THE RECAST CIVIL PROCEDURE AND LEGACY OF FRANZ KLEIN IN THE SLOVAK REPUBLIC

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Abstract

The year 2016 witnessed the completion of a next chapter in the history of civil procedure in the Slovak Republic. As of 1 July 2016, three new procedural codes entered into force, replacing the previously applicable Civil Procedure Code of 1963. The ambition of the legislator was primarily to (re-)build the civil judicial procedure on solid theoretical principles and mainly on the basis of so-called social conception of procedural law, as advocated in Central European tradition in particular by Franz Klein, author of the Austrian Civil Procedure Code of the late 19th century. Major events such as recasting of procedural codes certainly represent an opportunity to look back and to assess the overall continuity or discontinuity of the legal regulation being (re-) codified. This is also the case with the recast civil procedure in the Slovak Republic.

***Key words**: Civil Procedure, Franz Klein, Slovak Republic*

INTRODUCTION

The year 2016 witnessed the completion of a next chapter in the history of civil procedure in the Slovak Republic. As of 1 July 2016, three new procedural codes entered into force, replacing the previously applicable Civil Procedure Code of 1963 [Ficová 2016]. The ambition of the legislator was primarily to (re-)build the civil judicial procedure on solid theoretical principles and mainly on the basis of so-called social conception of procedural law, as advocated in Central European tradition in particular by Franz Klein, author of the Austrian Civil Procedure Code of the late 19th century. Major events such as recasting of procedural codes certainly represent an opportunity to look back and to assess the overall continuity or discontinuity of the legal regulation being (re-)codified. This is also the case with the recast civil procedure in the Slovak Republic.

Already during the works on the draft of the three new procedural codes (on contentious, non-contentious and administrative justice), historical archetypes of the individual procedural institutes have been taken into account – however, not as an end in itself or due to any kind of nostalgy. The creators of the new legislation were not afraid to admit their historical inspiration on one hand, but on the other have not stuck unnecessarily to the institutes and terminology that have been overcome in the meantime. In order to offer a more detailed overview of continuity or discontinuity in the development of civil procedure in Slovakia, two members of the Drafting Commission for Recast Civil Procedure submit this paper focused on setting the new procedural codes into their proper (historical) context.

Legal historians in Europe often highlight the case of procedural law, and especially of the civil procedure, as an example of long-term continuity of law – from the Middle Ages up to the present days [van Rhee 2000]. Indeed, while substantive law experienced a number of discontinuous ruptures associated with socio-economic changes throughout the European history, in contrast, continental procedural law shows numerous signs of traditionalism (comparable to the traditionalism of the common law system), and strong influence of the Romano-Canonical models, surviving up to the present. Classical doctrinal works of procedural law, especially starting from the 13th century onwards, treated procedural institutes and issues that are still relevant and present in a judicial trial up to these days. This was not affected negatively by any revolutionary wave of the 18th, 19th or 20th century, and even if some efforts aimed at departing from the traditional principles of procedural law were present in these watershed moments, there was always a return back to the traditional institutes. Changes that have been introduced throughout the centuries never changed the very essence, purpose and institutes of procedural law completely. The novelties introduced were rather following the goals of fulfillment of the original purposes present in the procedural scholarship since the 13th and 14th centuries – namely efforts aimed at quick and efficient solving of disputes. Historical experiments were confined primarily to whether the speed and efficiency is to be vested fully in hands of

the parties (which was historically proven inefficient), or in the hands of a judge with investigative powers – to ultimately reach a compromise in the form of the currently prevailing social conception of civil procedure, implemented in Central Europe since the late 19th century.

1. THE IMPORTANCE OF CIVIL PROCEDURE CONCEPTIONS

A (re-)codification or recasting process is considered to be a systematic arrangement of laws regulating social relations within a certain segment (legal sector) into a coherent and complex body. A successful (re-)codification should thereby represent not only a coherent collection of legal standards, but should also include an expression of underlying principles and ideas. These may thereby be based on historical traditions of the national legal system, or they may rather aim at introducing some novelties, be it from a technological point of view or in doctrinal terms. Still, even in the latter case, without any doubts, any complete system of legal rules must have an underlying conception. The need for a unifying conception defining the basic parameters of the civil procedure is in our opinion an absolute must. Otherwise, a mindless complex of rules of casuistic nature leads to opacity of the final outcome of the recasting works. Lack of an underlying value system makes it additionally virtually impossible to consistently interpret the law, whether at the doctrinal level, or at the application level. Additionally, should the 'legislative experiment' recede from the European standards, the outcome will be deprived of the positive effects of the wider international (regional) legal context, making it even more difficult to interpret the meaning and purpose of the legislation.

Lack of conceptions and consistency of the legal environment is thereby a risk and challenge not only in the Slovak Republic. This might be a common denominator of all countries of the former Eastern Bloc. Similar calling for a clear and defined conception can be heard, for example, in the neighbouring Czech Republic [Lavický, Dvořák 2015: 156]. Therefore, we believe that the rules of civil procedure (and of all other recasted branches of law) must necessarily be anchored in the complex system of values. Should a consensus be reached on the conceptual bases of the recast regulation, subsequent risk of political interference into the recast text will be mitigated, or at least the politicians will be forced to ponder upon serious interventions into the design of the recast code.

A broad social and political consensus on conceptual issues thus in many ways determines the durability of any codes, but also their concrete form. The conception of civil procedure can hence be compared to construction pillars underpinning the civil trial. Ill-advised invasions into structural elements of the system of the civil procedure could subsequently lead to disintegration of the whole construction. In contrast, leaving, figuratively speaking, the pillars that support the structure intact, any partial amendment by any political party can not compromise the construction of the civil procedure as a whole. The answer to the question of whether we need a

conception of civil procedure must therefore be seen in the need of stability and predictability of law, as a basic prerequisite of the rule of law principle.

2. TWO MAJOR CONCEPTIONS OF CIVIL PROCEDURE

Under the conception of civil procedure one ususally understands at the doctrinal level a summary of the characteristics of procedural institutes comprised in a code of civil procedural law. It is hence perceived as a unifying link, or a sort of 'unitary idea'. A brief outline of the two major existing conceptions of civil procedure can be described here as follows:

With the first codifications of civil procedural law in the late 18th and early 19th century, civil trial in Central Europe became a subject of scholarly research. Thereby, during the 19th century, civil procedural law was dominated by a conception of liberal civil procedure based on an extreme negotiating principle (*Verhandlungsprinzip*). In this sense, the litigants were 'owners' of the facts of the case [Lavický 2014: 13]. The role of the judge and of the court as a decision-making body was reduced only to the 'mouth' of the law, with the interference of the court into the facts of the dispute limited to a minimum. The result was a conception of civil procedure, the purpose of which was not to aspire to a fair decision corresponding to objective reality, but only to assess the facts and substantive evidence collected and presented by the parties.

Such a conception of civil procedure showed insufficient in the long term, though. As a reaction to the extreme conception of negotiating principle, in the late 19th century a new conception was introduced as opposed to the dominant liberal conception – a social conception of civil procedure. This perspective of civil procedure was to guarantee a more equitable resolution of the disputes. It should be emphasized, however, that even in the social conception of civil procedure parties retained a dominant role as to the claims about substance of the dispute and with respect to presenting substantive evidence to support their claims. The role of the court in the social conception of civil procedure got nevertheless more active – in order to identify the important facts, in cooperation with litigants. In the scholarship of civil procedural law, this is called **the principle of material guidance and the principle of procedural cooperation between litigants and the court** [Lavický 2014: 13].

A materialization of the outlined ideas into a comprehensive and coherent codification of civil procedure took place first in adoption of the Austrian Civil Procedure Code (ZPO) in 1895. The main author of this Code was an Austrian proceduralist Franz Klein – therefore, sometimes his surname is used to refer to this conception of civil procedure – talking thus not only of the social conception of civil procedure, but also of the 'Kleinian' conception of civil procedure.

It is to be emphasized, however, that the term 'social' has nothing to do with political sciences´ definitions or sociological connotations of that term. This label is derived only from the active role of the court and the judge in getting a realistic picture of the factual basis of the case. Nevertheless, the purpose of this conception is not

a judicial determination of the actual state of affairs and negation of any procedural obligations of the parties, as was the case in the communist type of civil procedure, adoring non-critically the principle of so-called material (actual) truth (manifested in Czechoslovakia in the codifications of civil procedure from the years 1950 and 1963). Social conception of civil procedure, building on the responsibility of litigants with an active participation of the court became a dominant conception of civil procedure in Europe in the 20th century. Under the influence of the Austrian ZPO of 1895 (which is still valid in Austria today, of course, with many amendments and additions), many Central European procedural codes were adopted to match this conception, adapted to the specific conditions of individual national legal systems.

These two conceptions of civil procedure, however, do not represent two developmental stages of civil procedure. The two conceptions coexisted and can still coexist even nowadays; stages of development of civil procedural law can only overlap with these conceptions – in a very simplified form presented as a dichotomy of 'conception with a weak judge' versus 'conception with a strong judge' (in terms of degree of interference into the trial). While the 'weak' judge may intefere to a minimal extent, 'strong' judge, on the contrary, has efficient instruments for making up for inactivities of the parties to the dispute. These procedural corrections have their fundamental legal and political objectives in the elimination of unjustified delays in the proceedings. The role of a 'strong' judge is to 'control' the procedure so that it respects the constitutional guarantees of fast and efficient proceedings. Differences between the two conceptions – and the defining elements of the two conceptions in general – thus rest primarily in the role of the parties and of the court in discovering and presenting the facts, in the process of collecting and evaluating the evidence, and in the speed and procedural economy of the trial, while honouring a fair judicial decision. Summary of the above given characteristics defines the respective conception of civil procedure. However, as it is the case with all theoretical constructs, it is quite impossible to detect 'pure' manifestations of one or the other approach to civil procedure. Law is always subject to cultural, sociological, and especially political influences to such an extent that almost every legal system can be considered as including a procedural regulation that is 'non-conceptional' – meaning that the features of some legal institutes wholly or partly exceed from the conceptual doctrinal principles of the prevailing national conception of civil procedure. Objective law (i.e. the national legal system) is namely often politically determined to a greater extent than one can possibly desire, and certainly sometimes gives up on the 'clean' legal solutions to the benefit of the practicality of legislative solutions, historical traditions, or the current social situation, and so on. This does not mean, however, that deviations in specific institutes do necessarily mean deflection of the core conceptual bases of the legislation.

Despite various possible common elements and variations, on the following pages we will try to briefly explain the two basic conceptions of civil procedure in greater detail, to compare their functionality and importance, and through the prism of our

theoretical conclusions to find an answer to the question of whether the recast Slovak civil procedure withstands the relatively strict criteria of a social conception of civil procedure.

2.1. The Liberal Conception of Civil Procedure

Procedural law originally developed as a single set of rules for both criminal and civil disputes resolution. There was no differentiation between criminal, administrative, civil or other types of procedure. Emancipation of civil procedure took place mostly at the end of the 18th century and was fully finished in the 19th century, which was characterized by extensive industrialization, hitherto unprecedented acceleration of social development, and in particular by a legislative boom. It was also a period of major codification efforts, based on the ideas of various philosophical schools [Störig 1993: 250]. An unshakable faith in human reason, along with the growing liberal individualism influenced the civil procedure as well. A very important role was played also by a response to enlightened absolutism and to judiciary being subordinated to the absolute monarch. An opposite was born as a reaction – the conception of a 'weak' judge. In other words, the liberal conception of civil procedure was born.

From an institutional point of view, the litigants became the dominant elements in the trial. The judge was to play an extremely passive role of recipient of acts performed by the litigants, and had no, or very minimal tools to interfere in the process. One can literally speak of 'ownership' by the parties of the facts of the dispute [Lavický 2014: 27]. Whatever and however litigants laid before the judge, the court had to accept without reservation. The agreement between litigants was sacred and unsurpassable, the court could not intervene even if the litigants agreed on an obvious lie. The question of 'truth' in the trial was thus allocated to the litigants. This in turn led quite predictably to unreasonable length of proceedings, and, of course, the rising costs of the trial.

This conception dominated the civil procedure throughout the 19th century, especially in the two major codifications of the 19th century. The first was the French *Code of Civil Procedure* of 1806, which holds quite a special place in the history of procedural legislation – it was a certain continuation of so-called *Ordonnance civile* of 1667, but on the other hand it is also referred to as the first modern codification of civil procedure [Lavický 2014: 25]. It laid down the principles of orality, directness, free evaluation of evidence, and the disposition principle, which were all a contemporary expression of the belief in individual freedom [van Caenegem 2006: 88]. Despite these undoubtedly modern elements, the Napoleonic Code of 1806 also contained some regressive elements, notably a consistent representation by an advocate, and the trial being based on an extreme conception of the principle of formal truth. The consequences were found reflected not only in the area of identification of facts of the case, but also in disposition by the parties with the trial and its object – no corrections by the court were permitted. Even obstacles such as *lis pendens* and *res iudi-*

cata could have been objected only by the party and the court might not have taken these into account based on its own motion [van Caenegem 2006: 18].

The second key legislative work based on the liberal conception of civil procedure was the German Civil Procedure Code of 1877. All of the above, *mutatis mutandis*, applies to this Code as well. At the doctrinal level, the liberal conception of civil procedure was in Germany also sometimes called a **conception of procedural burdens.** In fact it namely did not recognize the existence of legal procedural obligations (neither on the side of court nor on the side of the parties) – according to Goldschmidt, obligations which occur within the proceedings, are obligations of **constitutional nature** solely. This means particularly the obligation of the court to provide protection against breach or compromise of subjective rights. There is also no obligation of the defendant to adequately defend his case, Goldschmidt claimed. Certain objective burdens for the parties – in case of failure leading to unfavorable consequences in the trial – were called by Goldschmidt only as **procedural burdens,** which he understood as being no **obligations** in themselves, but rather only an expression of **the burden of pleading and burden of proof,** in order to succeed in the dispute. Even the 'obligation' to attend the trial and testify was not a proper obligation under Goldschmidt´s conception of procedural obligations, but merely a procedural burden imposed on litigants. There was therefore no procedural legal relationship between the court and the parties (or between the parties themselves), the content of which would comprise any procedural rights and obligations. Party had no 'duty' to tell the truth – as already indicated, the party 'owned' its claims and could dispose with them freely *(ad absurdum* even to lie), while the procedural game was played within the limits of procedural burdens rather than sanctionable procedural obligations [Stavinohová 1998: 18; Macur 1991: 17].

The liberal conception of civil procedure played a major role in the development of civil procedural law, but today it is considered rather abandoned. No legislation is known to us today that would openly declare being based on a liberal conception of civil procedure.

Some representatives of German jurisprudence additionally considered a so-called conception of subjective procedural rights and obligations to be an independent conception of civil procedure. It was to responds to Goldschmidt´s conception of procedural burdens. Representatives of this stream of scholarship, particularly F. von Hippel, criticized the conception developed by Goldschmidt [Stavinohová 1998: 27]. They recognized the existence of subjective procedural obligations (and rights), breach of which can be adequately sanctioned. From this perspective, the European procedural scholarship currently recognizes a compromise solution of so-called dualistic conception of procedural obligations and burdens. This conception recognizes the existence of both subjective procedural obligations and rights, as well as the existence of procedural burdens. It forms in fact a part of the currently prevailing social conception of civil procedure [van Rhee 2007a].

2.2. The Social Conception of Civil Procedure

During the 19th century, the pace of social development became faster. With the increasing industrialization, gradual emergence of private business undertakings, and related establishment of commercial law, number of lawsuits was also growing. This has led to an increasing pressure on the system of procedural law, which gradually ceased to be effective. This was also due to the liberal conception of civil procedure, especially as regards the excessive duration of litigations. The growing social and doctrinal criticism have together led to reform efforts in the field of civil procedure.[1] These efforts were particularly linked with contemporary Austrian school of civil procedure. The historical figures worth mentioning in this context are two – Anton Menger and Franz Klein.[2]

Klein´s famous article *Pro futuro* has become a kind of 'manifesto' of the social conception of civil procedure, followed by a series of journal articles published later in the form of a book under the same title *Pro futuro*. Klein's reforms and progressive views had been very much appreciated by the professional public and Klein has been invited to join the *Justizministerium,* where he has become a section director. A result of his activities within the Ministry was a monumental legislative work in the area of civil procedural law, which affects particularly the Central European legal area up to these days.

Klein's *Zivilprozessordnung* – Act No. 113 of 1895 (effective from 1st January 1898) and his *Exekutionsordnung* – Act No. 79 of 1896, are the legislative products of 'his' (social) conception of civil procedure (in the literature also known as 'Kleinian' conception). The impact of these codes was really enormous – under the pressure from incontestable progressive elements contained in the *Zivilprozessordnung*, even the liberal German Civil Procedure Code has been substantially redrafted in order to better reflect the Kleinian paradigm. Social conception has subsequently become a major trend in European civil procedural legislation [van Rhee, Verkerk 2006: 123] and represented an inspirational source for most modern codifications [Rechberger 2008: 101].

What was so new about Franz Klein's ideas? [Fasching 1988: 101] In particular, he was leaving the liberal conception of civil procedure, where the main function of the trial was to protect the individual interests of the parties. The essence of the trial was, however, according to Klein to be seen in something else – he claimed there is a broader, society-wide, public interest in resolving the disputes. Trial serves not just to protect the private interests of the parties, but it also fulfills an important **social function** at the same time – any dispute presented before the court is seen by Klein as a social evil that disrupts the *homeostasis* of the society. It interferes with the natural *status quo*, and therefore this social evil needs to be removed. Civil procedure

1 This does not mean that liberal conception of civil procedure was completely abandoned from one day to another. Legislative and doctrinal models coexist until present days.

2 Proponents of social conception of civil procedure included e.g. the famous lawyer Gustav Radbruch.

thus acts as a means of ensuring the 'general welfare' (i.e. *Wohlfartsfunktion* [Fasching 1984: 22]).

This thesis leads in Klein's theory to two basic postulates about how the lawsuit as a social evil can be removed:

It should be removed as quickly as possible. Austrian ZPO contains an instrumentarium of procedural options to accelerate court proceedings, which necessarily implies a shift towards the so-called strong judge. The judge in the social conception has some possibilities to interfere into a dispute so as to eliminate the negative traits of the liberal trial. The court (judge) represents the interest of the society in resolving the conflict, and therefore it is the responsibility of the State, acting through the court, to achieve the decision as quickly as possible.

1. The result is to be as fair as possible. Social conception resigns on the 'ownership by litigants' in relation to the facts of the dispute. 'Strong' judge can not be left in a position of a passive recipient of parties' claims. Still, the basic initiative is up to the parties, which are obliged to provide truthful and complete insight into the facts of the case – however, the court has certain competences with respect to some corrections and interferences. The judge is e.g. not bound by the substance presented by the parties, but has also power to further inquire about the facts by asking for additional explanations, and can also freely evaluate the gained evidence, taking into account everything that came to light within the proceedings. The administration of justice thus takes the form of so-called modified negotiating principle, where the area of facts and evidence is entrusted to the responsibility of litigants, but the court may not give up on the opportunity (and obligation) to base its decision on what may be the fairest basis, trying to come as close to the actual substantive aspects of the case as possible.
2. The mentioned features can be summarized generally as "strengthening the role of the judge and the restricting the parties´ role" [Lavický 2014: 29]. This basic postulate is, however, just the starting point for all that the Austrian Civil Procedure Code brought to the European legal culture, and also to the legal history of Czechoslovakia and modern Slovakia. Klein's Code was namely applied in Czechoslovakia until 1950 in the Czech part of the Republic directly, and it had also influenced to a large extent the Hungarian Civil Procedure Code of 1911, applicable in the territory of Slovakia up to 1950 [Kengyel 2005: 239].

3. THE SOCIAL CONCEPTION OF FRANZ KLEIN IN SLOVAK CIVIL PROCEDURE?

The new Slovakian recast civil procedure is claimed to be cast Czechoslovak0úhe Code of Civil Contentious based on the ideas of Franz Klein, and to quite consistently implement the social conception of civil procedure. The following lines will try to demonstrate this fact on some particular rules of the civil contentious litigation (under the Code of Civil Contentious Litigation no. 160/2015 Coll.). It should nonetheless be acknowledged that some of the institutes and paradigms of the original

Kleinian conception were already included intuitively in the communist (in the proper terminology of the period we should be strictly speaking of socialist instead of communist) codification of the Czechoslovak civil procedure of the years 1950 and 1963. Examples include the obligation to truthfully and fully describe the facts, the duty of the court to advise the parties, the concept of free evaluation of evidence, etc. However, many of these institutes were too formalized, truncated, and deprived of their original meaning and context. Their restoration and clarification was attempted for in the recast civil procedure of 2016.

The new regulations of civil procedure were prepared fully in the spirit of the above-mentioned social (Kleinian) paradigm consisting in the restriction of the litigants´ domination. This objective is achieved in the social conception primarily by laying down the **duty to truthfully and completely present the facts of the case** (i.e. substantiation of factual claims). The Civil Contentious Litigation Code of 2016 imposes this obligation on the parties in several of its provisions:

- Sec. 132(1) contains a standard rule that the filed court action is to contain besides the general requirements also the true and complete exposition of the relevant facts.
- Sec. 150(1) formulates a general obligation of parties to truthfully and completely present the essential and decisive factual allegations concerning the dispute.
- Under Sec. 186(2), the court relies on the facts where both parties concur, if there is no reasonable doubt about their veracity.

In particular, the rule *sub* iii) may be considered as one of the emanations of the idea of a strong judge, as well as a limitation of the parties´ domination with respect to the facts of the case. This rule as well as the rules mentioned *sub* i) and ii) are to be interpreted as a **legal obligation, non-observation of which leads to procedural sanctions.** The procedural sanction in this case takes *ipso facto* the form of a threat laid down in Sec. 191: *Court takes due account of everything that came to light during the proceedings*. The actual sanction is here *largo sensu* the loss of the dispute – namely the judge can (and in terms of safeguarding the social function of the procedure the judge should) take into account the breach of procedural obligations by the parties.

A fundamental key for understanding the role of a strong judge in the social conception of civil procedure is the so-called **material guidance of trial.** The judge does not rely on the activity of the party – albeit parties have an obligation to substantiate their factual arguments, and they also carry the burden to provide truthful and complete factual arguments. To achieve the social purpose of the procedure, being a fair judgment approaching as much as possible the 'real' state of affairs, the judge is equipped with relatively strong tools – those are mostly the **powers to request explanations and the power to query.** Still, this is only a modification of the classical negotiating principle in an adversarial trial, where the parties to the dispute are to 'persuade' the judge of 'their' truth – based on the weight of their statements and arguments. The

outcome is a judgment based on the **facts of the case, not on the actual state of affairs**.[3]

The Civil Contentious Litigation Code regulates the competence of the court to request explanations and the competence to query in Sec. 150(2), under which a *court may request further factual allegations from the parties in order to detect the essential and decisive facts.* The concept of a strong judge is absolutely clear in this provision – the court may not 'rely' or 'be satisfied' with claims of the parties – should the party not provide the judge with a convincing and satisfactory response, the court may apply – in assessing the evidence – the relevant procedural sanction, consisting usually in the loss of the dispute, or in restriction or other limitations of the rights sought by the plaintiff (or the defendant). This competence is of course combined with strict requirements as to the court providing **appropriate grounds for the judgment.** In this issue, the new Code has brought about major innovations as well (cf. Sec. 220), consisting in the obligation of the court to deal with the established case law in the respective matter.

The concept of a relatively strong judge and of litigants in an adversarial position necessarily brought about significant changes to the overall nature of litigation. Foremost, as already explained, the Code of Civil Contentious Litigation turns the judge into an actively participating entity that – on the other hand – leaves the initiative over to the parties under the negotiation principle. In this sense, the judge significantly interferes with the litigation at two levels:[4]

- in terms of **procedural economy** [Klerman 2015; Zuckerman 1994] – the court is the guardian of the smooth and due process. The role of a judge is thus primarily to guarantee the rules of 'the game' (dispute), which immanently include the requirement of a timely and effective justice. To ensure this function, the court disposes of effective tools to 'accelerate the proceedings' – within the constitutional limits of due process. The most important tool in this context is the newly introduced institute of **judicial concentration**. This may apply both forward (forward-looking, prospective judicial concentration) or backwards (as a kind of retrospective judicial concentration). Prospective judicial concentration means a limitation of the possible, future claims of factual arguments and evidence – in the Civil Contentious Litigation Code this is laid down in provisions of Sec. 181(4), reading that should the party be unable to substantiate essential and decisive facts, or to meet its obligation of presenting evidence to the court, the court may specify a time period for additional fulfillment of this obligation and after expiry of that period the court may refuse to take into account later arguments or evidence proposed by the party. A sufficient justification for do-

3 The real state of affairs under the principle of material truth is to be determined rather in the non-contentious procedure – in terminology of the recast codes, the notion of extra-contentious procedure is employed, being regulated in a separate Code on Civil Extra-Contentious Litigation.

4 Some trends have already found their way into procedural legislation in the recent decades (e.g. the concentration of legal proceedings, the elements of adversarial proceedings, etc.).

ing so is to be offered in the grounds for decision within the written judgment. A retrospective judicial concentration is the possibility for the court to disregard the evidence or facts previously presented or alleged, unless submitted in a timely manner – that is, if the party acting with due diligence (*nota bene* with professional care, when speaking of an attorney) could have presented these earlier and the court evaluates such late submition as purposeful, infringing the constitutional guarantees of effective and rapid protection of rights (cf. Sec. 153). It goes without saying that the evaluation of these circumstances is in the hands of a strong judge; nobody can thereby assume any biased approach by the judge.[5] Possible concerns of a potential abuse of this institute are not relevant, since in case of an excess on the side of the court of first instance, this is to be remedied in the second instance (but one can not of course exclude even constitutional or international legal remedies).

- in terms of **distributive social justice**. This element includes an interference into finding of reliable substantive facts to the dispute, as a part of material guidance of trial, explained above.

This rearranging of procedural roles is denoted in the contemporary European scholarship of procedural law by different names, but it has also been rightly pointed out, that essential is the content, not the name for this situation [Lavický, Dvořák 2015: 155]. However, we are inclined to a denotation known in the German language as '*Kooperationsgrundsatz*' [Roth et al. 2012: 12]. This means a sort of procedural cooperation of the court and litigants in fulfilling the basic purpose of the trial – i.e. fair and effective protection of individual (subjective) rights (cf. Article 2(1) of the Code of Civil Contentious Litigation) [Bratković 2014].

Some other manifestations of social conception of civil procedure are reflected in the new Code of Civil Contentious Litigation as follows:

1. first of all, it is the consistent application of the disposition principle – under the Code, only little can be done by court without the parties' proposal, by which the court is fundamentally bound. For example, in the appelate proceedings, this principle implies the prohibition of so-called *reformatio in peius*, which has previously been known only in criminal procedural law (in the new Code it is to be found among the basic principles, in Article 16(3) of the Code),
2. a more consistent legislative implementation of the principle of equality of arms is manifested in the newly introduced judgment due to the plaintiff´s default,
3. and finally, an important manifestation of the cooperation principle is to be seen in the newly introduced obligation of the court to provide its legal opinion on the matter at dispute (which is to significantly increase the predictability of judicial decisions).

5 However, accepting the latest research results proposing a strong role of unconscious intuitions in decision-making.

In the preceding lines we have tried to demonstrate that the new Slovak civil procedure represents a quite rigorous implementation of social conception of civil procedure. This is literally a paradigm shift, a change in the perception of civil procedure in Slovakia. Foremost, to a reasonable extent (and within its proper meaning) the new regulation introduces elements of judicial activism (i.e. of an active, strong judge), being a manifestation of *judicial case management and efficiency* [van Rhee 2008; van Rhee 2007b; Cadiet 2012]. The new Slovak civil procedure thus contains a number of tools of 'effective management of litigation,' which must be seen in the conceptual context of the development of civil procedural law in Central Europe in the 19th and 20th centuries. Still, their (re-)introduction or explicit manifestation in the Code requires significant changes in the 'procedural' thinking of laywers and judges in Slovakia; each major change namely requires some time for its proper application. The road may thereby be full of blind alleys and errors, but eventually should lead to the desired result. The desired result is thereby undoubtedly a modern civil procedure, with fast and efficient management of the dispute by a 'strong' judge, in the interest of procedural economy and the fairest possible judgment.

4. SOME SPECIFICITIES OF THE RECAST CIVIL PROCEDURE IN THE SLOVAK REPUBLIC

The recast rules of civil procedure in the Slovak Republic, effective from 1st July 2016, clearly endorse the conception of the social, Kleinian process. At the same time, however, they necessarily had to take into account the specificities of Slovak experience arising from the previous development of civil procedure in Slovakia.

The Slovak civil procedural law from before its recast of 2016 resembled in many ways a disintegrated construction without any unifying concept. The recast civil procedure thus had an ambition to become a **new beginning of civil procedure in Slovakia and to influence also its possible future legislative changes**. Even the greatest optimist can namely not hope that in today's world any legislation remains untouched by future amendments – all the more in case of a Code of Civil Procedure. The legislation must always be able to respond to the demands of the times, be it in the form of a legislative response to any imaginable societal demands (virtual or real), or through interpretation, which allows for adapting the legislative text to the new social requirements. The modern trends in continental Europe are thereby rather inclined towards (re-)interpretation via case law of supreme judicial authorities, with quasi-precedential effects.

This also corresponds with the terminological approach taken in the recast procedure – the linguistic expressions used in the text are attributed a so-called median semantic meaning, as recommended already by Emanuel Tilsch, one of the greatest and most respected Czech (and Austrian) Professors of Civil Law of the turn of the 19th and 20th centuries [Tilsch 1916: 27]. The median value of the semantic concept namely enables a judge in each particular situation to find **enough space for**

interpretation of legal standards in a particular legal case. The space for interpretation thus represents a prevention tool for legislative amendments to the text of law. In this line of thought, even the explanatory memorandum to the new Code was conceived as relatively brief. An explanatory memorandum to an Act (or Code) should namely primarily justify the new legislation and convince the entities as addressees of legal norms of the necessity and effectiveness of the new rules, while, however, not following any goal of petrification of the legislator´s views. The law must 'live' its own life and become justified and legitimized in daily practice, with interpretation adapted by the judiciary taking into account the specific requirements and demands of the time; and let us add that possibly without any amendments to the legal text.

An important part of the new conception of recast civil procedure in Slovakia was also the idea of **building on traditions dating from before 1948**. After 1948, and especially since 1950, traditional approaches to civil procedure were namely abandoned abruptly by the communist Czechoslovakia and various deformations were introduced instead. Conceptual changes were introduced, being peculiar to the communist (socialist) social system and totalitarian political regime.

It was mainly the idea of building upon the older historical traditions of Central European civil procedure, of course while accepting the modern trends and current needs, that was behind the final decision of replacing the original Code of Civil Procedure of 1963 by three codes instead of a single code – a code of civil contentious litigation, code of civil extra-contentious litigation, and a code of administrative judiciary. The idea of allocation of administrative justice in a separate code was an axiom that has not been challenged and was considered as a modern and appropriate solution taking into account the specificities of administrative judicial trial.

The issue of a separate regulation of extra-contentious (non-contentious) litigation was a bit more difficult. Each country has a different legislative culture and traditions in this respect. The internal differentiation of civil procedure into contentious and extra-contentious was thereby historically related to the strengthening of the role and functions of the state. While initially the courts dealt solely with contentious disputes (including 'criminal disputes', originally considered a part of private law), from the late 18th century onwards, and especially in the 19th century, the courts acquired jurisdiction also in cases other than traditional dispute resolution, e.g. concerning judicial custody (deposit), or deciding in matters of guardianship where one could hardly speak of disputes between adversarial parties. Albeit there was also a possibility to entrust the administration of these tasks to administrative authorities instead of the courts – e.g. to notaries or specialized guardianship and orphanage authorities, proponents of the opposite view, however, advocated for entrusting these issues to courts and judges representing authorities that best ensure legality and objectivity (impartiality) in performance of the related duties, emphasizing also the public interest in these issues. Courts were thus entrusted with certain tasks that can also be seen as administrative tasks – being a relic of unclear relationship between the ju-

diciary and administration throughout the 19th and 20th centuries [Hora 2010: 10]. Within the EU, currently, separation of extra-contentious (non-contentious) litigation into separate codes (acts of the parliament) is present in approximately half of the Member States. The Czechoslovak tradition in this regard (of course if not taking into account the tradition emerging from 1948 onwards) was a fundamentally separate treatment of contentious and non-contentious litigations (at latest since enactment of the Act No. 100/1931 Coll. on non-contentious litigation), and this division was acknowledged in procedural theory even in the 1948-1989 period. Both types of proceedings namely exhibit significant differences, which the post-1950 'tradition' of a unitary Civil Procedure Code of 1950 turned a blind eye to, leading to an unacceptable blurring of the differences between the two types of litigation,[6] especially at the level of blurring contradictory basic principles applicable in the two types of proceedings (manifested, for example, in the principles of formal and material truth). Legislative solution merging contentious and non-contentious litigation finally led to efforts by judges to conduct even contentious litigations under the principles of non-contentious litigation, in the sense of judges being tempted to uncovering material truth, i.e. 'how it really was'. This principle is, however, to be applied only to non-contentious proceedings and was introduced into the contentious litigation only after 1948 because of the contemporary Marxist-Leninist ideology and the Soviet procedural legal models. A quotation from the general part of the explanatory memorandum to the Act No. 142/1950 Coll. (Civil Procedure Code) can be very instructive in this regard:

> The so-called capitalist liberalism, which is nothing more than an ideological expression of capitalist free competition and the free exploitation, has coined in civil procedure the so-called principle of disposition and negotation, and condemned courts to a passive role within civil litigation. Courts should have been – as emphasized by bourgeois jurisprudence – above the parties, not stir up with the disputes and had to decide only on the basis of the facts presented or submitted by the parties.
>
> Bourgeois procedure therefore remained a guardian of formal truth, it did not attempt to uncover actual relationships between citizens, and was rather satisfied with the so-called formal certainty. ... Against the principle of formal truth stood up the Soviet GPK[7] introducing the principle of material truth. The role of civil proceeding in this respect is to examine the actual relationship existing between the parties, and to decide based on these facts.
>
> ***The draft Code ... does not differentiate between contentious and non-contentious litigation ... The basic principle underpinning the draft of the new procedural law is the rigorously implemented principle of material truth.***

Theoretical non-differentiation (i.e. leaving aside the differentiation) of civil proceed-

6 Rather than the previously used designation of 'non-contentious' the recast codes are inclined to the German legal terminology of 'ausserstreitlich', i.e. 'extra-contentious', which much more precisely denotes the particularities of 'other than contentious' proceedings.

7 Soviet Code of Civil Procedure.

ings into two subspecies – contentious and non-contentious (extra-contentious) – was related also to the abandonment (or at least weakening) of the concept of adversarial proceedings. The communist (socialist) law was namely to leave behind the idea of legal proceedings being conflicts, and instead both parties (and the court) were to pursue a common objective – the clarification of material truth. Parties (participants) therefore did not act in a contradictory manner, even in former 'contentious' matters. In this respect, all judicial proceedings were to be considered as equally important for the public, and the public interest was to outweigh the interests of individuals even in contentious matters.

In addition, the post-1950 legislation even ceased to talk about 'parties' to the dispute, and instead introduced the notion of participants, while the principle was still preserved that some proceedings were initiated by petition, and others on the own motion of the court. This division was, however, somewhat relativized by the fact that the petition might have been made by the public prosecutor as well, even in civil matters. Additionally, since 1963, the National Committee as a local administration authority was also entitled to file a petition to start judicial proceedings, unless it was in a matter of purely personal rights of citizens.

The breakdown of civil procedural legislation into three separate codes as of 1 July 2016 can in this historical context be seen as a targeted steering away from the unitary concept of civil procedure, back to the differentiation between contentious and extra-contentious (and also administrative) judicial litigation.

The idea of splitting civil proceedings regulation into several laws may thereby be perceived by critics as a departure from the prevailing efforts to reach a comprehensive codification of all branches of law in one code, and thus as a kind of step-back from codification, leading in fact to a **de-codification**. This view and claims longing for only one civil procedural code may, however, be seen just as extreme as voices proclaiming the efforts in the early 20th century to create a uniform procedural discipline and code that would merge civil and criminal procedure into a single 'procedure'. This concept of a uniform procedural law was tested in the USSR under the headline of 'judicial law' – aiming at combination of organizational issues of justice with general procedural law. Civil and criminal procedural law was to be integrated, which was reflected for example in transplanting the rules on evidence from the criminal procedural law into civil procedure. It was namely argued that both the criminal and civil procedure are in fact forms of public regulation of justice and common purpose of both civil and criminal procedural law is to settle 'the dispute on law', or to deal with social conflicts as a means to protect subjective rights of citizens [Macur 1988: 10-14]. This trend of integration of procedural law into a single scientific discipline (and potentially one code) was, however, ultimately not successful, which is in line with the historical split of procedural rules into criminal, civil and administrative procedure, and with the differentiation of civil procedure into contentious, extra-contentious, and administrative judicial procedure.

An opposite extreme (in contrast to a single procedure) would be an excessive **disintegration** of civil procedure, though. As early as in the interwar Czechoslovakia, the contemporary Professor of Civil Procedure, Václav Hora, an author of the draft of the Civil Procedure Code of 1937, claimed that the Czechoslovak legislation partially derogated from the idea of general civil procedure. First, he criticized the expansion of non-contentious litigation at the expense of contentious litigation (adversarial process). Contentious litigation, moreover, was further divided into general and causal (commercial, marine, mining) – being manifested in specific regulation of jurisdiction and in a special composition of the courts [Hora 2010: 32-33]. It was against this excessive disintegration that the idea of integration of civil procedure was proposed in 1950. Still, even the very Code of Civil Procedure of 1950 in its part two acknowledged certain differences and deviations from the general rules in eleven different cases (being in theory considered non-contentious), and there were also separate legal regulations that governed proceedings in matters of land registration, business registry and voluntary auctions [Rubeš 1958: 54]. Since 1963, the segmentation and formal disintegration of civil procedure continued further on again – entrusting through special legislation some types of disputes to state arbitration and to arbitration bodies of cooperative farms. These disruptive trends questioned the formal concept of a single integrated civil procedure, and made space for its theoretical disintegration, for example towards pondering upon existence of a specific procedural labour law [Filo 1981: 551] and similar. Therefore, in theory, a so-called broader concept [Macur 1988: 63-64; Češka 1989: 12] of civil procedure was introduced, fully in the spirit of a theoretically integrated, unified, complex civil procedure, but actually being internally differentiated and treated in separate laws. However, it is interesting that in the USSR itself, in the same period of time the draft of a new Civil Procedure Code of 1963/64 openly distinguished between three types of civil procedure: contentious litigation, reviewing of administrative decisions (e.g. administrative judiciary) and special proceedings, being in fact non-contentious [Zoulík 1969: 28]. This was a classical differentiation of civil procedure into its three basic types, which existed in Czechoslovakia prior to 1950; this differentiation was thus theoretically recognized even by the communist scholarship [Štajgr 1969; Stavinohová 1984].

To sum up, we can conclude that *in fact* the differences between the three types of civil proceedings (contentious, non-contentious, and administrative justice) existed in all countries and regimes, albeit historically the non-contentious litigation was considered in certain periods and countries as only peripheral, while conversely in other countries and time periods it was considered equivalent to contentious litigation, and expanding [Zoulík 1969: 5-6]. According to Zoulík, one can thereby distinguish three phases of a formal separation of non-contentious procedure from the general civil procedure:

- derogations from the general regulation of civil procedure,
- particular rules within the general civil procedure code (in its special parts), and

- separation into special rules of procedure (special laws) [Zoulík 1969: 148].

Zoulík noted in this regard that before 1989, in Czechoslovakia the time was still not ripe to introduce a separate type of non-contentious procedure. In 1950, Czechoslovakia namely in fact returned one developmental step back – from the phase of formally separated 'non-contentious' proceedings (in the Act No. 100/1931 Coll.), to a phase of particular rules in general civil procedure codes of 1950 and 1963.

At present, however, a new social situation fully justified the final reaching of the third phase in Zoulík´s scheme, allowing for a separate legal treatment of extra-contentious procedure. This view influenced the new conception of the recast civil procedure in the Slovak Republic, splitting the civil procedure into three separate codes in 2016.

5. SELECTED 'OLD' AND 'NEW' CIVIL PROCEDURE INSTITUTES IN SLOVAKIA

In the preceding sub-chapters, we have explained that the re-codified civil procedure in the Slovak Republic represents a social (Kleinian) conception adapted to the specificities of Slovakia and to the Slovakian procedural tradition. In the following, we shall move from the general to more specific aspects of the new conceptual approach to civil procedure in Slovakia. First, we shall offer examples of selected institutes where the new civil procedure (especially the new Civil Contentious Litigation Code) takes into account the **historical tradition.** Subsequently, we shall highlight some selected 'unhistorical', new procedural institutes within the novel regulation.

Party versus participant

A classical example of a return to 'traditions' from the deviations of the communist (socialist) civil procedure is the return to the denotation of 'parties to the dispute'. The concept of the 'participant' was a 'tradition' only since 1950, when the Act No. 142/1950 Coll. (Code of Civil Procedure), introduced this term in its Sec. 5. The explanatory memorandum to this provision had thereby only six lines; legislator was thus not too bothered with justification of this change. A more detailed explanation can be found in a renowned contemporary commentary by Josef Rubeš, as follows: 'correct definition (of the participant) is one of the preconditions of uniform procedural law, one of the preconditions for doing away with differences between the former so-called contentious and non-contentious litigation.' [Rubeš 1958: 86] Additionally, it is not without interest that the term 'participant' has been imported also into the substantive civil law – into the Civil Code of 1964, where the denotation 'party to civil relations' remains preserved in Slovakia up to these days. Historically, the term 'participant' was used in the civil procedure in a completely different context, namely to distinguish the parties and those other actors who were somehow 'involved' in the proceeding. These 'stakeholders' were mainly the intervening persons, entities of *litis* denunciation, or cases of so-called *auctoris nominatio* [Ott 1897: 182]. After 1950, in contrast, based on the principle of material truth, each subject was only a

'participant' in the process, where the court played the major role in public interest, providing 'instruction and assistance' to those who were participants in the process. One of the ambitions of the new Code of Civil Contentious Litigation was thereby to re-construct the adversarial process, with two 'parties' standing in the opposite – **litigants,** who are disputing, and who are the 'masters' of the dispute. Just these two parties, the plaintiff and the defendant, dispute over rights, and have contradictory interests in the result of the trial.

Finally, even where there is still some inertia of the residual term of participant, such as in the Czech Republic, commentators are quite clear about the fact that where the law speaks of participants, this should actually mean 'parties' [Drápal, Bureš 2009: 584].

Intervention

The institute of intervention in the Code of Civil Contentious Litigation is a return to historical tradition again, leaving aside the institute of 'side participant' from the wording of Sec. 93 of the Code of Civil Procedure of 1963. Due to the changes in the concept of parties it was quite obvious that the position of an intervening person has to change as well.

Until 1950, each vintage textbook or other legal text operated with a self-evident concept of an 'intervener' [Ott 1897: 182; Ratica 1948: 111]. An original intervener, however, has never been and is not considered a 'side participant' in any way; intervener is a completely different entity,[8] associated with the concept of so-called *litis* denunciation and *exceptiones mali processu*, being the cases of a classical intervention in the proceedings. In any case, such interveners can not be called 'side participants' nor by any other linguistic inventions.

Procedural attack and defense

If two opposing parties have a dispute on any issue of law, one in fact procedurally 'attacks' the other and the latter is supposed to actively defend itself (otherwise it faces the risk of losing the dispute). Both legal German and German doctrine use here the terms of 'procedural attack' and 'defense' routinely.

'The means of procedural defense' were thereby recognized also in Slovakian doctrine already before 2016 – e.g. resistance to the payment order, objections to bills of exchange payment order, or the general 'impugnation' objections to execution, these were all considered means of procedural defense. And where there is a defense, there must also be an attack.

In addition to the re-discovered historical institutes, there are of course institutes in the new Code of Civil Contentious Litigation that are **newly** introduced, mostly taking into account the specific situation and doctrinal scholarship in the Slovak Republic. These include, in particular:

8 For example, the provisions of Sec. 11 et seq. of the Act No. 113/1895 on judicial procedure in civil legal disputes (Civil Procedure Code).

Causal jurisdiction

This concept is not entirely new either; it is actually just a reflection and adaptation of an older concept of causal competence [Števček 2009]. The meaning of this expression points to the specialization of each court (not necessarily of each judge) within the judicial system, to decide a specific type of agenda.

Prejudiciality

Again, prejudiciality was a well-known concept to each practitioner even before 2016. However, the legal text of the Code of Civil Contentious Litigation contains this notion for the very first time. It is to express the correlation of two decisions of a public authority, understood more broadly than just a question of 'binding effect' of the first decision.

Legal terms and definitions

The new procedural rules were sometimes reproached with the argument that they contain definitions which have their place in textbooks rather than in legally binding texts. However, it should be noted that not everything perceived as a definition, is in fact a definition. One should namely distinguish between mere theoretical definitions on one hand, and references to legal concepts, such as legal certainty, on the other. The notion of legal certainty **is namely not defined** in the new Code, **it is only referred to its existence.** Thus, if the text asserts that legal certainty is a condition in which anyone can legitimately expect that the dispute will be resolved in line with the constant practice of the supreme judicial authorities, it is rather an instructive message, a program subscribing to the notion of legal certainty **as to the principle of legislation.** This notion is of course impossible to be exhaustively defined, and the Code is not even trying to define it.

Another example is the 'constant practice of the supreme judicial authorities.' The supreme judicial authority in a country is the Supreme Court. Accepting the current setting of the judiciary, the supreme authorities in addition undoubtedly include also the Constitutional Court, and based on the membership in various supranational and international organizations they certainly include also the Court of Justice of the European Union and the European Court of Human Rights. 'Constant' practice should then be perceived under the new Code through the prism of the decisions of Grand Senate of the Supreme Court, or through references to decisions in similar cases, where the Supreme Court may even choose a simple form of providing grounds for decision by reference to similar previous decisions.

Finally, if some terms that were not defined in the previous Code of Civil Procedure are now defined in the new Code(s), this was just in an attempt to emphasize the conceptual change in the civil procedural law as such. The Codes namely employed also norms that are otherwise only rarely used at the national level – **final or teleological standards.** This is the kind of norms which usually determine the intended purpose

of the rules and do not provide for the classical rules of behaviour. Typical examples here are the norms on validity and enforceability. Such standards namely have the potential to provide greater stability to the legal system [David 2012: 27].

Principles

In order to make any recast consistent, the recast must necessarily be a scientific work of its own kind [Knapp 1995: 113] – in the sense that the result must follow certain internal logic and should not consist of just random clusters of norms, orders or bans without any unifying structure. A guarantee of consistency is usually provided by a set of legal principles that can be considered (in the spirit of theories of Alexy and Dworkin) as a sort of 'commands to optimalization' [Melzer 2008: 36]. There has been much discussion on the 'place' of the principles in the text of the Code(s), until finally they were placed outside the Code (before the first paragraphs), being the solution most fitting the nature of principles (except for the Administrative Judicial Procedure Code, where they are a part of the articulated text).

The list of principles contains the traditional procedural principles, starting from the basic rights level (such as the principle of public, independent and fair trial, etc.) to 'traditional' principles such as the negotiating principle, the principle of free evaluation of evidence, etc., up to the modern concepts introduced only recently, such as the principle of protection of a weaker party. 'New' principles are the principles of legal certainty, and the principle of **objective teleological interpretation**, meaning that interpretation of law should accomodate to the time when interpreted [Radbruch 2003: 107] – unlike the subjective teleological interpretation seeking for the original 'intention of the legislator'. This only confirms a long-term trend in the case-law of numerous national Constitutional Courts, including the Czech and Slovak ones. This does not mean any 'discretion of the judges', though, because the principle stated in Article 3 of the Code of Civil Contentious Litigation provides quite clearly for guarantees of not going beyond unequivocal and clear words of the Code: where there are several possible interpretations, the meaning of the text should be given priority.

The new legislation is also built on the principle of judicial supplementing of law where the legal regulation is lacking (especially at the level of substantive law). The judge, however, can supplement the law only where there is a gap in law (while it is irrelevant whether it is a true gap, technical gap, false gap, and so on). In other words, where there is a clear text of law, this can only be applied or interpreted by the judge (taking into account the principle of objective teleological interpretation); only in the absence of rules and in case of inability to remedy this shortcoming by interpretation based on the principles of binding law, the judge may decide according to a standard that he or she would have chosen if being a legislator. This will in fact happen in very rare instances; hence, one can certainly not speak of any judicial law-making at all. Still, this possibility reflects the traditional Central European interference of case-law into social reality – as it was comprehensively, deeply and by naturally persuasive ar-

guments shown by the Czechoslovak legal scholar of the 20th century, Viktor Knapp, in his famous article '*Contribution of the Central European Justice to European Legal Culture*' [Knapp 1993: 725]. The indicated 'novelties' therefore do not depart in any way from the Central European procedural traditions. The new Slovakian Codes only reasonably return to the concept of classical Central European procedural law and procedural legal scholarship, while taking into account the latest developments of the global and domestic procedural doctrine and practice.

6. SELECTED 'PRACTICAL PROBLEMS' WITH THE RECAST

To point at this place to some practical problems with the new recast civil procedure in Slovakia would certainly come handy. However, since the new codes are in effect only for a year, there is still not much case law of the higher judicial authorities available. Instead of providing the relevant case law we must hence limit our account of the practical problems with the new civil procedure to a summary of discussions and polemics voiced mostly in the form of journal articles or blogs on the legal web-portals. Thereby, the largest part of discussions revolves around the new regulation of court injunctions. Hence, we shall start with this legal institute and with debates surrounding its new shape and contents.

Injunctions

Expert legal public has raised some doubts recently with respect to the new codes, namely as to whether a fundamental terminological change had to be made replacing the previous notion of interim measure by a concept of an urgent measure and a precautionary measure, especially since the regulation is claimed by the public to be essentially similar (if not identical). However, it is to be pointed out that these assertions by legal public can not be considered correct and seem to be based on a misunderstanding of the whole concept and purpose of injunctions in the Code of Civil Contentious Litigation, since the new regulation shows a diametric difference compared to the interim (preliminary) measures of the original Code of Civil Procedure of 1963.

The reasons for the significant change in these institutes have arisen, among others, from previous application practice. The first shortfall of the previous regulation and practice was thereby a limited duration of the measure due to which the interim measure was not capable of providing the guarantees up to the moment of enforcement proceedings.

The second deficiency was a relative severity of assessing the assumptions for an interim measure, primarily in proceedings where payment of an amount of money was sought for (suing for a monetary claim). Courts in such proceedings very often rejected proposals for interim measures with reference to the principle of proportionality, whereby, according to their own conclusions, it was not appropriate to impose on the party a restriction in the form of a ban on using specific property assets, should only

a pecuniary claim be filed.

And in addition, the original interim measure restricted the owners (the holders) in their right to dispose with their property, automatically resulting in a limitation of the right to property guaranteed under Art. 20 of the Constitution. If the court ordered interim measures restricting property rights, particularly in the case of lengthy disputes, the defendant was threatened with a long-term limitation in the exercise of his (her) ownership disproportionately.

The key goal of the recodification (recast) was to do away with these deficiencies, and mainly to remove the link between injunction and the main proceedings. The reason for this link was previously the nature of interim measures as an institute of civil procedure, which was to temporarily adjust the situation prior to main proceedings.[9] Thereby, while the adjustment itself was often considered sufficient by the plaintiff, he (she) was nevertheless forced under the previous regulation to initiate litigation (main proceedings), because the law required this (Section 76 (3) of the Code of Civil Procedure). This was particularly striking in cases where the operative part of the interim measure was the same as the petition in the main proceedings (for example, deferment within an unfair competition, etc.). In contrast, from the new regulation, introducing systematic incorporation of injunctions into the third part of the Code of Civil Contentious Litigation, one can now infer that a proposal for urgent measures, or precautionary (security) measures is to be perceived as a separate part of the civil procedure, where the decision itself may be meritorious (and hence *ipso facto* of a nature of final decision) without any need for initiating main proceedings in the issue itself.

It is hence quite clear even from the briefly sketched outline that in terms of new regulation of injunctions, these are no longer to be considered provisional or temporary. Therefore, the new regulation can not be considered identical with the previous one and also the change in the name of injunctions (into urgent and precautionary measures) is not to be considered inappropriate.

Furthermore, a relationship between urgent measures and precautionary measures was considered problematic by the expert public recently. The relationship between the two is thereby clearly explained in the provision of Sec. 324 (3) of the Code of Civil Contentious Litigation, according to which “the court shall impose an urgent measure only if the intended purpose can not be achieved by a precautionary measure”. The reason for prioritizing the precautionary (security) measure against an urgent measure is thereby clarified also in connection with provision of Sec. 343 (1) of the Code of Civil Contentious Litigation, according to which a court may order a precautionary measure only if the claim is of a pecuniary nature. The prioritization of the precautionary measure is thus based on the assumption that the most frequent subject matter of a claim is the filing for a certain monetary claim. The second reason for statutory preference of a precautionary measure against an urgent measure stems

9 Sec. 76 (3) Civil Procedure Code of 1963.

from the fact that while an urgent measure may result in an absolute interference with property rights (Sec. 325 (2) (d) of the Code of Civil Contentious Litigation), the establishment of a precautionary measure interferes with property rights only to the extent of establishment of a lien, by which the entity is not limited in disposing of the assets. Finally, concerning an assertion made by expert public that the precautionary measure is identical to a claim enforcement (execution) lien and is therefore superfluous, it should be noted that the enforcement lien is limited by the duration and scope of enforcement proceedings and once the enforcement procedure ends, the lien itself ceases to exist. On the other hand, however, a precautionary measure is not limited by duration of proceedings, and its effects remain preserved, as a rule, even after at the end of proceedings, until the lien is annulled by the court's decision. The precautionary measure should therefore be seen as a stand-alone form of lien. And, last but not least, one should also not forget an important attribute that is able to distinguish between the law of execution (enforcement) and a precautionary measure – namely the subject matter of lien. While in case of an enforcement lien this can only be established in respect of immovable property in accordance with Sec. 167 of the Enforcement (Execution) Code, a precautionary measure as a form of judicial lien may be established by a court decision in relation to any property, rights or property values transferable in private relations [Kotrecová, Števček 2017].

Interpreting and translations

Another issue discussed heavily by the Slovak expert public lately was linked to the question of interpreting and translations within court proceedings and their costs. The new rules of the Code of Civil Contentious Litigation thereby reflect and guarantee the constitutional right to act before a court in the language that the party understands (including the mother tongue). This is reflected in the very concept of reimbursement of cost of exercising this right:

a) in oral proceedings, in connection with Sec. 155 (1) and in accordance with Sec. 155 (3), the cost of interpretation is borne by the State;

b) in case of written acts, in accordance with Sec. 155 (2), should the filing or means of evidence not be articulated in the official (Slovak) language, the court shall invite the person who submitted these to provide for a translation in accordance with a special regulation within a specified time; otherwise the court will secure the translation on its own. Consequently, on the basis of the second sentence of Sec. 155 (3), the costs of translation shall be governed by the general provisions on costs, i.e. these are fully borne by the parties on the basis of the principle of success in the proceedings. The rules on costs of translation and their reimbursement have thereby not been modified in comparison with the previous regulation. Previously, under Sec. 141 (4) of the Code of Civil Procedure of 1963, the cost of evidence not covered by an advance payment, as well as the expenses of the appointed representative who is not a lawyer, as well as the costs associated with the participant acting in his/her mother tongue

or in a language they understand (i.e., costs of interpretation according to Sec. 18 of the Code of Civil Procedure), shall be borne by the State.

Composition (settlement of disputes)

Finally, the last, third, issue to which the expert public called attention since the Code's effectiveness, was the question of whether a composition (settlement) reached between the parties to the court dispute within the proceedings was to be approved by a resolution or by a judgment of the court. True, the Motives of the Code of Civil Contentious Litigation in the rationale for Sec. 148 read that the composition is to be approved in the form of judgment. However, since the contemporary Slovak legal science prefers an objective interpretation against a subjective, the content of the explanatory memorandum of an Act of Parliament is only a subsidiary source for interpretation, and in addition, it should also be noted that the explanatory statements never truly reflect the final wording of the text of the Act, changes being often introduced within the legislative procedure in and outside of the Parliament. Hence, interpretation can not be based only on the provisions of an explanatory memorandum. From the wording of the Code itself, specifically Sec. 212, one can in contrast to the Memorandum read that the main issue in the proceedings is always to be pronounced (decided) in a form of a judgment, and in other cases a form of resolution is to be employed. The question that needs to be clarified here is therefore whether the composition is a decision on the matter itself (*die Hauptsache*) or not. Traditionally, under the ruling on the substance of the case itself (*die Hauptsache*), civil law means an authoritative court decision as to whether or not the right of the plaintiff' has been violated or jeopardized. The German civilian tradition thereby considers a composition between the parties to be something other than the *Hauptsache* [Rosenberg et al. 2010: 727]. The same argument applies in Austria [Mayr, Fucik 2013: 147] and Switzerland [Berti 2011: 81]. The settlement between the parties to the dispute is namely traditionally considered a primarily private-law contract, and a surrogate of the judgment, due to which the court shall not authoritatively decide on the matter itself (*Hauptsache*). The court approval of the composition should therefore clearly take the form of a court resolution instead of a judgment [Števček 2017].

CONCLUSIONS

While the Czech and Slovak procedural jurisprudence was influenced in the late 19th and early 20th centuries mainly by Austrian and Hungarian legal scholarship (and indirectly by German scholarship), particularly by the Austrian social conception and the German liberal conception of civil procedure (with prevalence of the social conception), a substantial change occured in the second half of the 20th century. Soviet influence and models, but also the pursuit of an own Czechoslovak originality brought about various changes to civil procedure causing numerous theoretical and practical controversies. Numerous traditional institutions and concepts peculiar to Central European

civil procedure were abandoned, and many others were in turn unduly simplified. Countries of the former Eastern bloc currently share efforts to recast, or at least substantially amend their regulations governing civil procedure in order to fit the needs of a modern capitalist society and democratic regime [Gilles 2014]. These efforts are, of course, not limited to the rules of civil procedure; similar recasting process is present in these countries with respect to all branches of law.

Having identified the two basic models of civil procedure dating back to the 19th century – namely liberal and social conceptions of civil procedure, the new codifications, including the new Slovak recast, do not significantly exceed this conceptual framework, being rather inclined to the social model.

A recast, which seeks to completely rebuild the civil procedure so as to make up for the previous non-conceptual approach, is thereby a very suitable opportunity for historical assessment of the history of civil procedure. We have therefore offered an overview of the historical context of the civil procedure regulation in Slovakia. We have come the the conclusion that the substantial influences shaping today´s civil procedure emerged already in the 19th century, where we have come accross two competing conceptions – liberal and social, which influenced also the development of modern Austrian and Hungarian civil procedure (in Hungary in the form of the Code of Civil Procedure of 1911). The originally Hungarian Code was valid in the territory of Slovakia until 1950, and was superseded by a socialist (communist) conception of civil procedure in the codifications of the years 1950 and 1963. Slovakia finally succeded in overcoming this evolution only in 2016, when a return to the social concept took place in the form of recast civil procedural law, subdivided since 1 July 2016 into three separate codes – Code of Civil Contentious Litigation, Code of Civil Extra-Contentious Litigation, and the Administrative Judicial Procedure Code.

The latest recast can thereby be characterized by a statement made at the turn of the 19th and 20th centuries by Max Weber – namely that codification and recasting are generally expressions of rationalization and streamlining of the law – that is their main goal, Weber claimed [Kroppenberg, Linder 2014: 75-79]. At the same time, however, the historical codification efforts from the turn of the centuries considered recasts also as being tools of national self-identification, i.e. tools to codify the 'national spirit' [Canale 2009: 136]. Nowadays, however, one can hardly speak of a 'national spirit' in the context of current eclectic syncretism, e.g. introducing collective (class) actions [Hamuľáková 2016], and taking into account the impact of European-wide models [Tulibacka 2009]. At present, it rather seems more viable that the recasts, especially in the former Eastern bloc countries, represent an attempt to 'change the spirit' of local societies – in particular aiming at laying down 'new' ideological foundations of the society and its legal system. This is thereby usually done either by a formal return to the pre-1948 legislation, as it has happened in the Czech Republic with their new Civil Code, or by new and original regulation based on a mixture of current needs and historical traditions of a country – which was the leading idea of the recasting of civil procedure in Slovakia.

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