The conception of civil procedure in the Slovak Republic

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Abstract

This contribution offers a comprehensive analysis of the conception of civil procedure, all the way from the term itself through historical determinants, individual approaches and civil procedure in Europe up to the present. It discusses the need for the unified conception of civil procedure expressed in a consistent legislative form. The subsequent analysis of the specific institutes of the new civil procedural law in the Slovak Republic describes the correlation of Slovak civil procedure to the so-called social conception of civil procedure based on the codification of the Austrian Civil Procedure Code of 1895.

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JEL Classification: K40, K41

1. Entering the issue

The civil procedural law and its subject matter, the civil procedure, have at least one uncontested advantage over other legal sectors. That is an undeniable existence of the civil procedure conceptions, defined on the basis of relatively consistent criteria, which have been "tested" in the history of procedural law. Under the term “conception” we generally understand a clear idea of the examined phenomenon, the plan of its possible effect in the methodological and social sphere, or also the basic characteristics of the examined phenomenon.

This basic definition applies also to the civil procedure. The basic investigated characteristics of the civil procedure, as a social phenomenon, are on the background of defining its conceptions a degree of interference of the parties and the court as such in substantiation of factual claims of the dispute, in the process of collecting and evaluating the evidence, and in the speed and procedural economy of the trial, while honouring or, on the other hand, resigning to a fair judicial decision (in terms of the “approximation” to the actual substantive aspects of the case). The summary of these features (or more precisely, the prevalence of

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their phenomenal aspects, i.e. the manifestations of these features in the normative legislation) defines the conception of civil procedure.

It is understandable, as well as regards all theoretical constructs, that it is not quite possible to have totally "pure" manifestations of one or another conception of civil procedure. Like any objective law, even this area is subject to cultural, sociological and, in particular, political influence to such an extent that it is possible to state that the inclusion of certain institutions in the procedural regulation is "non-conceptual" in almost every law order – i.e. the phenomenal features of this institute are not, in whole or in part, covered with conceptual doctrinal basis for a particular conception of civil procedure. Objective law, as a normative system, is often determined more politically than we may wish and, certainly, such a system resigns to conceptually "clean" solutions in favor of proclaimed and sometimes even realistically fulfilled goals (such as the functionality of legislative solutions, the historical traditions of the law, the current social situation, etc.).

Nonetheless, this does not change the fact that deviation from specific institutes does not necessarily mean deviation from the conceptual basis of legislation.

Hence, we try to briefly describe the different conceptions of civil procedure, compare their functionality and importance, and, through the prism of the theoretical conclusions, answer the question whether the recast civil procedure in the Slovak Republic withstands relatively strict criteria for definitional features of its "conceptuality".

2. A few notes on terminology

The term "conception of civil procedure" is a complex language term. As we outlined the general meaning of the conception above, it is now necessary to briefly draw attention to the perception of the term "civil procedure". This is not always identical with the meaning given by doctrine abroad. Nonetheless, it is no self-purpose play with words, but the essence of understanding the fact that the conception of civil procedure is in its nature the conception of contentious proceedings.

Our doctrine of the civil procedure law traditionally differentiates the civil procedure between the basic ("first instance")[3] and enforcement (distress) procedures. Contentious and non-contentious proceedings are then understood as two types of basic, first instance proceedings, which are relatively equivalent.

[3] The term "first instance" is the pendant of the Czech term "first instance proceedings". Simple translation will not be evaluated from a linguistic point of view, but from the perspective of the broader context of theoretical discourse, this term can not be regarded as correct. Whether a court has the right to find or seek, or creates or completes is a question much wider than it might seem at first glance. Since this question goes beyond the scope of this contribution, we refer to a relatively wide range of legal literature in the details. From the most recent ones, cf. Machalová, T. et al.: *Aktuální otázky metodologie právního myšlení* (The Current Issues of Methodology of Legal Thinking). Praha: Leges, 2014, p. 336

However, the Austrian, German and Swiss literature reserves the notion of "civil procedure" only to contentious proceedings.[4] Thus any civil procedural (judicial) code regulates only disputes, whereas non-contentious matters are governed by the special regulations.[5] [6]

Hence, the term "conception of civil procedure" is understood as the conception of contentious procedure. The civil procedure is hereby understood, in the Central European tradition of civil procedural law, which has made a significant contribution to defining the conception of civil procedure on the continent, as the contentious litigation. The extra-contentious litigation is usually linked to different conceptual denotation. For example, it is the denotation of "die freiwillige Gerichtsbarkeit" as for the German tradition, or, it is the denotation of "Verfahren ausserstreitsachen" as for the Austrian tradition.

3. Individual conceptions of civil procedure in the historical and legal perspective

The conceptions of civil procedure do not represent its developmental stages in the real sense. This means that the defined conceptions existed alongside each other, whereas the individual developmental stages of (civil) procedural law overlapped with these conceptions. Nevertheless, there may be noticed some "historicity" in the trends of legislative development.

Individual conceptions can be approached in a very simplified form as a dichotomy of "conception with a weak judge" versus "conception with a strong judge", whereas the adjectives used shall mean the dominance of the judge in terms of degree of interference into the trial. While the "weak" judge may interfere to a minimal extent, the "strong" judge, on the contrary, has efficient instruments for making up for inactivities of the litigants. 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 thus to "control" the procedure so that it represents the constitutional guarantees of fast and efficient proceedings. The role (and responsibility) of the litigants is to substantiate the factual basis of the dispute.

Obviously, with further approaches to the meaning of the conception of civil procedure, we may not make do with a simplified version of the explanation.

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[4] E.g. Klicka, T. - Oberhammer, O. - Domej, T.: *Ausserstreitverfahren*. Wien: Facultas, 2013, p. 3.

[5] The exception is the new Swiss Procedure Code of 2008, which regulates both contentious and non-contentious matters, even bankruptcy and enforcement proceedings. In summary, the doctrine speaks of the so-called Zivilverfahrensrecht, and the term Zivilprozessrecht reserves for so-called Erkenntnisverfahren, that is, the equivalent of our "first instance" proceedings, which, from this point of view, does not distinguish between contentious and non-contentious matters. Cf. Berti, Stephen V.: *Einführung in die Schweizerische Zivilprozessordnung*. Basel: Helbing Lichtenhahn Verlag, 2011, p. 1.

[6] For more details, see Števček, M.: *Fama crescit eundo alebo prečo sa civilný sporový poriadok nazýva Civilný sporový poriadok* (Fama crescit eundo or why is code of civil contentious litigation called Code of Civil Contentious Procedure). Zo súdnej praxe 5/2015, p. 201 et seq.

Thus, we shall proceed to a more in-depth analysis of the two basic conceptions of civil procedure, as traditionally understood by the European procedural scholarship. It is the liberal conception (or rather, with a weak judge) and the social conception (with a strong judge). Another minor, but very important, terminological note is to emphasize that the naming of these conceptions has nothing to do with the political sciences' definitions or sociological connotations of that term - that would be a big mistake. Nonetheless, these designations reflect, to a certain extent, the developmental phase of the procedure, depending on the development of social structures (cf. further text).

3.1 The liberal conception of civil procedure

Procedural law originally developed as a single set of rules for universal procedure. There was no differentiation between criminal, administrative, civil or other types of procedure. Such an understanding of the unity of procedural law (which, to some limited extent, persists in the general theory of law) found its way in the form of legislative act of Joseph II., under the rule of which the first code of procedural law in the Habsburg monarchy, the so-called "*Allgemeine Gerichtsordnung*" (hereinafter referred to as "AGO"), was *stricto sensu* adopted in 1781. The unified, undifferentiated procedure is perceived as anachronism as well as its legislative expression, AGO. However, it played its undisputed role in the development of civil procedure, although rather a negative one - in the sense that it had, to some extent, preserved the status of procedural law for quite long decades. As a result, the first[7] Hungarian "Code of Civil Contentious Procedure" (Article LIV of 1868) did not manage to emerge from underpinning historical regression in the form of institutions and rules of a unified procedure. Yet, the development of civil procedural law had already been somewhere else.

The emancipation of civil procedure from the general procedure was completed at the end of the 18th century and it fully manifested itself in the 19th century. The 19th century is characterized by continual industrialization and industrial revolution, hitherto unprecedented acceleration of social development and, in particular (from our point of view), by a huge legislative boom. It was a period of major codification efforts based on the ideas of various philosophical schools.[8] An unshakable faith in human reason, as a derivative of natural-law rationalism, 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 certain profanation of judiciary, which was being subordinated to the absolute monarch. To put it very simply, confidence in the

[7] The Provisional Code of Civil Procedure for Hungary, Croatia, Slovakia, Voivodeship of Serbia and Banat of Temeschwar of September 16, 1852, is not considered as codification in the true sense.

[8] See Störig, H. J.: *Malé dějiny filozofie* (A Brief History of Philosophy). Praha: Zvon, 1993, p. 250 et seq.

judiciary was shaken.[9] It is documented by Robespierre's famous statement that "the word law-making must be erased from our dictionary".

The conception of a "weak" judge was born. The "liberal" conception of civil procedure was born. But what was it actually?

From an institutional point of view, the litigants became the dominant elements in the trial. The judge is "condemned" to the extremely passive role of recipient of acts performed by litigants, and had no, or very minimal tools to interfere in the procedure. One can literally speak of "ownership" of the litigants in relation to the facts of the dispute.[10] Whatever and however litigants laid before the judge, the court had to accept it without reservation. The agreement between litigants was sacred and unrestrained, 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 conception dominated civil procedure throughout the 19th century, mainly in the two major codifications. The first was the French *Code of Civil Procedure* of 1806, which holds quite a special place in the history of procedural legislation - on the one hand, it was a certain continuation and preservation of the so-called *Ordonnance civile* of 1667, but on the other hand, it is also referred to as the first modern codification of civil procedure.[11] 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.[12] Despite these undoubtedly modern elements, the Napoleonic Code also contained some regressive elements, notably a consistent representation by an advocate based on an extreme conception of the principle of formal truth (also known as the negotiating principle). The liberal conception of the principle of an adversarial process based on the activity of litigants in relation to the substantiation of factual claims (factual basis of the case) concluded the role of a "weak passive" judge. This led to an unjustified length of legal proceedings, and, of course, to overpricing of the proceedings. The tax for considering the factual basis of the dispute as an individual property of litigants within the liberal conception was that the whole proceedings were considered to be in a private ownership of litigants.[13] The consequences were found reflected not only in the area of the identification of facts of the case (the extreme conception of the negotiating principle), but also in the power granted to the parties to dispose with the trial and its object – no procedural corrections by the court in relation to the change of the action, the withdrawal of the action and so on, were admitted. Even obstacles such as *lis pendens* and *res*

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[9] How many times in history?

[10] Lavický P. et al.: *Moderní civilní proces* (Modern Civil Procedure). Brno: Masarykova univerzita, 2014, p. 27

[11] Ibidem, p. 25.

[12] Cf. Van Caenegem, R. C.: *History of European Civil Procedure*. In: Cappelletti, M. (eds): Civil Procedure. Tubingen: J. C. B. Mohr, 2006, p. 88 et seq.

[13] Lavický, P. et al.: o. c., p. 26.

iudicata could have been objected only by the party and the court might not have taken these into account based upon its own motion.[14]

The most important statement that illuminates the true nature of this conception is that the liberal conception of civil procedure refused any wider interest in finding a "truth" in the proceedings but the individual interest of the litigants. Consequently, the court was passive entity; therefore, it did not represent the state's interest in such a court decision that would have been as close as possible to the substantive "truth" between the litigants, and thereupon there was no instrument in procedural legislation that would have allowed the court to correct the extremism of the negotiating principle (or more precisely, its application by the litigants).

The second key legislative work based on the liberal conception of civil procedure was the German Civil Procedure Code of 1877. All the above mentioned, *mutatis mutandis*, applies to this Code as well. However, if the French Napoleonic Code dominated in legislative level, the doctrinal level was dominated by liberal conception represented in particular by the German legal doctrine.

At the doctrinal level, the liberal conception of civil procedure was sometimes also called a **conception of procedural burdens.** In fact it namely did not recognize the existence of *ipso facto* procedural obligations (neither on the side of the court nor on the side of the parties), or more precisely, obligations of a **procedural** nature. The leading figure of this conception, which was mostly theoretically elaborated at the beginning of the last century, was. J. Goldschmidt. He argued that *de iure* there was neither obligation on the side of litigants nor on the side of court that would have been of a procedural nature. Obligations that arose in the court proceedings were, in his view, the obligations of **a constitutional nature arising from a constitutional law.** In particular, the obligation of the court to provide protection against breach or compromise of subjective rights of the parties was an obligation stemming from the content of a constitutional law (a variant of the conception of social contract).

There was also no obligation of the defendant to adequately defend his case – such an obligation was a result of the obligation to subordinate to the jurisdiction of the state and it did not arise from a procedural legal relationship, but from a constitutional law. 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**. There was no **obligation** to plead and to prove, but "only" **the burden** of pleading and burden of proof. Even the "obligation" to attend the trial and to testify was not a proper procedural obligation under Goldschmidt's conception, but merely a procedural burden imposed on litigants.

Thus, there was no procedural legal relationship between the court and the parties (or between the parties themselves), the content of which would have comprised any procedural rights and obligations. Party had no "duty" to tell the truth - as already pointed out, the party "owned" its claims and disposed with them

[14] Cappelletti, M.: o. c., p. 18.

freely (*ad absurdum* even to lie), while the procedural game was being played within the limits of procedural burdens, rather than sanction procedural obligations. Procedure law was characterized as the "hope, or prospect of something," in contrast to the substantive law characterized by the classical pandectistic "legal domination" (cf. the meaning of the concept of property law as "legal domination between a person and a thing").

A detailed analysis of the liberal conception of civil procedure, in particular of Goldschmidt's work, was carried out in Czechoslovakia mainly by Jaruška Stavinohová and Josef Macur, on which we refer to in this regard.[15]

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 jurisprudence considered the so-called conception of subjective procedural rights and obligations to be an independent conception of civil procedure that responded to the Goldschmidt's conception of procedural burdens. The representatives of this stream, especially F. von Hippel, criticized the conception developed by Goldschmidt regarding the trial as a tactical discovery of the opponent's weaknesses - positive procedural law was thus a guide for the parties to how to proceed if they wanted to gain superiority in the proceedings.[16] On the contrary, they acknowledged the existence of subjective obligations (and rights) in the process, the breach of which can be adequately sanctioned - we recall that the only sanction in the proceedings was practically a loss of the dispute. From today's point of view, of course, there is a number of obligations in the procedure, which are also sanctioned only by the loss of the dispute (e.g. the burden to provide truthful and complete factual arguments, as shown by the following text, is also a procedural obligation, but it is inconceivable to enforce it in the form of a classical sanction such as a fine).

From this perspective, the European procedural scholarship recognizes a compromise solution of the 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.

Together with other attributes, not less important for the development of civil procedure, this modern stream forms in fact the so-called social conception of civil procedure.

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[15] Stavinohová, J.: *Občanské právo procesní. Řízení nalézací* (Civil Procedural Law. First Instance Proceedings). Brno: Doplněk 1998, p. 18 et seq. Macur, J.: *Povinnost a odpovědnost v občanském právu procesním* (The Obligation and Responsibility in the Civil Procedure). Brno: Masarykova univerzita, 1991, s. 17 et seq.

[16] Stavinohová, J.: o. c., p. 27 et seq.

3.2 The social conception of civil procedure

During the 19th century, the pace of the 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 led to an increasing pressure on the system of procedural law, which gradually ceased to be effective. This trend was due to the consequences of the ongoing liberal conception of civil procedure, particularly as regards the excessive duration of litigations. In short, the system stopped working. The growing social and doctrinal criticism resulted in reform efforts in the field of civil procedure.[17]

These doctrinal efforts were linked with the contemporary Austrian school of civil procedure. The historical figures worth mentioning in this context are two – Anton Menger and, above all, Franz Klein.[18] Klein´s famous article *Pro futuro* became 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 attracted the professional public so much that he was later approached by the *Justizministerium*, where he became a section director. As a result of his work within the Ministry was a monumental legislative work in the area of civil procedural and enforcement law[19], which affects particularly (but not only) the Central European legal area up to these days.

Klein's *Zivilprozessordnug* – Act no. 113 of 1895 (effective from 1st January 1898) and his *Exekutionsordnug* – Act no. 79 of 1896, are the legislative products of "his" conception of civil procedure (in literature Klein's influence is so significant that the social conception of civil procedure is also referred to as the "Klein's" 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 was also substantially redrafted to fit the Klein's paradigms. Social concept became a

[17] This, of course, does not mean that liberal conception of civil procedure was completely abandoned from day to day. Legislative and doctrinal models coexist practically until present days. The emergence of the new conception can be schematically explained by overcoming the original conception from which it emerges, and in a sense, also follows it.

[18] Proponents of the social conception of procedure, not just the civilian one, included also other important legal theorists, among others, the famous Gustav Radbruch. On the individual representatives of the social conception and doxographic sources see, e.g. Brehm, W.: *Die Bindung des Richters an den Parteivortrag und Grenzen freier Verhandlungswürdigung*. Tübingen: J. C. B. Mohr (Paul Siebeck), 1982, p. 13.

[19] Cf. terminological note on the meaning of the concept of civil procedure, i.e. the perception of the contentious proceedings as a civil procedure.

dominant trend in the European legislation[20] and the inspirational source for most modern codifications.[21]

What was so new about Franz Klein's ideas?[22] Above all, he was leaving the liberal conception of civil procedure, in which the main function of the trial was to protect the individual interests of the parties. The essence of the trial was, according to him, something else – he claimed that there is a wider, 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 – every dispute before the court is perceived by Klein as a so-called social evil, which (in Knapp's terminology) disrupts homeostasis of the society. It interferes with the natural *status quo*, and therefore it is in the interest of society to remove this evil in the form of litigation. The civil procedure thus acts as a means of ensuring the "general welfare" (i.e. *Wohlfartsfunktion*[23]).

These theories result in Klein's theory to two basic postulates about how the litigation as a social evil should be removed:

i) It should be removed **as quickly as possible.** Thus, the Austrian ZPO contains an instrumentarium of procedural options for the court to speed up the 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 in order to eliminate the negative traits of the liberal trial. The court (the judge) represents the interest of society in resolving the conflict; therefore it is also the responsibility of the state, acting through the judge, to achieve the decision as quickly as possible.

ii) The result is to be **as fair as possible.** The social conception resigns to "the ownership of litigants" in relation to the factual basis of the dispute. The "strong" judge can not be left in the position of a passive recipient of parties' claims. Still, the basic initiative is up to the parties, which are obliged **to truthfully and completely** substantiate the facts of the case - however, the court has authority **to request explanations and the authority to query** the facts of the case with respect to some corrections and interferences. Therefore, the court is not bound by the substance presented by the parties, but has the authority to intervene by

[20] E.g. see van Rhee, C. H. – Verkerk, R.: *Civil procedure*. In: Smiths, J. M. (ed): Elgar Encyclopedia of Comparative Law. Cheltenham, 2006, p. 123 et seq.

[21] On the enormous impact of Klein on the European civil procedural law, cf. a great concise essay of Professor Rechberger. Rechberger, W. H.: *Die Ideen Franz Kleins und ihre Bedeutung für die Entwicklung des Zivilprozessrechts in Europa*. Ritsumeikan Law Review, No. 25, 2008, p. 101 et seq.

[22] In literature, his influence consists not in creating a revolutionary new paradigm, but mainly in the fact of combining the existing ideas into a functional unity fulfilling difficult criteria of the social conception of civil procedure. Cf. Fasching, H. W.: *Die Weiterentwicklung des österreichischen Zivilprozessrechts im Lichte der Ideen Franz Kleins*. In: Hofmeister, H. (ed.): Forschungsband Franz Klein (1854-1926). Leben und Wirken. Vienna 1988, p. 101 et seq.

[23] Fasching, H. W.: Lehrbuch des österreichischen Zivilprozessrechts. Wien: MANZ 1984, p. 22.

> asking questions, asking for clarification and, above all, in the context of free evaluation of evidence, **the court takes a careful look at everything that came to light within the proceedings.** The administration of justice is thus projected in the form of the 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 proportions of the litigants as possible.

These features can be summarized as "strengthening the role of the judge and limiting the party's role".[24] This basic postulate is, of course, only a starting point for all that the Austrian Civil Procedure Code brought to the European legal culture. We remind that the Klein's Code was applied in Czechoslovakia until the end of the so-called legal dualism in 1950 in the Czech part of the Republic, which means that it was being effective in our country for more than 50 years. Similarly, the modern Hungarian Civil Procedure Code of 1911 (Rule I/1911) had already been influenced by Klein and his ideas.[25] This historical link has a dual meaning.

The first one consists in a reasonable degree of continuity with institutes that are not completely unknown to broader legal awareness. In spite of the violent discontinuity in the development of our law during socialist legal realism, we do not create anything "on a greenfield site" (with regard to the existence of the First Republican legal doctrine and rather rich case law) with the return to the certified institutes. Though, a **reasonable degree** of inspiration must be emphasized.

The second historical and legal significance of the real functioning of the Klein's conception of civil procedure in our territory is that some of the institutes and paradigms of the original Klein's conception were intuitively taken over by the socialist codifications of civil procedure of 1950 and 1963. As an example, it is possible to refer to the obligation to truthfully and completely substantiate the facts of the case, the obligation of the court to advise the parties, the conception of free evaluation of evidence etc. However, many of these institutes were formalized, circumscribed, deprived of their original meanings and context. When we add this to the radical doctrinal deviation and the related deviation of case law, the result is the present state where, from a conceptual and institutional imbalance, we come (at least) to misinterpretation of the functioning of some of the institutes, and quite often to totally incorrect and unsustainable conclusions. As an example, it is possible to refer to the constant case law dealing with the relation between the declaratory action and the action for performance in the light of *res iudicata* – conclusion, that a final judgment on performance constitutes *res iudicata* in relation to a declaratory action, is simply totally incorrect and unsustainable. This phenomenon is caused due to the absence of a functional legal regulation of the

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[24] Lavický, P. et al.: o. c., p. 29.

[25] See Kengyel, M.: Der Einfluss der österreichischen Zivilprozessordnung auf die ungarische Kodifikation. In: Bittner, L. – Klicka, T. – Kodek, G. E. – Oberhammer, P. (eds.): Festschrift für Walter H. Rechberger zum 60. Geburtstag. Wien: Springer, 2005, p. 239 et seq.

interlocutory judgment and due to "forgetting" on doctrinal conclusions linked with the Klein's conception of civil procedure. Nevertheless, countless examples can be found.

These and similar questions imply another fundamental question – is it desirable to be inspired in legislation by conceptual and methodological assumptions of positive law?

4. Do we need a conception of civil procedure?

Obviously, the reader shall not be satisfied or convinced by the one-syllable answer to the question. Nevertheless, at the very beginning of this part of our considerations we may predict that the answer will be one-syllable. The clear definition of conceptual basis and its consistent legislative implementation have a huge interpretative reach. Theoretical postulates thus merge in with the practicality of their application. If we have a clearly defined conception of legal regulation, it greatly simplifies the process of interpreting law primarily in the application range.

The current legislative trend, which seems to be characterized in many ways as pitiful, has resigned to comprehensive conceptual questions. The outcome of the legislative process, not only in the field of civil procedure, is the non-systemic search for answers to alleged or actual application problems and "problems". Shallow forming of individual sections of case character leads to confusion in practice. The consistent interpretation of law on doctrinal, propaedeutic or application level is practically impossible due to caused absence of values in the legal regulation.

If our "experimental legislative laboratory" is gradually moving away from the European standard, we are going to be deprived of its effects in a wider, at least, central European legal context. If our legal environment is going to be transformed into some hybrid hardly comparable to the rest of the world, it is about to be difficult to interpret the purpose and the sense of legislation.[26] The deficit of systematics and conceptuality in the legal environment is the problem not only in Slovakia. It is a common denominator of all countries of the so-called Eastern bloc. Doctrine's call for a clear and defined conception is evident, for example, in the Czech Republic.[27]

We are therefore convinced that the civil procedure law has to be anchored in a standard conception. Therefore, if we pointed out the sketch of the individual conceptions of civil procedure, it was not an end in itself. The new legislation of civil procedure in the Slovak Republic calls for the social conception of civil procedure that has been dominant in our legal environment from a comparative and historical point of view.

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[26] With a bit of exaggeration, we can mention in this context the quotation that it is hard to find a black cat in a darkroom, especially if there is no cat.

[27] Lavický, P. – Dvořák, B.: *Pro futuro*. Právní rozhledy 5/2015, p. 156 et seq.

5. Social conception of Franz Klein in the Slovak Republic

The new Slovak recast civil procedure is claimed to be 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 specific legal rules of the civil contentious litigation.[28]

The above-mentioned paradigm consisting in the restriction of the parties' domination is in the social conception achieved by laying down **the obligation to truthfully and fully describe facts** (i.e. substantiation of factual claims). The Civil Contentious Procedure Code imposes this obligation on the parties in several of its provisions:

i) Sec. 132(1) contains a standard rule that, in addition to the general requirements, the action is to contain also the true and complete description of the relevant facts.

ii) Sec. 150(1) formulates a general obligation of the litigants to truthfully and completely present substantiate and decisive facts concerning the dispute.

iii) 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 described as one of the emanations of the idea of a strong judge and, at the same time, as a limitation of parties' domination with respect to the facts of the dispute. This rule (as well as the rules mentioned in *sub* i) and ii) are to be interpreted as a **legal obligation, non-observation of which has in the concept of a strong judge the effect of procedural sanctions.** The procedural sanction in this case is the loss of the dispute if a "strong" judge finds out the failure of the party to fulfill such an obligation while evaluating the evidence. The procedural sanction of the above mentioned legal norms is thus *ipso facto* a threat laid down in Sec. 191: *Court takes due account of everything that came to light during the proceedings.* The real sanction is *largo sense* the loss of the dispute – namely the judge may take into account the breach of procedural obligations by the litigants.

Essential 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 is not dependent on the "parties' domination" – albeit parties have an obligation to substantiate the factual claims according to the negotiating principle. At the same time, they also carry the burden to provide truthful and complete factual claims. In order to achieve the social purpose of the procedure, which is a fair judgment approaching as much as possible the "real" substantive state of affairs, the judge has at his disposal a relatively strong instrument - the so-called **authority to request explanations and the authority to query.** Still, this is only a modification of the classical negotiating principle in an adversarial trial, i.e. the principle of formal truth, being realized by the parties which are to "persuade" the

[28] Act no. 160/2015 Coll. Code of Civil Contentious Procedure (hereinafter referred to also as the „Code of Civil Contentious Procedure" or the „Code").

judge about "their" truth based on the weight of their statements and arguments. It is a judgment based **on the actual state of affairs, not on the real state of affairs.**[29] However, the social function of the procedure places increased demands on judgment in the context of the actual state of affairs.

The Civil Contentious Procedure Code standardizes the authority to request explanations and the authority to query (and correlative obligation to advise the parties) in the Sec. 150(2), under which a court *may ask the parties for further factual allegations to detect the essential and decisive facts.* The concept of a strong judge is absolutely clear from this provision - the court may not "rely" or "satisfy" with claims of the parties - should the party not provide the judge with a convincing and satisfactory response, the court may, while assessing the evidence, apply the appropriate procedural sanction, consisting in a loss of the dispute, or in restriction or other limitations of the rights sought by the plaintiff (or the defendant). This, of course, corresponds to a very strict requirement for a court to provide **proper grounds for the judgment**. Even in this issue, the new Code has brought about major innovations (cf. Sec. 220), consisting in the obligation of the court to deal with the established case law in the pertinent matter, and so on.

The concept of a strong judge and of parties in an adversarial position has changed the nature of the litigation in a fundamental way. The Code of Civil Contentious Procedure has turned the judge from the "sphinx" or rather someone locked up in the imaginary ivory tower to an actively participating entity that leaves the initiative over to the parties under the negotiating principle, and, at the same time, significantly interferes with the litigation at two levels:[30]

i) in terms of adherence to procedural economy - the court is a thoughtful guardian of the "hourglass", which, according to the rules of the fair trial, requires the smooth and due proceedings. The role of the judge is thus mostly to guarantee the rules of "the game" (dispute), which immanently include the requirement of a timely and effective justice. To ensure this function of the litigation, the court has at its disposal effective tools to "speed up" the proceedings - but rather, in this context, we should talk about maintaining the constitutional limits of a fair trial. The most important of these tools is newly established institute of judicial concentration. On the one hand, this institute may apply in the "forward" way (it acts as an anticipatory, prospective judicial concentration), and, on the other hand, it may apply "backwards" (it acts as a kind of retrospective judicial concentration).

Prospective judicial concentration means a limitation of the **possible**, i.e. **future**, factual claims and evidence of the parties' - in the Civil

[29] 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 civil procedure, the notion of extra-contentious procedure is being regulated in a separate Code on Civil Extra-Contentious Procedure.

[30] Some trends have already found their way into procedural legislation over the past decades (e.g. legal concentration of the proceedings, elements of adversarial trial, etc.), but the recast civil procedure respects the European trends much more consistently and conceptually.

Contentious Procedure Code this is formulated in provision of Sec. 181(4), under which should the party be unable to substantiate essential and decisive facts, or to fulfill its obligation of presenting evidence to the court, the court may specify a time period for additional fulfillment of that obligation, after expiry of which the court may no longer take into account later claims or evidence proposed by the party. As a matter of course, appropriate justification of such a procedural penalty is to be offered in the grounds for decision within the written judgment.

Retrospective Judicial Concentration means a possibility for the court to disregard **already submitted** evidence or the alleged facts, unless submitted in a due time - that is, if the party acting with due diligence (*nota bene* with professional care, when speaking of an attorney) could have submitted these earlier and the court evaluates such late submission as purposeful, infringing the constitutional guarantees of fast and efficient protection of rights (cf. the normative form of retrospective judicial concentration in Sec 153). It goes without saying that the concept of a strong judge entrusts the evaluation of these circumstances to him (judge); No conception can thereby conceptually assume any biased approach by the judge. Concerns of a possible misuse of this institute are in our opinion not pertinent. Should there be an excess on the side of the court of first instance, it is to be remedied in the second instance (one can not, of course, exclude constitutional or international legal remedies).

ii) In terms of distributive social justice. This element constitutes an interference into finding of reliable factual (substantive) basis of the dispute as a part of material guidance of trial, as explained in the text above.

A rearrangement of procedural rules is being denoted in the contemporary European scholarship of procedural law by various names, but as correctly pointed out, the essential is the content, not the name for this situation.[31] From the point of view of the instructional nature of the new rules, especially in the field of collecting and evaluating the evidence, we refer to the designation "*Kooperationsgrundsatz*"[32], i.e. some form of procedural cooperation between the court and the parties in fulfilling the fundamental purpose of the civil procedure, which is the fair and effective protection of subjective rights (cf. Article 2(1) of the Code of Civil Contentious Procedure).

Given the scope of this article, other key institutes of the social conception of civil procedure projected into the Code of Civil Contentious Procedure are to be mentioned only in short. First of all, it is the consistent application of the disposition principle – under the Code, there is a little that can be done by the court without the parties' proposal, by which the court is bound. For example, in the appellate proceedings, the disposition principle implies the prohibition of the so-called *reformatio in peius*, which has been so far recognized only in criminal

[31] Lavický, P. – Dvořák, B.: o. c., p. 155.
[32] Roth, M. – Holzhammer, R. – Holly, A.: *Zivilprozessrecht*. Wien: MANZ, 2012, p. 12.

procedural law (in the new Code it is laid down in the basic principles, cf. Article 16 (3) of the Code). A more consistent legislative implementation of the principle of equality of parties is also reflected in the newly-incorporated judgment due to the plaintiff's default; important manifestation of the principle of procedural co-operation is newly introduced mandatory obligation for the court to provide its legal opinion on the pertinent matter (which is about to greatly increase the predictability of judicial decisions), etc.

6. Conclusions

We have tried to demonstrate that the new Slovak codification of civil procedure is relatively a consistent legislative implementation of the modern, social conception of civil procedure. It is literally a paradigm shift, a change in the perception of modernity and the functionality of the civil procedure. To a reasonable extent (and within its proper meaning) it also represents the functionalities of judicial activism (i.e. of an active, strong judge) as the modern European scholarship of procedural law has been tracing out for a long time. This concept is also called *the judicial case management and efficiency.*[33]

The Code of Civil Contentious Procedure includes several tools for "effective management of litigation". However, these tools need to be understood in the outlined conceptual context of the development of civil procedural law, especially over the past century. As our procedural law (unfortunately, not just civil) had been evolving in a fundamentally different way than a way towards modernity, this task remains quite challenging for all who create a "working community of the court and parties" in the proceedings. It requires a considerable change in "procedural" thinking, in viewing at the individual institutes and the rules of the new procedure. It is self-evident and natural that this change is not about to happen immediately, from day to day, but it is necessary, under our deepest opinion, to begin with it.

Nonetheless, each legal regulation requires some time for its proper application, but not the panic of any interpretive problem that arises – because the problem inevitably shall occur, and certainly not one.

Every fundamental change namely requires the testing of its interpretation and application, often full of blind alleys and mistakes, but ultimately leading to the desired outcome. The desired outcome is thereby undoubtedly a modern civil procedure, with fast and efficient management of the dispute by a "strong" judge in the area of procedural economy and, based on the activity of the parties, in the area of the factual basis of the dispute, in the interest of the fairest possible judgment.

Everything is regulated by people. And even the best legislation does not provide for these – the legislation is just some software. Nevertheless, if those who use the software do not know the basic rules of its operation, they will not necessarily attain the desired result. The question, whether it is the fault of the

[33] See van Rhee, C. H. (ed.): Judicial Case Management and Efficiency in Civil Litigation. Antwerpen: Springer 2008.

software mentioned above, or rather the fault of its user, shall be answered after a careful assessment of the impact of the new legislation after a very long time, instead of adapting the legislation to misconduct. Neither the Germans nor the Austrians have resigned to their codes under the influence of changes in their application impact. However, this requires a lot of courage and self-reflection.

"*To face these processes is the task of law. But as soon as the law gets a little bit together and breaks loose from the mystical ideology, there are already ardent opponents with extensive generational experience to quickly maul it. The law can not be subject to artificially evoked crowd hysteria. Quies cannonica – the rest of a legal rule – is its proven method, and aggressio vulgaris – attacks of furious masses – shall not affect it*."[34]

Whether and to what extent the Slovak legal environment is ready for this, time alone will tell.

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[34] Čermák, K.: *Moskva je třetí Řím čili Filofejova doktrína* (Moscow is the Third Rome or Philotheus's doctrine). Bulletin advokacie 9/2014, p. 65.

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