THE ACTIVE ROLE OF THE JUDGE IN THE CIVIL PROCEDURE IN THE CONTEXT OF THE MODERN LEGISLATION

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Abstract. *In the last time in the literature of speciality finds a clearly practical interest linked to determining the role of the judge in the civil proceedings. This interest results from the necessity to ensure a correct and uniform application by judges of the rules of civil procedure. National judges interpret the rules of procedure, including regarding the role they should play in civil process. Given these arguments, we believe that the role of the judge in the lawsuit reached a turning point and needs to be reconsidered, the principle being exacerbated at the moment, which harms establish the truth in every concrete issue. All these facts are indisputable that a current manifest.*

Keywords: *judge's active role in the civil process, adversarial system, inquisitorial system, mediation judicial, powers of the judge examining the case.*

АКТИВНАЯ РОЛЬ СУДЬИ В ГРАЖДАНСКОМ ПРОЦЕССЕ В УСЛОВИЯХ СОВРЕМЕННОГО ЗАКОНОДАТЕЛЬСТВА

Аннотация*. В последнее время в литературе по специальности обнаруживается отчетливо практический интерес, связанный с определением роли судьи в гражданском процессе. Этот интерес вытекает из необходимости обеспечить правильное и единообразное применение судьями норм гражданского судопроизводства. Национальные судьи толкуют правила процедуры, в том числе в отношении роли, которую они должны играть в гражданском процессе. Учитывая эти доводы, мы считаем, что роль судьи в судебном процессе достигла переломного момента и нуждается в пересмотре, принцип обостряется в данный момент, что вредит установлению истины в каждом конкретном вопросе. Все эти факты неоспоримо то, что ток манифест.*

Ключевые слова*: активная роль судьи в гражданском процессе, состязательная система, следственная система, судебная медиация, полномочия судьи, рассматривающего дело.*

The judicial role is one of the central issues of civil procedure: what is the judge, anyway? Aneutral arbiter of the dispute between the parties? An expert in solving legal disputes, leaving all other aspects (human, economic, social) outside his concerns? Or, on the contrary, a mediator, a conciliator? A seeker of the truth? Maybe sometimes ... even a legislator?

The answer to all these questions legislature is not, maybe, always evident. However, Code of Civil Procedure, in different historical periods, was preoccupied of the prerogatives of the judge in conducting the civil trial, dedicating the traditional "the force lines", but with many nuances and aspects of innovation that deserves attention to this research. This theme presents a special theoretical interest. National and international theorists are tempted to discover the true meaning of the legislator introduced the phrase "guiding role" or "active role". Interest increases as you discover that this should not be reflected in codes of civil procedure of many countries.

The issue of the role of the judge in the civil benefited from the attention of European scholars. Opinions are divided regarding the role of the judge, recognizing an active role or a passive role, a role of judges or simply sharing the role of justice to be exercised. These differences

are due to the fact that the major systems of law (Anglo-Saxon and continental) have expressed different opinions about the authority that should be the judge.

The Civil process is a process of private interests, so that the active role of the judge is to be understood, as mentioned doctrine, in the context of balancing those two fundamental principles of civil process: availability and contradictory [10, p. 31].

A short look at the legislation allows different states to see that from one case to another judge may assign passive role or active role guiding role. Besides the CPC RM, few legal systems that contain a provision that expressly define the role of the judge in the civil trial. To conclude on the role of the judge is required to initially make some clarifications.

Starting from the premise that justice should function, the greatest extent, the work of the judge, and knowing that the judge stood before the conflict between the parties - that come each with their own interests and passions personal - it must be an independent, impartial, objective that is stable parties in order to resolve social conflict, over time, legal systems have offered various solutions to create triangular relationship between the parties and the judge in the course of trial.

In large, advanced procedural solutions were leaning, more or less, to be the judge granted a passive role, neutral, negative clearance or an active, energetic, with ample opportunities to intervene in the debate.

1. Accusers Procedure

Accusers procedure, or procedural system regulated by the principle of non intervention of the judge. It has its origins in liberal conceptions that support the autonomy of will of the parties, both at the level of contractual freedom, and recognizing them total freedom to choose when, how and against whom to proceed in seeking justice. In the same principle of "Judicial contract", in this system the parties who determine the fate trial court not be entitled to modify itself quality, subject, legal due process, being able to dispose regardless of the requirements of public policy. Parties absolute master of their rights and are best placed to decide the route for their own defense interest at one time or another they must not overlap the intervention of the judiciary [13,p.243].

The question remains subject to private judgment, on which the judge called to resolve must not act only as an arbitrator, disinterested, impartial.

More than that, this system value, and freedom of the parties to decide how to disclose or not, judge of the evidence, the judge is not entitled to request, one further clarification of the facts or law. His neutrality was characterized by a French doctrine of the early twentieth century. As „a kind of car it is made on materials like basis, to issue a sentence" (*une sorte d'automate auquel on apporte des materiaux en vue d'en tirer un jugement*) [9, p. 41].

A feature of the adversarial procedure, the doctrine was also underlined that the judge's opinion as less of studying the file and more parts of the oral debate of the dispute [8, p. 32].

Thus allowing full freedom of the parties, to ensure opportunity for the judge to leave the simply convinced that managed to „pack" best submissions, whether its question corresponded gain or not to the judicial truth.

All the parties of the existence of wide opportunities to „drive" the duration of the trial process as it came to depend on them, leading to delays and often obvious and shocking.

2. Inquisitorial procedure

The opposite system that of inquisitorial procedure which enshrines the power to intervene judge pronounced characteristic of all orders procedural felt as a young doctrinal Romanian

emphasize that „the state is not interested in the subject of civil proceedings, but he is interested in riding, instruction and loosing of" [6, p. 356].

The common feature of all systems of procedural law who decided over time, dedication more or less express this procedure is to formalize the act of judgment. Intervention of the state in the lawsuit, which must be governed by rules largely in public, not private - the system adversarial - should be a vigorous one. Thus, the judge controls the entire development process checking the quality of the parties, their representation, the need for further clarifications for discerning the truth in question, censorship - if necessary - a procedural documents of the parties would become a drag on the process by suspension or deferral.

Also, inquisitorial procedure allows the judge to intervene in support of the parties free legal aid, offering the chance - not exist otherwise, theoretically the adversarial system - as a judicial decision to reveal the truth and not to rely on higher skills of a party to convince the judge [13, p. 243].

But what gives force to inquisitorial procedure judge is entitled to take all those measures in order to manage more accurate and complete evidences to get an accurate picture of the facts and law. This trend has evolved over time and the right judge at the discretion of the evidences.

Judge control is reflected in the opportunity to settle in motion a broader number of issues incidental to apply the rules of public order, to decide on appropriate measures fully in the discussions.

Justification judge's active roles in these systems keep the social value of the dispute which concerns the state in several ways:

a) state may be interested to end the dispute parties not only to protect but also to support the rights of others who took part in the trials;

b) application of the rule of substantive law in the case before that can involve other similar sites:

c) the state is always interested in conflict resolution and proper implementation of laws and the welfare of judgment and enforcement proceedings.

In short, in these systems, the judge is „a genuine master has the most extensive powers to make the truth to come to light, if necessary even against the will of the parties concerned".

How the systems described above could not implement absolutely any of the procedural laws, remained the same dilemma, it is required to have priority? Respect for private interests of the parties and their right to be master, including driving process or the public interest to make objective truth to triumph following a trial as quickly and efficiently? This question tried to find an answer including through the criticism in one aspect or another, each of these systems:

a) the adversarial procedure was criticized [6, p. 361]:

- Would be a residue of „primitive formalism in which the judge was simply a witness of the judicial duel between the warring parties";

- Does not allow for a quick resolution of the case, such as systems that practices „Formalize" in a greater or less a civil trial, the requirement of any proceedings judicial being to be at least simple and quick;

- Parties no having legal training would lead the process wrong, and „often, given their interest, not caring process, leaves it leaving or postponed or to tangle the justice";

- In the matter of the evidences, the parties are tempted to ask favors only those samples, the judge is not able to intervene ex officio to clearly specifying accurate the facts and law and for the correct and full of evidences;

- The judge would become „a being without soul, passive and being stopped to intervene in the discussion of the parties, even though a simple question could change and contribute to the solution process of the triumph of truth".

b) To the inquisitorial procedure and opposed arguments such as [6, p. 364]:

- It would be hard to accept in a system where judges are called to apply not well enough being prepared in terms of professional and inexperienced;

- Raising the danger of mistrust the parties in the impartiality of judges, which would risk, trying to find the truth, become the lawyer of one party in the detrimental of the other and would enjoy „only" of the support of the lawyer or worse to have a defections legal assistance of even inexistent:

- Lowers the prestige of the judiciary which might err in its interventions, affecting their impartiality;

- The risk of abuse by the judges, could „use this power either to give justice to what no one has either to complicate, delay or drawl causes for";

- Intervening judge harms the freedom of parties because a „too harsh discipline may be regarded as a judicial tyranny".

Naturally, each of these criticisms may be an argument for supporters of the other scheme. However it proved historically that the adversarial system. In its classic form, characteristic of Roman law judge so that judge only *secundum allegata* and choose the proven and liberal tendencies of the nineteenth century that influenced the great French codification had to be subjected to serious amendment.

From dominance principle that justice is not only one of the state powers but also one of the most important public services due to the citizen, which obliges the state to settle as quickly as a state of conflict private share and to seek the truth objectively, giving force to the judicial authority by issuing legal decisions and sound system suffered on non intervention of the judge to the attenuation over time. They allowed to the judge that - protecting both individual rights of the parties and the right target - intervene in the course of debates surveillance purposes not only meet the rules of substantive law, but also the smooth running of the process, including: leadership debates, monitoring their duration the possibility of claiming the evidence considered relevant parts of the case, controlling procedural flaws and the invocation of public policy provisions. Became the principle that the parties, even if the lawsuit is completely in control, and should not lead walking procedure.

At the same time, and thanks to the spectacular developments of the last half of the twentieth century the sacrosanct rights enshrined internationally, which requires all states to provide the parties the right to independent judgment, impartial, quick, effective where legal aid is guaranteed, has become a common thing that judiciaries contemporary recognize beyond any doubt the public interest of justice makes people to be absolutely convinced that judges obviously owes this public service. How else could ensure the smooth running of the public service of justice than by broadening the considerable powers of judges in civil judicial proceedings?

In the Civil Procedure Code of Moldova, the legislature has regulated under Chapter I - „Main dispositions" [3] and the principle guiding role of the judge in the civil trial, although other principles are enshrined in a separate chapter. We appreciate, however, that this does not diminish the value and the important role that must carry out the trial judge. In the Romanian doctrine some processualist mentioned with reference to the Code of Civil Procedure of the Republic of Moldova and the principle of the active role of judge that „such legislation, separate chapter enshrines fundamental principles, do not ignore character principle of the active role of the court, but means incidence throughout conduct civil proceedings" [11, p. 52].

In procedural systems of other countries, the situation is different. For example, in Romania legislature has recognized the important role that they meet fundamental principles in civil proceedings and devoted among them the judge's active role in finding the truth. [4] Such a mode of settlement but is not appropriate to the Romanian Code of Civil Procedure. Regulating the fundamental principles of the Code was first promoted by other civil statutes and civil procedural. Among the codes that have resorted to such legislation recall, firstly. The French Code of Civil Procedure, which governs in a preliminary process guiding principles (art. 1-24) [11, p. 48]. A similar approach and meet new federal code of civil procedure Swiss. It regulates „procedural principles" in Title III of the First Part of the Code, including art. 52 58. In the same direction are the provisions of art. 50-73 of the new Code of Civil Procedure Luxembourg (entered into force on September 16, 1998) [11, p. 48].

Most of codes of civil procedure regulation system preserved but disparate fundamental principles of civil procedure. And this assertion is valid. Paradoxically, even some modern codes of civil procedure, such as for cod in the Canadian province of Quebec [11, p. 49].

We note, however, that the Civil Procedure Code of Moldova (CPC) leading role is enshrined in a text designation marginal, unlike Civil Procedure Code of Romania (NCPC) or the Code of Civil Procedure of the Russian Federation [5] that have no text less a name marginal covering the active role of judge (name marginal texts of the code is also a modern solution, being used by a large number of codes (eg. the Swiss federal code of civil procedure, Code of Civil Procedure, the Code of Civil Procedure of the Republic of Moldova, the Civil Procedure Code Portuguese and Spanish Code of Civil Procedure). French Code of Civil Procedure, although it is one of the most modern and representative codes do not include names of its marginal texts). Paradoxically, however, that the civil procedure law of Romania, devotes a separate text NCPC active role of the bailiff (art. 618) [12, p. 365-376].

Previous proceedings in regulating the promotion of the judge's active role was undeniable. One such principle was often cited in the literature as one of the defining elements of socialist civil procedure and its superiority to similar regulations in Western countries.

Therefore, after 1991 was questioned failing to give such a principle. Given that the national CPC judge's active role not among the principles explicitly, we could examine the incidence of this principle in our civil procedural law.

Modern procedures are no longer purely adversarial, the judge acts as a simple will of the parties, but rather they are more powerful connotations inquisitorial [6, p. 356]. Inquisitorial procedures within the active role of the judge is indispensable, and his lack of efficiency and celerity of justice would always be uncertain. It is therefore not by chance that some legislation instead refer to role of "director" or "guiding" of the judge in the civil proceedings. French doctrine

latest highlights, rightly, the need for cooperation between the parties and the judge in the conduct of judicial proceedings [7, p. 328].

In this respect the provisions of procedural legislation of the Republic of Moldova are on station model. According to art. 9 paragraph (1) of the CPC: „The court plays a guiding role in organizing the process whose limits and whose contents are established by this Code and other laws. I remarked on this text character of generality, within the meaning of its reference to the role of the court "organization and holding" [3].

The active role of the judge has many manifestations, and highlighting them all is almost impossible under the present approach. Thus in the continuation, we recall just some of them.

One of the most relevant forms of expression of the judge's active role aimed his duties to dispose all measures permitted by law to ensure the conduct of speedy trial, that the proceedings fairly and within optimal and predictable (art. 6 of the European Convention) [1]. To this end, the judge will assess, at first within which the parties are legally summoned, the time required for the research process; he has the opportunity to reconsider the deadline mentioned (art. 191 CPC) [3].

Also, the judge is required, in any process, parties to discuss all applications exceptions, the factual or legal grounds presented by them, by law, or of its own motion. The same judge's active role is also reflected in the application of procedural penalties or the invocation of procedural exceptions. We note in this regard, by way of example, the right and duty of the judge to take measures to regularize the pleadings (for example, not to act on the request), the right of its own motion absolute nullity of a pleading and right to invoke procedural exceptions absolute (authority of the judged fact).

The judge must exercise an active role to try reconciliation of the parties throughout the process. The procedural provisions regarding the attempt to reconcile the parties and those on mediation are of utmost importance given the current trends are directed towards finding effective alternatives to state justice. In this respect the Moldovan legislature intervened with some changes in 2016, as the content of his guiding role in the process, completing tasks judge mentioned in art. 9 of CPC obligation to inform the parties about the possibility of initiating the mediation process. These provisions are related to the introduction of a new pregnancy to the time of preparing the case for judicial debates, established by art. 183 CPC. Namely - evaluating opportunities to resolve the dispute through mediation laid the foundation mandatory judicial mediation procedure, which aims to decongest the courts of the large number of cases that are pending.

In the courts for judicial review, the active role is reflected in the law judge of its own motion grounds of appeal or cassation public order. Even within the special procedures meet some relevant provisions relating to the active role of the judge. For example, according to art. CPC 280: „If at the request or the examination of the case in the special procedure, there is a law dispute the jurisdiction of the courts, the court remove the demand by means of a conclusion and explains the petitioner and interested persons their right to settle the dispute in the action proceedings of the competent civil court". Also, in the procedure for declaring a person as missing, the legislator by art. 299 CPC point 1 states: „The judge, preparing the case for trial, establishes the people (relatives, friends, ex-collaborators), bodies and organizations (operating housing organs, organs of police, military institutions, municipalities, etc.) that can communicate information about the disappeared person, invoking information about it [3]. Thus, although we

are in the presence of a special procedure, the judge is assigned a quite active role and this is because the principle of availability and active in this type of procedure has a limited role.

In conclusion, we should mention that the leading role of the court if it is not exercised improperly, can be a real panacea for the parties to civil proceedings, especially in those legal systems where the presence of the lawyer is not overwhelming, and the unreadiness of legally prevent individuals to assert the rights and procedural obligations they have.

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