

## **THE NEW CODE OF CIVIL PROCEDURE – HOW WILL IT AFFECT THE ROLE OF THE JUDGE**

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### **S u m m a r y**

The article analyzes the intentions of the legislator when adopting the new Code of Civil Procedure, the expected changes in the role of a judge, as well as the judicial practice concerning the civil procedure. Following the Lithuanian and international practice, the author tries to predict some aspects of the adaptation of certain novelties in the judicial practice. The publication tries to draw the attention of the reader to certain aspects of the Code of Civil Procedure, passed in 2002, which are important for the proper explanation and application of its provisions in the practice of the courts. The article raises and searches for an answer to such questions, as whether the new legal instruments, set in the Code of Civil Procedure, will have a positive effect on the course, the length and the effectiveness of the civil procedure.

At the beginning of 2002 Seimas (the Lithuanian parliament) adopted a legal act, which is considered to be an extraordinary event in the Lithuanian legal environment. I'm referring to the new Code of Civil Procedure of the Lithuanian Republic [1]. What is expected of the new codified legal act, which will be regulating disputes, arising from civil relations? Are the fixed measures adequate for ensuring that the society, and first of all, the legal community, will be prepared for the innovative provisions of the civil procedure? Are all of the necessary steps taken in order to ensure that the judges, who are responsible for guarantying a *proper* procedure, immediately perceive their new role, and after January 1, 2003, start applying the new provisions, as well as also exercising other methods than just the semantic method of legal argumentation? It would be irresponsible to consider these questions as simply rhetorical. Although it is obvious that the "real" answers to these questions will be found only when the intentions of legislators are tested by at least a minimal judicial practice.

When we exercise the theological method of legal reasoning, we notice that new Code of Civil Procedure [2] it is expected to help defend the violated human rights more effectively, eliminate the possibility of taking advantage of the rights of the parties and of misusing the procedure for the manifest purpose of delaying the proceedings, to help at least partially solve the problem of a lengthy duration of the proceedings, which has been a topical issue even before Lithuania joined the European Convention for the Protection of

Human Rights and Fundamental Freedoms. Article 6 of the above-mentioned convention, which states that everyone is entitled to a fair and public hearing within a reasonable time, [3] is of a constant concern to all member states of the European Council.

It is easy to trace the evident footmarks of the models of continental codes of civil procedure, especially German and Austrian. It is quite obvious that the legislator strived not only to implement the experience of Western European states, but also the principle provisions, concerning the civil procedure, which are laid down in the recommendations of the Committee of Ministers of the Council of Europe. This is especially true in regard to the following: Recommendation N° R(81) 7 *on measures facilitating access to justice* [4] and Recommendation N° R(84) 5 *on the principles of civil procedure designed to improve the functioning of justice* [5]. For example, Recommendation N° R (81) 7 lays down these measures and principles:

- 1) simplification of the judicial proceedings;
- 2) promotion of the amicable settlement of disputes;
- 3) acceleration of the judicial proceedings;
- 4) reduction of the court fees;
- 5) simplified procedures for dealing with certain special matters.

Recommendation Nr. R(84) 5 specifies the above-mentioned measures and principles and states that the court should, at least during the preliminary hearing, but if possible throughout the proceedings, play an active role in ensuring the rapid progress of the proceedings, while respecting the rights of the parties to eliminate any misuse of the procedure.

Such are the expectations for the new Code of Civil Procedure, set by its drafters, the legislator and, of course, the society. By trying to avoid a simply academic analysis of the new provisions, regulating the civil proceedings [1], I will take a look at the new Code of Civil Procedure from a judge's perspective. Everyone understands that even the perfect law is only a dead letter, a basis, the effectiveness of which mostly depends on its interpretation and application. Whereas in this case the judicial proceedings are in question, it seems that the judge will be playing the main role in the process of the implementation of the new Code of Civil Procedure.

It was not by coincidence that Dr. V. Nekrosius just recently reminded us of the words of Justinian, the emperor of ancient Rome, who fixed a time-limit of three years for the duration of the judicial proceedings in the constitution: "everybody knows, that the duration of the proceedings depends on the influence of the judge, and if the judge does not wish for it, nobody else is able to delay the proceedings against his will" [6, p. 15]. Unfortunately, we must admit that even though during the past decades Europe has been feverishly looking for ways to mitigate the affect of one of the attributes of democracy – the increasing rate of litigation – on the duration of the judicial proceedings, no significant solutions have yet been found. The issue of the length of the civil proceedings is a problem in Lithuania as well. In spite of the fact that, in comparison to other states, Lithuania (with some exceptions) is not among the „leading“ countries with the longest lasting judicial proceedings, but when adopting the new Code of Civil Procedure, the Lithuanian legislator tried to look ahead and, in a way, to forestall the events. Today the courts are already urged to act accordingly, so that the proceedings are operative.

"The aim of the civil procedure is *to ensure a quick and fair settlement of private disputes and a determination of civil rights and obligations in question* (highlighted by the author). Article 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal. This right is guaranteed to the plaintiff, the defendant and other parties involved in the case [7]."

It is evident that the court is not always capable of solving the problem of the duration of the judicial proceedings, but that is a topic for other discussions. When talking about the Code of Civil Procedure, which is presently in force, we realize that it does not lay down any measures for eliminating the odds of a manifest delay of the proceedings by the unfair party. Therefore, the first point, which I would like to stress, is that the new Code of Civil Procedure foresees such possibilities. Perhaps, from this point of view, the judge will feel more at ease because it will lift the responsibility from him for the facts, which he has no influence on (even though this will hardly relieve him of his workload). On the other hand, it will depend solely on a judge (and this refers to judges of all instances), whether he will make proper use of the new legal instruments.

Everybody will be facing a challenge because the new Code of Civil Procedure looks at the role of a judge in the judicial proceedings from a completely different perspective. In the transition period, which lasted for approximately ten years after Lithuania regained its independence, the so-called “pendulum” principle could not be escaped: right after renouncing the soviet inquisitional judicial procedure, Lithuania switched to the other extremity. Suddenly, absolute passivity and neutrality was expected of the judge. The prevailing opinion was that only the litigating parties managed the course of the proceedings, while the judge was only an observer of the process. However, eventually it was realized, that this was not the situation in the continental Europe or elsewhere. Countries with old democratic traditions acknowledged the judge as the master and manager of the proceedings and it was not considered as an ignorance of the rights of the litigating parties, nor a violation of the principle of the impartiality of a judge. Certainly, it is solely up to the parties to decide, what to make of their rights in the proceedings, it depends on them, whether they choose to defend their rights or not (dispositivity is one of the essential principles of the civil procedure), but the litigation is not only a private business of the parties. The parties are granted with the right to defend their rights at a fair trial (Article 3 of the Constitution of the Republic of Lithuania, article 6-1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, article 5 of the Code of Civil Procedure), and, at the same time, a mechanism for doing so, as well as the conditions for exercising it, are fixed. The Supreme Court, in reacting to the occasional attempts to ignore the requirements set by the procedural provisions, was forced to set a practice, which lead to a uniform conclusion that the litigation process is not and can not be considered as “a game without rules”:

“[...] laws lay down the order for exercising one’s right to bring a case to the court, as well as the order for the course of the judicial proceedings, which is binding to all of the parties. [8]

As it was mentioned earlier in the article, when the case is taken to the court, namely the court has the obligation to ensure the right to a fair trial and a *fair* use of legal instruments, laid down in the laws of procedure. Without further help from the legislator, the judicial practice has formed certain provisions, in order to understand the substance of this term, as well as the substance of the prohibition of the *abuse* of procedural rights:

“[...] when the procedural rights are exercised in a way, which is contrary to their purpose, it violates the right of other parties, involved in the proceedings, to a quick and fair trial. A principle of the public interest to settle civil disputes quickly and fairly is also violated. When procedural rights are carried out in a way, in which they contradict with the purpose for such rights and unjustly restrict the rights and reasonable interests of other parties, it is considered as an abuse of procedural rights – an illegal act. No legal consequences can arise from illegal action; neither law nor the courts can acknowledge illegal action or protect the rights of persons, misusing law [9].

It is already very important not only for the judges, but also for all of the parties, involved in the case, and especially for the attorneys, to understand the changing role of a

judge. For example, the judicial practice has been gradually restricting the possibility for the representatives of the litigants to manipulate the proceedings on their clients' behalf:

"[...] when the court is adjourning the hearing of a case, the judge is not obliged to inform the attorney, who is present, of the possible consequences, which might arise, in case he would choose not to participate at the next hearing. An attorney is considered to be an expert of law, who is expected to know about such consequences *ex officio* [10].

Persons, participating in the proceedings, should not be surprised by the more active role of the judge or a stricter evaluation of the abuse of the procedure by the parties. The new Code of Civil Procedure (article 95) lays down strict measures to be applied in cases of abuse of the procedural rights by the parties, while the duty of distinguishing such abuse lies on the judge:

"The court, which ascertains that a party has been abusing its procedural rights, is *ex officio* (on its own initiative) obliged to eliminate such illegal action and its' consequences" [7].

These were just some of the relevant examples. Evidently, today a strict attitude towards the abuse of the procedure is no longer new to Lithuania. In other words, the judicial practice got ahead of the legislator by establishing a favourable environment for a smoother process of the implementation of the novelties of the civil procedure into the mentality of the litigants. On the other hand, ever since the new Code of Civil Procedure has come into force, more procedural possibilities to stop its abuse were established as well – therefore, the above-mentioned article 95 of the new Code of Civil Procedure may be considered as the so-called "sword of Damocles" to the unfair litigant.

But that is not all. Since the new Code of Civil Procedure came into effect, a resolution to eliminate any kind of abuse of the procedural rights is not all that is expected of a judge. It is expected of the new Code of Civil Procedure to direct the procedure in a completely different direction, asking for any additional evidence, whenever is necessary, eliminating from the process everything, that is not relevant to the case. This task is especially important to the judges of the courts of first instance, who play the main role in determining the facts of the case. The new Code of Civil Procedure lays down the principle of cooperation, the obligation of the court for an explanation, requires the judges to be active and provide help (perhaps it would be better if the term *support* was used instead) to the litigants, when they carry out their rights.

One of the most complicated tasks for the judge will remain finding the right balance between the impartiality and the active role of the judge. The level of the activeness of the judge can not be the same in cases, where the litigants are represented by attorneys and when they are not. Even the unrepresented litigants are not the same: for example, when a senior citizen and a businessman participate in the judicial proceedings. A different educational background of the parties, their attitude towards the proceedings and the ability to independently disclose the facts of the case, induces the court to demonstrate flexibility, without prejudice to objective neutrality. At no time can the court offer its help, if it is not requested by the litigants. In every case *the judge alone* (I would like to draw attention to this point because a uniform behaviour of *all of the judges* of all instances under relevant circumstances is of great importance) will have to define the limits of his activeness. At this moment, I would like to quote one representative of the law of civil procedure: "judicial defense should not be thrust on those, who do not request it – that is competitiveness; on the other hand, staying inactive, when a litigant cannot defend himself, when he wants to, is not competitiveness, but injustice" [11].

On the other hand, those, who seek to *overly* "socialize" the civil procedure, should not be admired. By striving to "damp" similar discussions, which have been starting to arise, the Consultative Council of European Judges (CCJE) has noted that "as long as they [the judges] are dealing with a case or could be required to do so, they should not consciously make any observations, which could reasonably suggest some degree of pre-judgement of

the resolution of the dispute or which could influence the fairness of the proceedings” (article 24 of an opinion of the CCJE of November 15, 2002) [12].

The attitude towards the role of the judge has been changing radically. The judge is no longer required to implicitly implement law; there have been stronger notions that a judge should perform the role of a “healer of the society” (which, as it has already been mentioned, should be regarded with caution), an interpreter of law, a creator. Naturally, any kind of a re-evaluation of virtues must have an adequate legal basis, for example, granting the judge with certain leverage, which, under certain circumstances, would allow the leader of the proceedings to have sufficient discretionary powers. Of course, the bestowal of such powers on the judge must only be to a limited extent. First of all, the traditions of continental law must be bared in mind, a typical characteristic of which is a detailed regulation of the rights and obligations of all of the litigants. For example, the Code of Civil Procedure of 2002 allows the court to choose its method of preparation for the proceedings. What criteria should the court rely on? Apparently, such a choice should depend on various factors: objective criteria (the possible reconciliation of litigants, their educational background, the participation of legal representatives, etc.), as well as subjective (during the preparation for a case some of the judges prefer to have a possibility to communicate with the litigants directly, while others prefer inspecting written documents). Certainly, that is not the only case, when the judge has the liberty to choose the course of his actions in a specific situation.

Meanwhile, I would like to pause upon the aspect of reaching an amicable settlement of a dispute. There were provisions, encouraging the court to promote a reconciliation of the parties, in the Code of Civil Procedure of 1964 [13] as well, but they were more of a theoretical nature, rather than practical. The procedural regulation was too “mild” or, in other words, neither the litigants, nor the court was interested in “avoiding” a decision of the court (in its proper sense). The situation is likely to change in the future. A tendency of the practice of foreign states shows that the percentage of disputes, resulting in amicable settlements, should increase in Lithuania as well. The present-day Europe is in search of ways to avoid the “actual” judicial proceedings. Here’s one (but not an only) example. In November of 2002 the Consultative Council of European Judges (CCJE) met in Strasbourg and suggested to the European Commission to hold a conference on November 24, 2003 [14], which would benefit to a more thorough understanding of a role of the judge, which has changed in the present-day society, to encourage the court to look for a way to help the parties reach an amicable settlement. What is it – are the European judges following the Lithuania’s example set by the creators of the new Code of Civil Procedure? Let us be a bit more modest. The continental Europe is simply taking another look back at the times of F. Klein and is trying to hear his insights, such as, for example, that the civil procedure, which is a mechanism guaranteed by the state, is more “an instrument of social help”, the purpose of which is to ensure the help of the state in defending the violated rights of individuals, from the beginning to the end. According to Klein, naturally, the purpose of procedural law was to be found in substantive (material) law: “the proceedings are a measure for determining substantive law and that is how it should stay”. F. Klein aimed to put this purpose into practice and upheld the idea that “the limited powers of the judge should be liberated, and the court, as well as other state institutions, should serve the law, the well-being of the society and social peace” [15, p. 36].

As if following the ideas of T. Klein, the new Code of Civil Procedure urges the court to try to reconcile the parties already during the preliminary hearing, and so to avoid any further judicial proceedings. In these cases the court should not play a passive role by limiting its actions to formally proposing to the parties to enter into an amicable agreement. The judge should explain, encourage, and give the litigants “a push” towards an amicable settlement of the dispute by supplying them with solid argumentation. The extent of the activeness of the court should depend on the specific circumstances of the case. It is

important to realize that an amicable settlement of the case is often a better alternative, than even a fair judgment, which is still “thrust” on the parties. Also, a greater percentage of peacefully solved disputes, on its account, lessens the general case flow at courts, has a positive effect on the duration of the proceedings, and, finally, encourages the parties to look for a common solution themselves and to feel greater responsibility.

It is possible to forecast that the judge, who plays an active role in the proceedings, will encounter certain difficulties. In some cases, when the judge offers help to the weaker party, he will face accusations of violating the principle of impartiality. Certain points, which are natural in some countries, might cause astonishment, suspiciousness and even anger. It has to be realized, that no reforms pass unnoticed and all novelties make their way step by step. For example, even though the prohibition of placing evidence before the court of appellate instance, which was introduced in 1999, was at first looked at with distrust, basically, today it does not cause any problems. There was a similar situation, when the litigants started to receive notices of trials instead of summonses to inform them of the judicial proceedings at the court of appellate instance. Practice showed that there was no reason for worrying. An another example: previously, after the Supreme Court has toughened its position towards the abuse of procedural rights, the courts of lower instances started to act more boldly as well. It seems that soon it will be difficult to find such cases in the judicial practice, where a representative of a litigant asks the court to revoke its decision on such a ground, as the inability to attend a court hearing for a significant reason – he was at a picnic during the weekend, when his car broke, his mobile phone went out of service and he could not come to the court for the hearing, which was held on Monday afternoon. The Court of Appeal of Lithuania has also repeatedly stated that “persons, involved in the case, must exercise their rights fairly [...], take interest in the course of the case, provide the court with reasons and evidence, inform the court ahead of time about the inability to attend a court hearing and contribute towards a fast and fair settlement of the case” [16]. Apparently, that is associated with the changes in the judicial mentality and some elements of a certain procedural clarity, allowing the litigants to forecast, how a court might qualify one kind of procedural behaviour or another. Certainly, it is essential for the standards of equal behaviour to be adopted by courts of all instances.

On the other hand, it would be incorrect to suppose that new Code of Civil Procedure lays the entire responsibility for the course of the proceedings solely on the court. That is not true. On the contrary, the new Code of Civil Procedure clearly defines the responsibility of the litigants to promote the proceedings and fixes negative outcomes for those, who fail in doing so. There is a need to emphasize that the new Code of Civil Procedure searches for an optimum balance between the obligations of the court and the obligations of the parties. On the one hand, it lays down the responsibility of the litigants for a proper fulfillment of their obligations and, on the other hand, it grants the court with real powers and measures for controlling the course of the proceedings.

Actually, the provisions of the Code of Civil Procedure of 2002 will start functioning effectively only if the court stops limiting itself to the semantic method of legal reasoning. The provisions of the Code of Civil Procedure have to be interpreted and applied with regard to their systematic connection to other rules of the Code of Civil Procedure and to the intentions of the legislator. It is especially important to perceive the aim of the civil procedure and its main principles. Only by interpreting a specific rule in the context of the principles of civil procedure can the right balance between the activeness and the impartiality of the court be found. Evidently, because the position of a fair party in the proceedings can not be the same as the position of an unfair one, a party, which has qualified legal representation, can not expect the same activeness of the court, as a party with no such legal aid.

When interpreting and applying the provisions of the new Code of Civil Procedure, along with the already mentioned recommendations of the Committee of Ministers of the Council of Europe, the practice of the Court of Human Rights and the European Court of

Justice, are significant as well. It has to be taken into account that the law, procedural law as well, is not stagnant, and the judicial practice is the best way for adjusting to the social conditions without having to amend laws. In Lithuania, the courts of higher instances (the appellate instance, and especially – the courts of cassation) play the main role in doing this. The role of the Constitutional Court in interpreting the legal standards, which are established by the Constitution, has to be taken into consideration as well.

The importance of the judicial practice does not solely depend on the “vitality” of law, but also is the requirement for legal preciseness. It is difficult to disagree with the opinion found in theory, that the parties should be able to foretell the possible consequences of their action. For example, if a party clearly realizes that, by being ignorant to the course of the proceedings, it will not escape the negative procedural consequences, it is likely, that this party will alter its action. On the other hand, if the party refuses to act according to the rules of procedure, the judgement of the court will not be unexpected. In this case, the provisions of law are inadequate: there is a need for the uniformity of the judicial practice in regard to certain procedural questions.

It has to be taken into account that the procedure, which is to become effective, establishes a number of legal institutions, which are completely new and there is no history of applying them, no traditions and, therefore, some irregularity of judicial practice and certain polemics between the academic society and practicing lawyers will not be avoided. The implementation and the substance of the provisions of the new Code of Civil Procedure will mostly depend on the courts of higher instances. For this reason it is important to prepare for the proper implementation of the provisions of the new Code of Civil Procedure by promoting a continuous edification of the judges and of lawyers in general.

The question, whether the new Code of Civil Procedure will complicate the job of the judge, can probably be answered accordingly: yes and no. It will complicate their job because every novelty, especially that of a conceptual nature, always brings some confusion and uncertainty. This is because the judges will have to perceive the new role, which they are expected to perform. It will be more difficult to the judges of the courts of first instance, because they will be the first to interpret the provisions of the new Code of Civil Procedure. On the other hand, the present-day courts are unquestionably capable of performing the role, which is being assigned to them, and the new procedural possibilities, as well as a greater liberty in making their decisions should not only facilitate their task, but also contribute to the effective functioning of the judicial procedure.

## Conclusions

1. The success of the infiltration of the new Code of Civil Procedure into the legal system of Lithuania mostly depends on the fact, whether the courts of *all instances* perceive the essential novelties of the procedure *uniformly*, and apply them in practice boldly.

2. By perceiving the changing role of the judge, forecasting the actions of the court, when it is applying the new Code of Civil Procedure, and exercising their procedural rights fairly, the litigants and their representatives should avoid negative procedural consequences.

3. The quest for a balance of the activeness and the impartiality of the judge will stay topical and will have to be decided upon on a case by case basis.

4. The effect of the new Code of Civil Procedure will reveal, whether the courts accept the invitation of the legislator to encourage the litigants to reach an amicable settlement of their dispute already during the preliminary hearing of the case.



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