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Case Management in Ukrainian Civil Justice: First Steps Ahead

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Abstract

The article aimed to analyze case management in civil justice in Ukraine. Ukraine is one of the members of the Council of Europe and declares its integration path towards the European Union. The Association Agreement between the EU and Ukraine was signed in 2014 and requires the approximation of national legislation, which led to reforms, covering various areas of legal regulation. In the research, the comparative method was used to analyze the legislative provisions of case management, together with the structural method and the historical method to reveal the background of the idea of case management in the past research of Roman Law. The authors concluded that the deep historical beginnings of case management are based on Roman law, and the idea of restoring this phenomenon is fully reasonable today. Finally, the implementation of case management in procedural legislation must be reassessed and adapted to the complex of the rights protection system, helping to transform the role of the court in the dynamics of the civil judicial process.

Keywords: civil justice; access to justice; the right to a fair trial; civil procedure; procedural legislation.

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Gestión de casos en la justicia civil de Ucrania: primeros pasos a seguir

Resumen

El artículo tuvo por objetivo analizar la gestión de casos en la justicia civil de Ucrania. Ucrania es uno de los miembros del Consejo de Europa y declara su camino de integración hacia la Unión Europea. El Acuerdo de Asociación entre la UE y Ucrania se firmó en 2014 y requiere la aproximación de la legislación nacional, que condujo a las reformas, cubriendo diversas áreas de la regulación legal. En la investigación se utilizaron el método comparativo para analizar las disposiciones legislativas de la gestión de casos, junto al método estructural y el método histórico para revelar el trasfondo de la idea de gestión de casos en la investigación pasada del Derecho Romano. Los autores llegaron a las conclusiones de que, los profundos inicios históricos de la gestión de casos se basan en el derecho romano y, en la actualidad, la idea de restauración de este fenómeno es plenamente razonable. Finalmente, la implementación de la gestión de casos en la legislación procesal debe reevaluarse y adaptarse al complejo del sistema de protección de derechos, ayudando a transformar el papel del tribunal en la dinámica del proceso judicial civil.

Palabras clave: justicia civil; acceso a la justicia; derecho a un juicio justo; procedimiento civil; legislación procesal.

Introduction

But you see, the courts don›t exist to give them justice - the courts exist to give them a chance at justice (The Verdict, direct by Sidney Lumet).

Today, in the context of significant paradigmatic shifts in the perception of law and global changes in public relations, legislative reforms shall reflect the real aspirations to build a genuine area of European justice, and Ukraine shall become an integral part of this process.

First, we want to draw attention to the very beginning of the court proceedings, lied far away in the Roman law. For this, we will sketch up the difference in *legis actiones* of the most ancient court procedure and the second procedure, which has completely changed the very idea of the interrelation between a judge and parties. In our opinion, that may be considered as a source of the late case management idea, which was blossom especially successfully in Great Britain, place of greatest impact of the praetorian Roman law.

Then we would like to describe the gradual introduction of the case management in the national civil justice system of Ukraine. (Izarova and Silvestri, 2018) This is one of the latest trends in the development of the civil process and its benefits are evident. With the help of modern technologies, the court can manage the organization of consideration as effectively as it is possible in each case.

The last research show that case management is not so modern, (Cornelius and Van Rhee, 2018; Tsuvina, 2020) due to its grounds in early German and Dutch civil procedure`s studies. As we see from the ideas of Lord H. Wolfe, the principle of organizing a case review includes the following components: the division of responsibilities between the parties and the court in choosing a procedure for consideration of the case; definition of specific terms for the conduct of procedural actions; observance of proportionality in matters of court costs. As it was noted by J. Sorabji, previous laissez-faire approach to case progression and party-control of litigation could generate unnecessary cost or delay (Sorabji, 2014)

Traditionally in Ukraine, the approach functioning with an authoritarian judge has been criticized as a Soviet Union heredity (Kroitor and Mamnitskyi, 2019; Tsuvina, 2020); so advocacy and the transfer of key roles to the parties are being introduced in the context of the establishment of an independent legal process in our state that meets the requirements of building a legal and democratic state. Anyway, it not so easy to pass over an old traditional approach in judiciary.

During the preparation of the CPC in 2004, the main task of civil justice was changed. In Article 2 of the CPC of the Ukrainian SSR in 1963, the task of civil proceedings was defined as protection of rights and legitimate interests of individuals, legal entities, and the state through comprehensive consideration and resolution of civil cases in full compliance with the current legislation (as amended on January 23, 1981). This was the basis for the almost infinite power of a judge in the Soviet process, which, to protect the rights and interests of individuals, even went beyond the boundaries of the claims filed in the case.

Ukrainian legislators decided to move away from the Soviet approach and to actively monitor the dynamics of the case and ensure fair, impartial, and timely consideration and resolution of civil matters in order to protect the challenged or contested rights and freedoms of individuals and legal entities. That is, the main emphasis of the work of the court was transferred to the consideration of the case, and not to the protection of rights or interests, which is fully justified in civil cases.

Accordingly, the judge was limited only in the examination of claims (namely: only on the request of individuals, within the limits of their claims and on the basis of the evidence submitted by the participants

in accordance with Article 11), also he was deprived of the opportunity to claim evidence or to appoint an examination (instead, the court was supposed to promote the full and complete clarification of the circumstances of the case as follows: explain their rights and obligations to the persons involved in the case, warn about the consequences of the commission or non-execution of procedural actions, promote the exercise of their rights under Article 10).

Concepts of the CPC are due to the change of the main task of civil justice, which should be effective in accordance with the CPC 2017. This testifies to the transition to a new law for the administration of justice in Ukraine and the introduction of a new approach to determining the role of judges and participants in the case in the organization of proceedings.

Accordingly, in the provisions of the new CPC, three components of the principle of organization of the case can be distinguished: the decision on the procedure of consideration of the case; establishment of the terms of commission of procedural actions; and also, the determination of legal expenses incurred by the parties.

1. Background of the Case Management in Roman Law Procedure

The introduction of the formulary process, in addition to simplifying proceedings resulted in the discovery of simplified and more convenient means of praetorial influence. On the contrary to the magistrate that played a passive role in the *legis actiones* procedure, the formulary role of the praetor became active, for example, the formulation of the formula depended entirely on the praetor. This makes us think about comparison with the case management in modern civil procedure in Europe.

If he refused to formulate the formula, then he stopped the progress of the process and made the plaintiffs civil right insignificant. Consequently, the praetor becomes a direct controller and litigant. Praetor could refuse to make the formula in cases when it immediately becomes clear to him that the plaintiff's claim, although justified jus civile, is still but unfair.

Also, the praetor was able to influence the relations between private individuals through "administrative" means like administrative orders and administrative regulations. If a person appeared to the praetor with a claim that did not have a basis in civil law, but in the opinion of the praetor was fair, he could make the corresponding formula and submit it to the judge's decision, assigning him to verify the actual data on the accusation of the defendant. Thus, along with lawsuits based on civil law (*actiones civiles*) there are praetorian actions (*actiones praetoriae*).

Sometimes the case was simplified: the praetor could apply "*fiction*" (the assumption or rejection of an existing circumstance that could not be disputed). In particular, the judge was given an order to act as if there was no certain circumstance (if the person lost his ability to act, this fact should not be considered when it comes to repayment of the debt).

In both the *legis actiones* procedure and in the *formulary procedure* there was a demand for the presence of both parties at the beginning of the proceedings, there was no proceedings in absentia. The official summons to court did not exist, the plaintiff himself provided the presence of the defendant in court. For this purpose, the previous measures remained, but the defendant's presence provided by force was replaced by a fine.

As a rule, the parties conducted the process personally but there was also procedural representation. There were two types of representatives: the cognitor and the procurator. A cognitor is a formal representative appointed by the principal in the presence of the opposite side after which he replaces the principal completely. Gaius states:

> (I. 4.83) Moreover, the attorney in an action is appointed by prescribed forms of words in the presence of the adverse party. The plaintiff appoints an attorney as follows: "Whereas, I am bringing an action against you (for example) to recover a certain tract of land; I appoint Lucius Titius my attorney against you in this matter." The adverse party makes his appointment as follows: "Whereas, you have brought an action against me to recover a tract of land, I appoint Publius Mævius my attorney against you in this matter." The plaintiff may make use of the following words: "Whereas, I desire to bring an action against you, I appoint Lucius Titius my attorney in this matter." The defendant says: "Whereas, you desire to bring an action against me, I appoint Publius Mævius my attorney in this matter." It makes no difference whether the attorney appointed is present, or absent; but if an absent person is appointed, he will only become the attorney if he accepts and undertakes the duties of the office (Gaius institutions. Text and trans. F. Dydynsky. Warsaw, 1892. XL, 540).

The principal for such representation could no longer file the same suit for the second time. The charge by the solution was addressed to the principal and not to the cognitor.

Procurator was a representative who was appointed informally and even, probably, without the knowledge of the opposite side. He could act in the interests of one of the parties without any mandate. After the procurator's process the principal could bring an action against the same defendant himself (therefore, the procurator demanded a guarantee of compensation for the defendant in the case of double recovery). The recovery by the prosecutor's suit was addressed to him, and not to the party he represented. Subsequently, the differences between such representatives as prosecutors and cognitor disappeared.

In the formulary procedure, the means of proof were more effective than those used in the *legis actiones* procedure. Means of proof were statements of the parties and testimonials; testimonies of witnesses (their number was not limited); written documents, which in the first place were the testimony of witnesses, recorded earlier, documents, stipulations, contracts, hereditary documents, accounting books. It should be noted that in the classical period there were documents of an official character. This led to the creation of special books, which contained records of legal facts, in particular, it is known that there was a real estate cadastre in Egypt, and from the age of Augustus the Romans recorded the births. Also, the means of proving were inspections of the object by a judge and expert opinions.

The evidence was provided by the parties and should have been based solely on the facts; the judge was free to evaluate the evidence presented by the parties.

Following the outcome of the case, a decision was made (*sententia*), which could not be appealed in our understanding of the word. At the same time, the plaintiff could contest the validity of the decision and request the appointment of a new judge. The defendant could contest the decision about seizure by suit.

The value of the decision was that it completely resolved the disputed legal relationships, was binding and unconditional. The decision established a new obligation between the parties instead of procedural legal relationships. The final decision was a guarantee against further contesting the law.

If the decision was of "not guilty", then all legal relations stopped. If the decision was of "guilty", then the issue of seizure was raised. The tool for such a penalty was an executive action or action judicati. The period of 30 days had to pass between the decision and the action judicati for the defendant to voluntarily decide. After 30 days the debtor`s property manager began selling all the property, even if its value was significantly higher than the amount of the debt. In certain categories of cases, a procedure for the sale of property was foreseen. Subsequently such a form of forced execution became obligatory.

To briefly summaries, we may mention the following: the most relevant today issue is the magistrate or judge acquired the functions of control or organization of hearing of the case. This is the heart of the idea of case management in procedure, which may be a perfect ground for all the further national civil procedure models of Europe.

2. Choosing the Order of the Case Consideration

According to the law, the judge decides on the determination of the procedure for reviewing the case, namely, general or simplified. (Izarova and Flejszar, 2018) The ability to initiate simplified proceedings, however, still belongs to the plaintiff, in accordance with Article 184 (2) of the CPC, as well as Article 276, which is virtually duplicated. At the same time, Article 277 (1) states that the court itself decides on the consideration of a case in the form of a simplified procedure in a ruling on opening of proceedings in a case (small or labour); and only in accordance with Part 2 - in all other cases it is done in view of the consideration of the relevant petition. That is, the court has quite vast powers to decide in which order the case will be considered. We should immediately note that the ruling in which the court decides on the procedure for reviewing the case – general or simplified – is not challenged separately from the final decision of the court.

The court also has the right to decide whether to appoint a court hearing in a simplified proceeding, in accordance with Article 279, paragraph 5, the court will consider the case in a simplified procedure without notice to the parties on the materials available in the case, in the absence of a petition of either of the parties. In resolving this issue, in accordance with the CPC, the court takes into account the price of the claim, its category and complexity, as well as the method of protection, the category and complexity of the case, the evidence, necessity of expert examination or summon witnesses, the parties and other participants in the case; if there is a public interest, the value for the parties and their opinion concerning the simplified procedure.

These conditions are important for solving a case. In particular, the importance of considering a case for the parties should really have an impact on the choice of the procedure for the protection of rights, so the question of taking into account the opinion of the parties on the consideration of the case in the order of simplified proceedings should be raised. In order to protect their rights, applicants will choose the most effective procedure – simplified, which will allow them to optimize costs and time, or general, which will enable them to use all available tools to achieve the result. At the same time, the simplification should not mean narrowing or reduction of the rights of the persons involved in the case, but only the right to choose the procedure for consideration of the case and the protection of their rights. This choice must be ensured by law, agreed upon between the parties and the court, which is more in line with the proposed principle of cooperation of judge and parties.

3. Organization of the Case Consideration in a Timely Manner

The second component of the organization of consideration of the case is connected with the equally actual problem of the duration of legal proceedings. According to the CPC 2004, reasonable time was provided for the consideration of a civil case, but not more than two months from the date of opening of the proceedings. Reduced terms were set only for two categories of cases, which are alimony and labor disputes. The CPC 2017 secures the principle of the reasonableness of the terms of consideration of the case by the court. Accordingly, a reasonable period of consideration is provided for simplified proceedings, but not more than sixty days from the date of opening of the proceedings.

The following time limits are foreseen for the general proceedings: the court must begin the examination of the case on the merits no later than sixty days from the date of opening of the proceedings, and, in case of extension of the preparatory proceedings, no later than the next day after the expiration of such term; the court should consider the case on the merits no later than thirty days from the date of the beginning of the trial on the merits. According to Article 189, preparatory proceedings must be held within sixty days of the opening of the proceedings, but in exceptional cases, in order to properly prepare the case for substantive consideration, this period may be extended by no more than thirty days at the request of one of the parties or by the initiative of the court. Thus, proceedings in the case may take about 120 days or 4 months: the preparatory proceedings may take 90 days, then 30 days to consider the case on the merits.

The judge, in accordance with the provisions of the new CPC, even received more power: in accordance with Article 121, he should establish reasonable time limits for the conduct of procedural actions. Procedural terms in national legislation have always been divided into two types: the ones established by law and those established by court. According to the new CPC, the court should set such terms as submission of written applications, etc. However, there are some weaknesses in the new CPC the provisions of part 7 Article 178, according to which a revocation shall be submitted within the period set by the court, but not later than fifteen days from the date of delivery of the decision on the opening of the proceedings.

This term must simultaneously allow the defendant to prepare this revocation and the relevant evidence and allow other participants of the case to receive a revocation no later than the first preparatory meeting in the case. According to Articles 179 and 180, the plaintiff and the defendant are also entitled to exchange the response to the revocation and the objections in time set by the court, but before the start of the trial on the merits. That means that, on the one hand, the basis for the cooperation between the court and the parties is created, but, on the other hand, it is hardly possible

to foresee this without exceeding the deadlines in advance. It is likely that the exchange of such documents out of court sessions by agreement between the parties during the time limit set by the court would be the best way.

4. Influence on Court Costs

During the reformation of civil justice, the approaches to judicial control of the distribution of court costs also went through some changes. For the first time in the CPC 2017, the rule on reimbursement of the court costs of the party in whose favour the judgment was made, was established in the form of a principle (Article 3 part 2). At the same time, the procedure for determination the size of these court costs and their payment and distribution was significantly complicated.

In particular, in accordance with Articles 134-135, each party must determine in its first application what legal costs it has incurred and which it intends to incur in connection with the consideration of the case; the court may accordingly oblige the parties to enforce the court's costs. The court received the relevant instruments of influence on the behavior of the parties to the case, in particular, when deciding on the allocation of costs and expenses, it may consider the behavior of the parties during the proceedings that led to the delay of the proceedings, including filing clearly unreasonable applications and petitions, unfounded allegations or objections to certain circumstances relevant to the case, unreasonable overstatement of claims by the plaintiff, etc., as well as the actions of the party in relation to the pre-trial settlement of the dispute and the peaceful settlement of the dispute during the consideration of the case, the stage of consideration of the case in which such actions were committed.

Under the current CPC, the court even has the right to oblige the party to pay all the legal costs in full or in part regardless of the outcome of dispute resolution in the case of misuse of procedural rights by this party or its representative, or if a dispute arose as a result of improper actions.

The behavior of the parties in the trial may also be affected by applying a fine as a coercive measure (in accordance with Articles 144 and 148 of the CPC). Among the grounds for its application are non-compliance with procedural obligations, in particular, evasion from the commission of actions imposed by the court on the party to the trial; abuse of procedural rights, commission of acts or assumption of inactivity in order to interfere with legal proceedings; failure to inform the court of the impossibility to file evidence requested by the court or failure to submit such evidence without good reason, etc.

Such powers of the court, established by the CPC 2017, provide it with the opportunity to effectively influence the behavior of the parties in the process, enhance its role in the dynamics of the case, and assist in the proper organization of the case.

Thus, in general, the introduction of a new principle in the organization of case studies in the legislation will help to ensure the efficiency of legal proceedings. Given the fact that there is some bias about judicial control over the dynamics of the process in Ukraine, it is necessary to specify more precisely the goals and criteria for the use of specific powers of the judge, in particular, when resolving the issue of the distribution of court costs, etc.

For effective consideration of the case, it is necessary to ensure not only loyal cooperation between the judge and the parties, but also between the parties of the dispute, impose certain procedural obligations on them. This includes the disclosure of evidence, the exchange of competitive papers, the service of judicial documents, etc. Thus, participants in the process can be inclined to organize interaction, which will likely lead them to a more compromise solution. At the same time, the court can be relieved from some functions that are not directly related to the administration of justice. The judge's control over the organization of interaction between the parties to the dispute is sufficient to ensure the dynamics of the process of its consideration and resolution.

Conclusion

The desirable membership of Ukraine in the EU cannot overshadow the need to ensure effective protection of the rights of citizens, increase confidence in the judiciary and the establishment of the work of enforcement of judgments, which, with the proper definition of the ECHR, is an integral part of the process of protection and restoration of rights.

The views expressed in this project reflect the evolutionary step towards a person appealing to the court within the EU internal market. And right now, we are witnessing remarkable events when the joint European Community launches the introduction of common minimum standards for the civil process.

The future Single European Union Code of Civil Procedure has already been identified in the Community documents, which once again confirms the correctness of its conclusions and proposed approach. Ukraine, as an integral part of Europe, in the light of future membership in the EU, should borrow best practices without losing the benefits of a national approach to the administration of justice in civil matters.

Therefore, the implementation of case management in Ukrainian procedural legislation should be reassess and fit with the complex of national system of rights protection. In particular, it is worth redefining the role of the court in the dynamics of the process. It is designed to administer justice and to guide the course of the case, and there must be a driving force behind the parties who are interested in the result.

Therefore, it is possible to leave the court with the authority to organize and control the progress of the case, and to oblige the parties to provide the necessary elements, such as delivery of documents, disclosure of evidence, exchange of written statements, etc. The court, by establishing the procedural deadlines for the performance of these duties, will influence their behavior by applying procedural coercive measures, as well as considering the distribution of court costs and the settlement of a case.

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