expressed by I. A. Zheruolis [26, p. 69] and I. S. Ilyinskaya [24, p. 29], according to which the procedural relationship also exists between the parties to the process, for example, the plaintiff and the defendant.

The development of procedural legislation, including the emergence of simplified and conciliatory procedures in civil and economic proceedings, makes it necessary to rethink the established approaches to the definition of the essence of the civil process and civil procedural legal relations. As correctly noted by T. V. Sakhnova, civil procedure is evolutionary, and if traditionally legal proceedings were connected with the public beginning and the civil procedural form, an integral feature of which is participation in the legal relations of the court and the exercise of power to resolve the case, the future of civil law process is associated with the development of private law in the methods of judicial protection [27].

From the point of view of the new approach, the civil process is beginning to be understood as a set of various "judicial procedures", some of which may not meet the criteria of civil procedural form. For example, Yu. a. Popova supports the need to preserve the concept of "procedural form" to characterize the procedure in the field of justice, but notes that not every activity of the court should be called a process. In particular, writ proceedings and preparation of the case for trial are defined by the author as special procedures of the court, which are not related to the administration of justice and judicial proceedings [28, p. 79-80; 29].

3. Place of conciliation procedures in the civil process system

The position, which the researcher defines for himself as the starting point in the analysis of doctrinal concepts of the civil process, predetermines his answer to the question of what is the place of conciliation procedures in the system of the civil process.

Scientists, opposes "process" and "procedure", implying the process is exclusively the activity of the court in the administration of justice and protection of rights for which there is a special procedural form (regulated by the law and are guaranteed by), take out the conciliation procedure in the framework of civil procedure. A similar conclusion is also given by the view of the civil procedural attitude as a power relationship, in which the court necessarily takes part. The independent

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settlement of the dispute by the interested parties through the coordination of interests does not fit into the concept of the civil process as an activity for the protection of law, which involves the resolution of the dispute on the basis of legal norms by making a decision by a subject with jurisdictional powers, secured by the force of enforcement. In the best case, if the term "judicial mediation" is still allocated, it includes the actions of the court initiating the negotiations of the parties (the explanation of the parties rights to the conclusion of a settlement agreement or the agreement on the application of mediation, dispatching of information and assessment meeting with a mediator, the appointment of a judicial mediator), and associated approval of the settlement agreement. For example, A. A. Rusman [30] and L. N. Liango [31], solving a similar problem about the place of conciliation procedures in the criminal process, noted that the procedural form covers only the initiative of reconciliation and the order of termination of the case in connection with reconciliation, while the procedure of drafting the terms of the agreement by the parties is non-procedural.

If the content of the civil process is analyzed from the point of view that it is not limited to the concept of justice, and to the civil procedural attitude to be treated as allowing the existence of not only "vertical" (between the court and the participants in the process), but also "horizontal" (between the participants in the process) relations, then the statement about the procedural nature of the conciliation procedure (including its negotiation stage) becomes quite legitimate.

The latter approach is fully consistent with the trends of the civil process, which are manifested in the following:

in its development, the idea of cooperation between the court and the parties, which is the modern value of the adversarial principle, is transformed into the cooperation of all participants in the process, including the plaintiff and the defendant. Competitiveness is complemented by the principle of solidarity of the parties in their promotion of justice [21, p. 117-119]. Despite the strengthening of the procedural activity of the court, the parties retain a significant amount of procedural actions that they must perform not only in relation to the court, but also to each other (exchange of procedural documents, disclosure of evidence);

the leading idea is the strengthening of private, dispositive principles in the organization of protection of law (this trend is known in legal science under the terms of "materialization" and "privatization" of the civil process) [32; 33; 34, 35]. Further reform of the civil process involves reducing the role of adversarial trials and the use of simpler and more diverse methods of dispute resolution, including those that do not require the direct participation of judges [36, p. 44]. In the modern sense, the ADR is not an alternative to the state legal proceedings, but an integral part of it, ensuring the increased accessibility of justice [37]. In particular, as I. A. Belskaya points out, the incorporation of the conciliation procedure into the proceedings is consistent with the private-public principles of procedural law and the imperative-dispositive method of procedural law, as a result of which there is no alternative to the conciliation procedure in relation to the judicial process [38, p. 12, 16, 18].

In these conditions, in our opinion, the concept of procedural legal relationship as a power relationship, the obligatory participant of which is the court, requires adaptation to the new trends of the civil process. It seems correct that with the General approach to civil procedural legal relationship as a single multi-subject legal relationship, the main backbone of which is the court, at the level of elementary procedural relations should be allowed the existence of direct links between the participants in the process.

The thesis that the relations on reconciliation of the parties within the framework of the judicial process cannot be recognized as procedural, as a rule, is based on two arguments: 1) the court is not a participant in these relations; the relations between the parties in the case, not mediated by the court, cannot be recognized as procedural. In our opinion, both of these statements are refutable.

Thus, the point of view of A. N. Kuzbagarov, who spoke in favor of the procedural nature of conciliation procedures, deserves attention. According to the author, recognizing the court as an

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obligatory participant in any civil procedural legal relations, it should be taken into account that the degree of its activity in various respects may be different. In conducting conciliation procedures, the court's participation is minimal, but it nevertheless acts as a subject of these relations – in particular, the role of the court is to analyze various aspects of the dispute in order to determine the possibility of conciliation procedures, in recommending the parties to participate in such procedures [39, pp. 229-231, 234].

As for the idea that the parties are not related to each other by procedural relations and their activities in the process of legal proceedings represent only the Commission of unilateral actions by each of them addressed to the court, it is only a consequence of certain conceptual approaches conditioned by the relevant cultural and historical prerequisites.

First of all, as correctly pointed out by M. A. Rozhkova, this idea was due to the exaggeration of the adversarial beginning of the civil process – namely, the approach to it as a confrontation between the parties. At the same time, according to the author, the formal dispositivity of the civil process (the freedom of the parties to dispose of their procedural rights and influence the course of the process) objectively involves the procedural interaction of the parties – for example, their joint will in the form of procedural agreements [20].

The fact of its historical belonging to the continental system of law is also important in relation to the thesis of the absence of procedural relations between the parties established in the domestic doctrine of the civil law process. Since this system of law was initially characterized by the inquisitorial type of civil proceedings, involving the activity of the court and the passivity of the parties in the process, this contributed to the formation of a theoretical approach to the court as a mandatory subject of civil procedural relations, and to civil procedural law – as a branch of law governing the court. In contrast, in the Anglo-American system of law, the civil process has historically been understood as the activity of the parties themselves [40].

In the modern understanding of competition as interaction between the court and the parties and the optimum ratio of their activity is lawful, the question of the reinterpretation of traditional domestic procedural civil law definition of civil procedure law as a branch of regulating the activity of the court in the consideration and resolution of civil cases. As T. V. correctly notes. Sakhnova, once axiomatic for the continental type of process thesis "the dispute belongs to the parties, and the process – to the court" is no longer relevant, the modern process is thought of as a joint procedural activity of the court and the parties, built on the private law method [8, p. 14]. In these circumstances, more adequate, in our opinion, is the definition of the industry as a set of rules governing the activities of not only the court, but also the parties themselves to resolve a legal dispute, which is the basis for the recognition of the existence of procedural relations between the parties. Modern procedural legislation is already implementing this approach, regulating the preparation of the case for trial as a stage of the process, which is not only the court, but also the parties, carrying out against each other a number of actions provided by law (for example, Art. 149 CPC RF, Art. 260-1 CPC of the Republic of Belarus).

In connection with the recognition of reconciliation of the parties as the purpose (task) of the proceedings, the question of the need to expand the subject of legal regulation of civil procedural law is also updated. It should be agreed with D. Ya. Maleshin that the boundaries of the civil process and its structure depend on the objectives of civil proceedings [41, p. 59]. The author demonstrates the validity of this thesis on the example of two historical types of legal proceedings – continental and Anglo-American, in relation to which the purpose of the civil process is formulated differently. In the countries of continental law, the purpose of the proceedings is defined as the actual restoration of the violated right, in the Anglo-Saxon doctrine – as the resolution of the dispute. Accordingly, in the continental tradition, the boundaries of civil procedure include issues of execution, while the English procedural experts define civil proceedings as a dispute resolution process [41, p. 13, 59-61]. Following this logic, the inclusion of reconciliation of the parties among the goals of the civil process entails the inclusion of this activity in the subject of

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legal regulation of this branch of law.

Based on the concept of polystructurality of the civil process proposed by D. Ya. Maleshin, in accordance with which the latter combines two types of procedural activities – dispute resolution and the execution of judicial decisions, which, in turn, include more private activities characterized by the specifics of the purpose, subject composition and methods used [41, p. 74-75], it seems legitimate to determine the reconciliation of the parties as a private direction of procedural activities within these structural elements of the civil process.

In support of our point of view, we cite the words of M. S. nakhov, who believes that the incorrectly formulated purpose of civil proceedings (defined by law as the correct and timely consideration and resolution of the case), as well as a narrow understanding of the tasks to achieve it (as the resolution of the case on the merits by a decision) limit the possibilities of the judicial form of protection of the right. According to the author, taking into account international standards of justice and the actual needs and demands of modern society, the purpose of civil proceedings should be defined as "accessible, fair, effective and real protection of violated and (or) disputed rights, freedoms and legitimate interests of subjects of substantive law." Thus achievement of the specified purpose is seen by M. S. Nakhov through realization by court of one of two functions – 1) justice by pronouncement of the decision or 2) reconciliation of the parties by the statement of result of conciliatory procedure [1].

4. Conclusions

Scientific categories are the backbone that gives stability to a certain area of knowledge and ensures continuity in its development. However, scientific categories are not something frozen. Their content is subject to the General dialectical principle of continuous development and is conditioned by both scientific progress and changes in the socio-economic basis. The doctrinal concepts of the science of the civil process in this respect are no exception. Their content is historical in nature and gradually changes (evolves) following the transformations that occur at the systemic, conceptual level, which determines the basic principles of the civil process in the framework of the corresponding historical type of economic relations and socio-political structure of society.

Traditional for the domestic procedural civil law identification of the concepts of "civil proceedings" and "civil justice", operating the concept of "civil procedural form" as a necessary feature of the court to review and resolve civil cases, the theory of civil procedural legal relationship as a relationship, mandatory subject of which is the court, formed at a time when under the influence of socio-political processes of strengthening and centralization of state power the concept of the court as a body, resolving exclusively private law dispute was transformed into the concept of the court as a body that protects the violated subjective right in the interests of the whole society [42, p. 69, 75, 77]. At the present stage, at a new stage of historical development, due to the relevant economic and socio-political transformations in the life of society, the existing ratio of private and public principles of legal proceedings is significantly changed [43], which is reflected, inter alia, in the development of the ideas of "alternative justice" and the court's assistance to reconciliation of the parties.

Conciliation procedures receive legal regulation at the level of procedural legislation and are actively integrated into the practice of legal proceedings, which is why they are beginning to be perceived as an integral part of the civil process. At the same time, at the level of doctrine, the question of the place of conciliation procedures in the branch system of civil procedure remains open, since these procedures do not "fit" into the established definitions of civil proceedings and civil procedural legal relations.

The organization within the framework of civil and economic proceedings of conciliation procedures actualizes the need to revise the content of the doctrinal concepts of procedural civil law. The modern civil process should be established in its understanding as a set of procedures, some of which are characterized by more intensive activities of the court and strict procedural form, and for others (for example, conciliation) – the activities of the parties in the case and relatively informal. The content of the civil process should be analyzed from the position that it is not limited to the concept of

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justice, and to the civil procedural attitude to be treated as allowing the existence of not only "vertical" (between the court and the participants in the process), but also "horizontal" (between the participants in the process) links. This approach is fully consistent with the trends of the civil law process and makes it possible to define more clearly the place of conciliation procedures in the civil law process.

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