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FACING THE REFORM OF THE CIVIL PROCEDURE CODE

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1. INTRODUCTION

There has been a lot to say on the efficiency of the Courts in the civil procedure code claims. The general opinion is that litigation procedures last over the reasonable time period. Even the judges ruling the cases share the general opinion.

Searching for the reasons of such a state the commentators usually point out that judges are not efficient, expert or conscientious enough. It is partially based on methodologically disharmonies and non standardizes (therefore unreliable) statistical data, partially on anonymous questionnaires done by domestic and foreign nongovernmental and governmental organization[2] and partially on the judgmental opinion of the commentators themselves derived more on the current estimate of the fact liable to be presented to the public than on the serious studying of the situation in the justice system.

It could be said that none of the sources forming the opinion and used so far have been reliable enough for the serious analysis of the reasons for the unreasonable length of the litigation procedure. The fact that even after the extra effort taken by the judges over the past few years there has not been significant improvement in the efficiency speaks as the justification[3].

As a serious professional organization aiming to assist the justice system, the Judges Association of Serbia has decided to consult the expert public, in order to, trough the expert discussion lead by judges, lawyers, Law faculty professors, NGOs and all others practicing or dealing with the litigation procedure in theory, answer some questions on certain samples of long term litigation procedure and to offer possible solution to this problem and, among others, the very issue concerning the litigation procedure. Therefore, in cooperation with the Supreme Court of Serbia and the Comparative Law Institute, a valuable project started that would unable the expert public to offer solutions for more efficient litigation procedure. Significant written material has been collected and the round table discussions were held in Nis, Novi Sad and Kragujevac with one preparing to be held in Belgrade at the time this paper was written.

This paper should present the short resume of the updated discussion on the basic guidelines of the amendments of the Civil Procedure Code.

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[2] The Report of the OSCE on the current situation in the justice in Serbia, Belgrade, 2003 is based on such questionnaires; The Report of the World Bank –Simeon Djankov, Rafael La Porta, Florencio Lopez-de-Silanes, and Andrei Shleifer, 2003, "Courts", Quarterly Journal of Economics, May 2003.

[3] See: Statistical overview of the workload and efficiency of the Courts and Judged published in the "Bulletin of Judges Association of Serbia", special theme edition no. 2/2004, Belgrade, March 2004.

2. THE BASIC PRINICPLES OF THE AMENDMENTS

The efficiency of the procedure is based on two issues. The first is the reasonable length and the other is that the disputable legal relationship is solved essentially (not only illusory) and thus harmonizes the disturbed or jeopardized system. The efficiency of the procedure in its quantity form (the length) can often be fully contradictory to other principles that the procedure should provide and that is for the party in the case to achieve lawful and righteous decision. In order to provide the real efficiency of the procedure (and not only quick one) it is necessary to reconcile these two principles. It is possible provided there could be a right measure found. If we, beside the comparative legal solutions and international standards imposing the quicker procedure, still recognize the specific conditions in our country – legal, historical, social, economical and others we can still achieve it.

Legal and political aspect

The approaching to the community of the European States, that we strive for, inevitably leads to the high standards regarding the human rights and their Court protection. It could be said that they have legal and political grounds. The European Convention on the human rights protection imposes the obligation for efficient procedure and number of the Recommendations of the Ministers Committee of the Council of Europe generally develops the methods showing the possible solutions for the implementation of the article 6 of the ECHR. When amending the CPC in order to harmonize it with the European standards the most important recommendation should be mentioned:

1) Recommendation R (81) 7 on measures providing the access to the Court;
2) Recommendation R (84) 5 on the civil procedure principle for the improvement of the justice;
3) Recommendation R (86) 12 on measures for abolishing and diminishing the overload of the Courts;
4) Recommendation R (93) 1 on efficient access to the Law and justice to the most indigent population;
5) Recommendation R (94) 12 on independence, efficiency and role of the judge;
6) Recommendation R (95) 5 on implementing and improving the appeal procedure in the civil procedure and commercial cases;
7) Recommendation R (98) 7 on family mediation;
8) Recommendation Rec (2002) 10 on mediation in the civil procedure claims.

Considering the possibilities and implementation of the above mentioned Recommendations it should be noted that CPC qualitatively provides the implementation of the Article 6 of the Convention. As for the quantity and the length of the procedure it is possible to correct some issues according to the Recommendation of the Council of Europe. Thus it should be considered that the Recommendation in order to speed up the procedure in some segments proclaim the certain rules closer to the Anglo-Saxon than continental system of the procedure codes. When considering certain amendments of the CPC according to such rules the ones fitting the current concept of the CPC should be chosen.

Comparative-legal aspect

The Civil Procedure Code was uniformly applied on the territory of the former SFRY. Upon separation most of the former Republics used their jurisdiction and amended the Codes thus adjusting them to their own needs. Due to the similar social and economic conditions BiH and Croatia are particularly interesting. BiH has decided to radically amend the Code in

concept and structure of the procedure, while Croatia decided on some more moderate measures.

Formal-legal aspect

Upon the adoption of the Constitutional Charter of the Union State SRCG the jurisdiction to regulate the civil procedure has transferred from the federative authority to the Republic of Serbia. Thus, in the formal and legal sense the condition for the Serbia to adopt its own Code has been fulfilled.

On the other hand, some amendments presume the adoption of amendments of some other regulative (Law on lawyers and legal assistance service, Law on free legal assistance, Law on public notary, Law on electronic signature, Law on postal service, organizational rules on justice department and others). Since such preconditioned regulative are not currently adopted, the possibilities of amending CPC narrowed.

Legal and historical aspect

Civil Procedure Code was established by the adoption of the Austrian procedure legal practice at the end of the IX century, which was applied in our country between the two World Wars. Regardless of the elapsed time the concept mainly the one regarding the basic procedure principles that was adopted then, essentially still provide the modern approach of the continental type. Such a tradition should be used as a basic concept for the new CPC. On the other hand, the revising of certain institutes for the purpose of more efficient procedure should be considered while not radically changing the basic concept.

Social and economic aspect

The whole social and economic background should necessarily be taken into consideration when amending CPC. The major number of cases occur or last long due to the general situation in the State, destroyed institutions, general ethic principles and mass occurrences of the unlawful conduct of the State authorities, civil disobedience and unlawful acts. Furthermore, a great number of citizens are of poor education and indigent and the State so far does not have any economical potential to provide the right for free legal assistance. Considering certain amendments of CPC the following fact should be considered - certain rules adopted in the European Union in our country could significantly burden or maybe even deny the most indigent population the right to free access to the Court. Thus the problem would not be solved but only covered up.

3. THE NEEDS AND POSSIBILITIES OF CODIFICATION

There is almost undivided opinion that the amendments of CPC should be directed towards the codification of the civil procedure including all special procedures. Upon adopting the Constitutional Charter of the Union State SRCG the formal and legal conditions for the codification in the Republic were fulfilled.

There are several arguments for the codification:

- It would wholly and thoroughly regulate all rules of the procedure and thus significantly ease the application of the Law;

- There would be thorough analysis of the current need for adopting certain rules in order to exercise certain rights regarding their characteristics (legal nature of the case, parties, monetary value and such) and such rules would not be the result of the daily political needs for exercising certain rights;
- The unique and complete regulation of the special civil procedure by one Law would provide better staging of the significance of certain legal relationship and thus avoid unequal position of the citizens when exercising their rights regarding their essential importance both for the individual and the State;
- All special procedure should be compatible with the general concept of the civil procedure and its essential principles.

On the other hand, the arguments against codification should be essentially listed as follows:

- The preparation for the codification takes a very long time since it presupposes the thorough analysis of several scientific aspect and number of already adopted regulative so the concrete results in codification could not be expected fast;
- The codification of the civil procedure, regarding their instrumental character, presupposes the stable social, legal, political and economic background, stable institutional system, that has not been fulfilled so far in our country.

Long and short term plan. Using the abovementioned arguments, there is a conclusion that there are no real possibilities to provide the valid codification soon. Nevertheless, it should be a strategic long-term objective and that there should be a parallel work on the short-term amendments of the CPC and preparation for the codification first the material and then procedure law.

4. HARMONIZATION OF THE BASIC PROCEDURE PRINCIPLE

The starting point for the analysis of the provision of CPC is its basic principles. The Law does not treat them equally even though they are equally declared. Certain principles are significantly more dominant while others are so neglected that the question if they could be considered basic at all arises.

4.1. THE VIOLATION OF THE PRINCIPLES AS THE REASON FOR THE APPEAL

Which principles are considered as most significant is evident by the analysis of sanctions for their violation.

The sanction of the obligatory revoking of the decision and the renewal of the procedure is applied for the violations of the most significant principles. In case of such violation there is and undisputable presumption of the unlawful decision (absolute violation). Thus the CPC provisions protect the following principles: assembly, objectivity, protection of the general interest, contradictory, the right to use native language and alphabet, *ne bis in idem* and publicity. Furthermore, within this group of principles a lesser significance is given to the right to use native language and alphabet (since there is no *ex officio* as a remedy

measure) and the verbal principle and publicity (since its violation cannot be the reason for the revision) and the greatest significance is given to the contradictory and objectivity principle, since their violation can be used for all permissible regular and special legal remedies.

The other group consists of those principles which violation is not absolute but certainly causes the revoking of the decision and procedure renewal. Those CPC principles are considered the foundation of the right and complete determination of the facts (inspection and investigation, free estimate of the evidence, material truth). The protective mechanisms for those principles are evidently providing the significance of the investigation and material truth principles.

The third group consists of the principles that are sanctioned indirectly trough the sanctions for other more significant ones, indirectly related (e.g. the right to expert legal assistance – trough the contradictory principle) or trough the institute of the relatively significant violation when it leads to an unlawful decision.

However, some principles are not at all or properly sanctioned. So the economic, case concentration and single main hearing principle and the principle of conscientious use of the procedure rights have been neglected.

4.1.1. Are such solutions relevant?

The total harmonization of the basic principles is neither possible nor needed – there are certainly some that should be considered more significant. The fact that the essence of the civil procedure is not only to solve the case quickly but also to provide the parties with the lawful and justified decision should not be forgotten. Nevertheless, other solutions are not only possible but also needed if we want the procedure to be more efficient and still not to the jeopardize the parties in the case:

1) There is too great a significance given to the investigation principle, the principle of official and material truth, which are sanctioned indirectly trough the official interrogation of the established facts in the appeal procedure and directly trough the sanctions of the violation of other principles (e.g. the protection of the general interest).

2) The violation of the direct and verbal principle, as a “mean” for the Court to investigate the disputable material is not necessary to be acknowledged officially but should be left at the active disposition of the party provided he/she is not satisfied by the conclusion of the Court based on the presented facts.

3) The same can be said for the violation of the publicity principle since it provides the open trial in order to have a public control of the Court’s objectivity towards the parties even if they do not object to it.

4) The violation of the assembly principle in the first instance procedure does not have to be absolutely relevant since the jury judges as legal layman show little interest and do not influence the outcome of the case. There is an open issue if the assembly principle is at all justifiable in the first instance procedure.

5) The right to the use of native language, whose purpose is to provide the equal possibility to the parties to argue their cases, is protected trough the strict sanction of the violation of the contradictory principle so there is no need for it to be indirectly sanctioned trough the violation of the absolute relevancy.

6) The principle of disposition, inspection and case concentration and single main hearing principle and the principle of conscientious use of the procedure rights due to the fact that there is no relevant protective mechanism and too strict sanctions of other so to say

"contra" principles, are almost symbolic. Thus, there is a significant disbalance of the key procedure principles to the damage of its efficiency.

4.2. THE EQUALITY OF THE PARTIES

When providing the equality of the parties the most significant is the *principle of objectivity* that provides equal treatment of the Court to the parties and the *principle of disposition and inspection* that provides the right to the parties under the same conditions, without the Court intervention for one or the other, to influence the material and the outcome of the case on their own conduct and the *contradictory principle* that provides equal rights to the presentation and arguing the case.

The great significance is given to the principle of teaching the illiterate party and the right to legal assistance (provides the equal position of the illiterate party), the right to free legal assistance (provides the equal position of the indigent party) and the right to use native language (provides the equal position of the party that does not know the official language). Nevertheless, they are all provided trough the contradictory principle since it enables each party to argue and present her/his case undistracted.

4.2.1. Do the current solutions provide equality?

The contradictory and objectivity principle are properly established and protected. Nevertheless, the disposition and inspection principle are not properly practices, since CPC prescribes too many exceptions (official principle and investigation principle) that significantly lessen the essence of the principles and jeopardizes the equality of the parties in the case. It reflects all spheres of the parties disposition: when *exercising the procedure* (the obligation of the Court to teach the illiterate party, already taught of her/his right to legal assistance or that already has the assistance, of procedure and the consequences), *the definition of the subject or material of the case* (the obligation of the Court to assist the party in writing the petition, even the lawsuit) and *collecting the material* (the obligation of the Court to ask for the clarification of the arguments and to officially collect and determine the evidences).

4.3. THE INFLUENCE OF THE PRINCIPLES TO THE EFFICIENCY OF THE COURT PROTETCTION

The lawful and righteous decision and essential solution to the disputable case are most important in the Court procedure. Nevertheless, each party has to exercise her/his right to efficient court protection during reasonable period. If the case is not closed within the reasonable period there is no purpose of the Court protection, however the decision is lawful and righteous. In order to achieve such a protection the key principles are economic, case concentration and principle of conscientious use of the procedure rights and the second instance principle (the remedy relevance).

4.3.1. Can the procedure be more efficient and not to jeopardize the exercise of the rights?

Even though the CPC proclaims the economic principle, case concentration and principle of conscientious use of the procedure rights the current solutions are providing impermissibly low significance. It leads to the long procedure without the possibility of the

Court to affect the duration. Other solutions are possible and they should not jeopardize the parties in the case:

1) The absence of the relevant protective mechanism in the economic principle and the principle of conscientious use of the procedure rights gives the parties vast possibility of abuse and use of "tactics" when presenting the case. Even more so, since the case concentration of the procedure is exercised with the method of so called "appropriate order" with no preclusion for the separate procedure which provides the possibility in the first instance procedure to exercise the same phases several times and to abolish all already conducted procedure (by filing contra law suit, changing the lawsuit, arguing some material legal objections and unjustifiably arguing some new fact and evidences that significantly change the case etc).

2) The rule of the possibility to present new facts and evidences trough the appeal with no limits whatsoever is possible to revise and condition it by absence of the guilt on behalf of the party is presenting them in such a late phase of the case.

3) The possibility of the second instance Court to, with no limitation, cancel several times the first instance decision with no control over its own conduct in the appeal, in practice makes the appeal, as a legal remedy, irrelevant since it is only the mean to reinvestigate the conduct of the first instance court and does not produce the final solution of the case. This is possible to change if the number of canceling is limited for the cases where the appeal was not changed during the case and the obligation is imposed on the second instance court to issue a final verdict after two cancellations. It is necessary to work on the rules on the permissible number of cancellations, on the possibility to present new facts and evidences with the second instance court as well as on the sanctions for the inappropriate and nonprofessional first instance judge.

4) Low limits for the revision, great number of revision reasons and the possibility for the public prosecutor to vastly intervene with the demand for the legality protection leads to burdening the Supreme Court with a large number of cases which diminishes the efficiency of the protection in the procedure of the special legal remedies due to the impossibility of the highest court to pay particular attention to the most significant cases.

4.4. THE SIGNIFICANCE OF THE PRINCIPLES FROM THE ASPECT OF THE PROTECTION OF THE GENERAL INTEREST

The civil procedure is conducted for the protection of the individual rights and interest of the parties in the case. The court, however, should take care of the protection of the general interest regarding the forced regulations that the conduct of the parties make inadmissible. Such corrective function court exercises trough the ***official principle*** and ***investigation principle*** that are evident trough the provisions that obligate the court to intervene with the conduct of the parties – not to admit the arguments contradictory to the forced regulations, public system and ethic rules, and to determine the facts and to provide the evidences that parties have not used.

Nevertheless, it could be said that CPC provides too great a significance to the official and investigation principle, so that they appear not only to be a corrective measure but also to dominate the procedure. Besides, the vast intervention of the public prosecutor is permissible to demand the legality protection and it is overcoming the general interest and disturbs the sphere of individual rights and interest of the parties. The majority of the expert public opinion is arguing to change such rules in order to find the right measures for the significance

of the official and investigation principle – the measure of the general interest (art. 3. par. 3. CPC).

4.5. THE SIGNIFICANCE OF THE PRINCIPLES FROM THE ASPECT OF THE DETERMINATION OF FACTS

4.5.1. Preponderance of the investigation and material truth principle

Even though it should only be a corrective measure for the protection of the general interest, the investigation principle, according to the current solutions, dominates over the arguments of the case in such an extent that the procedure in its final outcome sums up to an investigation. This is also the dominative function of the material truth principle that in its absolute essence is nearer to the philosophical category and in practice is almost impossible to achieve, since almost any conclusion of the court for the disputable fact can be reasonably doubtful and can cause the renewal of the procedure.

4.5.2. The principle for the free estimate of the evidence

CPC establishes such a system of the instance control that shows great mistrust in the free estimate of the fist instance court to which the evidences are directly presented. Besides, this principle in the law text could be more detailed, since it is not clearly formulated to which extent of probability should a certain fact be reasonably doubtful. It is left for the standard of the best jurisprudence. The consequence is that courts, instead to investigate the circumstances to the measure that dismiss reasonable doubt, are exhausted trying to dismiss any doubt. The current rule on the documenting the proofs that exists to solve "unsolvable" situation is almost symbolic. Since such a state in long-term experience only leads to the long procedure there should be greater significance given to the rule on documenting the proofs. It a reasonable, clear and efficient logic on the estimation of the case documents that quickly leads to the final outcome of case – *it is up to the parties to, during the reasonable time, convince the court that something "is" or "is not" or not to convince the court of such – the result is the same either way, the case closes.*

4.5.3. The significance of the direct principle

The direct principle (and verbal) is too significant when determining those facts that are relevant to some procedure solutions (recurrence to the previous condition, deciding on some procedural obstacles), when admitting written evidences (expertise, written documents) or during the hearing of already heard witnesses and parties. The rules on determining evidence is possible to change to a certain less significant extent for the direct presentation where it is not absolutely necessary. Regarding the verbal principle, it is possible in some cases to, instead of obligatory hearing, authorize the Court to schedule hearings as it sees fits (investigating procedural obstacles, recurrence to the previous condition, the petition for the case renewal etc.).

4.5.4. New facts and evidences

One of the major problems affecting the long procedure is the authorization of the parties, with no limits whatsoever, to present new facts and evidences during the regular proceedings up to the final verdict of the case and even in the appeal procedure. This is also the essence of the dominating material truth principle. In practice, this rule provides vast possibilities for the abuse in as much as it allows the party to be totally passive during the first instance procedure (which as a rule he/she is) and to exhaust the court which is trying to

"investigate" whether there are some more facts and evidences that are not presents and then the party activates them trough the second instance court regardless of the fact that the first instance court has done very conscientious job. This all leads to the prolongation of the procedure. Therefore, the provisions of the CPC should more precisely define new facts and evidences. The possibility of their presentation after the preliminary and first hearing for main hearing should be more strictly conditioned. The possibility of their presentation in the appeal procedure should be allowed only under the condition as currently prescribed in the procedure for the recurrences (as in the commercial cases). The situation when there is a case with the second instance court should be specially considered and such a procedure should be limited to the right to present new facts and evidence.

5. THE ROLE OF THE COURT AND EFFICENCY OF THE PROCEDURE

There have been some discussions lately regarding the efficiency of the courts that was related to the efficiency, expertise and conscientious of the judges. It is beyond doubt that the efficiency of the court protection depends on it as well. Over the past few years there have been great effort of the individual judges to update their work and it was somewhat effective since the efficiency of the court was higher and the total number of the cases was lessened. However, such a work, beside the fact that it exhausted judges did not result in the court efficiency. Thus a question imposes: up to which extent the judge and the court, within the current system of the procedural rules, can affect the length of the procedure and how long will it take to update the courts?

It could be said that the general estimate, due to the significance that CPC trough certain provisions has imposed on the official and investigation principle, court has significantly more active role in the procedure which is necessary, even more than the parties and also has the complete responsibility for the parties disposition: when ***exercising the procedure*** (the obligation of the Court to teach the illiterate party, already taught of her/his right to legal assistance or that already has the assistance, of procedure and the consequences), ***the definition of the subject or documents of the case*** (the obligation of the Court to assist the party in writing the petition, even the lawsuit) and ***collecting the material*** (the obligation of the Court to ask for the clarification of the arguments and to officially collect and determine the evidences).

The consequence is that the court, instead of directing its effort to consider the case documents, discussion and deciding, looses the valuable time to investigate the subject of the case and ordering the parties to argue and clarified the insufficient material or submit evidences. The eventual failure of the first instance court to exhaust all procedural possibilities will lead to the cancellation of the decision whichever it was.

Such a procedural role of the court provides the parties vast possibilities to prolong the procedure with their passive behavior – which they do as a rule. The court is left with the obligation to, trough the order of the conduct, first ***assist*** them to write the lawsuit (art. 109. it. 1.[4] related to art. 186.[5] CPC), then to investigate and ***assist in the determination of the facts*** of

[4] Art. 109. para 1 CPC: "If the filing is unclear or does not contain all the information necessary to allow the proceedings to continue, the court shall advise the party submitting the filing and **assist them** to

the lawsuit (art. 298.[6] in conjuction with Art. 7. para 1.[7] CPC) and in the end to investigate the evidences the parties posses and to determine which of the evidences should be presented at the court (art. 7. para 3.[8] CPC in conjuction with Art. 355. para 1[9] CPC). Furthermore, this does not end here. Afterwards, party has the possibility, with no limits whatsoever, to present completely new facts and evidences in the appeal. That will, as a rule, lead to the cancellation of the decision and recurrence of the procedure (Art. 355 para 2 [10] CPC) and all judge's effort so far will be worthless and the parties will be provoked to express their dissatisfaction, regardless of their own unscurpulness.

In such a procedural role system the lawyer beginner and even the illiterate party, with no particular knowledge or effort can significantly prolong the case of the experienced judge no meter how expert or efficient he/she is. And then it is fairly justifiable to ask a question on the responsibility of the State that has not provided the procedural law that determines efficient court protection.

Civil Procedure Code is judge's main mean to provide efficient court protection and it has to be amendment in order to equally determines the obligations and responsibilities of the court, lawyers, legal assistance service and to clearly define who initialize the case and provides the material, who provides legal assistance and who conducts and rules the case.

6. THE ROLE OF THE PARTY, PARTY DISCIPLINE AND RESPONSIBILITY FOR THE PROCEDURE AND OUTCOME OF THE CASE

The interest of the parties is exercised or protected in the civil procedure. It is only natural that the parties are the ones most interested in the procedure and the outcome of the case and in their active participation. Court as an empowered state authority that does not bow to a party's interest is responsible to conduct the procedure and decide on the parties' demands, intervening for corrective purposes only when necessary to protect the general interest, if the prohibited parties' disposition contradicts it. Is this currently the case?

Trough the current provisions of the CPC there is no appropriate correlativity between the procedural rights and obligation of the parties regarding their disposition since their right

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complete or correct the filing. The court may do this either by inviting the relevant party to come to the court or by sending back the filing to said party to allow for corrections to be made."

[5] Art. 186. CPC: "A law suit should contain a claim concerning the subject matter of litigation and additional claims, the facts on which the plaintiff bases the claim, proof of such facts and other information necessary for any filing (Article 106)."

[6] Art. 298. CPC: "The presiding judge will take care, by asking questions or by other appropriate means, that all decisive facts are presented in the course of proceedings, that incomplete allegations of the parties about significant facts are supplemented, that the means of evidence referring to allegations of the parties are designated or supplemented and, in general, that all explanations necessary for establishing the facts significant for decision-making are given."

[7] Art. 7. Para 1. CPC: "It is incumbent upon the Court to ascertain completely and correctly the disputed facts validating the claim."

[8] Art. 7. para 3. CPC: "The Court may require presenting of other evidence than proposed by the parties if such evidence is significant for deliberation.

[9] Art. 355. para 1 CPC: "Incorrectly or incompletely established factual state exists when the court establishes certain decisive fact incorrectly, or when it does not establish such fact at all.

[10] Art. 355. para 2 CPC: "Incompletely established factual state either exists when new facts and evidences indicates that.

and obligation to actively affect the procedure are not properly sanctioned. Almost any failure of the party (out of ignorance, negligence or malicious intention) is at the end correctable on account of the court since in most of the cases there is some obligation of the court (official principle) for a corrective conduct in case the party fails to follow certain procedural rule. Due to the domination of the investigation and material truth principle this is most prominent in the case where the parties' disposition should be totally dominative – when presenting and collecting the facts. The consequence is that the parties and a number of unscrupulous lawyers often abuse their positions leading the litigation court to a situation to investigate what is it exactly that a party wants and claims, which unnecessarily burdens the efficiency and quick solution of the cases.

Essentially, the amendments of the CPC should provide the affirmation of the parties' role. Bering in mind such a role, the parties' discipline is of a great significance – the efficiency of the court largely depends on whether the party shall use his/her procedural authorities. Parties' discipline cannot depend on the parties but the court should posses the efficient procedural mechanisms to prevent the abuse. Such mechanism, on one hand can be direct, trough the loss or limitation of certain procedural authorities to sanctioned negligent behavior of the parties and on the other hand to sanctioned them with the fines for the most significant violation of the procedural authorizations or for the conduct that can be qualified as the in contempt of the court. The current solutions given by the CPC are easy to avoid and apparently are not enough to establish the optimal parties' discipline that could lead to the conscientious exercise of the procedural rules.

6.1.1. Communication of the court and parties

In order to conduct the undisturbed procedure, the first condition is the efficient rules on delivery. The current provisions of the CPC do not provide it since they do not respond to the current social background and unfortunately the diffusion of the civil disobedience. A great number of citizens and entities do not have proper addresses and the delivery services are given incorrect data. There are also a number of other abuses. Therefore, great number of cases cannot even be started with.

6.1.2. Unscrupulous litigation

In order to provide that even the party not to his/her benefit uses the procedural rights and authorization conscientiously there has to be such a system of sanction that unscrupulous party at the final outcome can gain less with the abuse than can loose with the sanction. Bearing in mind current solution there is a need to prescribe stricter consequences both for the omission of the timely conduct in the procedural and conduct for other inadmissible motives.

6.1.3. In contempt of the court

The in contempt of court is wide negative occurrence. It can be seen in the worst abuse of the procedural authorizations, disturbing the order at the main hearing, threatening and insulting the court or other parties and various kinds of pressures. The strict sanctions of such a behavior are not only the need for the parties' discipline but wider they are the need to preserve the authority of the court which is already disturbed, mostly because there is no appropriate protective mechanism. Such behavior should be named with the regulative as such and high fines and when such a measure needed by the denial of the right to appear at the hearing should decisively and strictly sanction it. The system of sanctioned and method of their use should be such *not to exhaust the court and not stray it from the conduct* of the case and when a party show utmost in contempt of court, sanctions *have to be obligatory.*

7. THE ROLE OF THE PROXIES

The more active role of the parties in the case, greater impact of their disposition and greater responsibility for the conduct (or failure) necessarily leads to the prescription of the higher standards regarding the right of the illiterate party to the expert assistance and certainly to the greater responsibility of the lawyers and legal assistance service. This first calls for the amendments of the CPC but the amendment of the systematic solutions in the current regulative regarding the lawyer and legal assistance service is also desirable.

7.1.1. Postulate competence of the party

Bearing in mind the current social status of the population and (im) possibility of the State to provide the efficient free legal assistance it seems that it should be unrealistic to impose the party the obligation to hire the professional proxy. It would not solve the efficiency problem in its essence but it should only be covered up since a large number of citizens would be de facto denied the access to the court. Therefore, it seems justifiable so far to keep the solution for each party to present itself at the court. Nevertheless, there are some justifiable exceptions that should be considered by the means of prescribing obligatory representing by the proxy in the most significant cases and in the remedy procedure in a way that the right of the party to access the court should not be denied.

7.1.2. Proxies competence

Pseudo-paroxysm with the multiple damaging consequences is widely spread in our country. The current provisions according to which the proxy cannot be a person that is conducting the pseudo-paroxysm is not exercised in practice, since it is extremely difficult to prove that the person that is not a lawyer and is presented as a proxy in the case and charges the fee. There are propositions to consider some additional rules according to which the proxy can only be a lawyer apart from the persons employed with the party which a legal entity[11] or a contractor, close relatives and spouses of the party which is an individual[12] and if the special Law prescribes differently. The exemption would be also in the case of representing other entities such as territorial defense and local authorities (public offices) where the rules on the conditions for representation are prescribed in the special regulative as well as with the special provisions of the CPC on the qualified representative according to the monetary value of the case (art. 91 CPC[13]).

7.1.3. On the role of the lawyer

It could be said that the role of the lawyer regarding their expertise, professional choice and significance that they should have in the procedure, is unjustifiably neglected in the current regulative, even more than that – by the current solutions CPC shows great distrust in their role in the first instance procedure since it imposes the obligation to the court, over

[11] The reason why at the round table discussion it was generally not accepted to impose the parties with the obligation to be represented by the lawyers was that they have, as a rule, organized legal services where, according to the experience, most of the lawyers are conducting an expert and conscientious representation.

[12] There are divided opinions as regards this solution. During the discussion it was justifiably stated that this rule might abolish the pseudo-paroxysm but it would simultaneously impose the Court with the obligation to determine the evidences on the fact of kinship or marriage and the failure of the Court to do so would lead to the absolute violation of the procedure.

[13] If in an action on property claim the value of the subject of litigation exceeds 300,000 dinars, only persons with Bar Exam may act as attorney for a legal entity.

any reasonable measure, to “investigate” and “assist” parties even when the party has a lawyer.

On the contrary to the judge who should provide the equality to the parties the lawyer is the one who, with his/her knowledge, should help the party he/she represents. In order to really assist the party, he/she has to be expert, conscientious, efficient and dignified and such a lawyer shall help the court itself to quickly close the case. There are sufficiently enough lawyers in our country who are capable and willing to use their knowledge in order to help the efficiency of the procedure. Unfortunately, the current CPC provisions do not approve them but on the contrary – they equals them with the unprofessional, unscrupulous and inefficient lawyers. Due to the extreme domination of the investigation and official principle that transfer the essence of the procedure back to the role of the court for an illiterate party it is not visible that the cause of the long procedure is the unprofessional or unscrupulous lawyer. It is also not visible to the party when her/his lawyer is professional and conscientious. The reason is that current rules provide the incompetent and unscrupulous lawyer to “hide” their weaknesses from the party by transferring their obligations to the court and to practice the representing in the litigation as well as some other proxies that invest a large effort and knowledge in the case. The affirmation of the parties’ role in the procedure and stronger procedural discipline would disable such a “cover up” and would affirm the lawyers who are expert and contentious which would be to a benefit to them and their parties and the efficiency of the procedure.

8. THE NEED TO IMPLEMENT NEW AND AMEND THE CURRENT INSTITUTES

Using the propositions so far presented at the round table discussions regarding the amendments of the CPC as a starting point a number of propositions for implementing new and amending current institutes can be mentioned. We shall shortly revise some of them.

8.1. INTERUPTION (DISCONTINUANCE) OF THE PROCEDURE

There is a provision that the death of the party having a proxy does not call for the interruption (art. 212. par. 1. item 1.[14] related to art. 100[15] CPC). In practice it proves that the heirs of the deceased party do not join the procedure and thus extremely prolong it, so there is a dilemma to what extent the current rules related to the procedure in the case of the deceased party with the proxy are justifiable and necessary.

[14] Ar. 212. par. 1. item 1 CPC: "…The proceedings is discontinued: 1) when a party dies or loses litigation ability, and has no attorney insuch litigation;

[15] Art. 100 par. 1. and 2. CPC: "If the attorney holds a power of attorney to undertake all acts in the proceedings and the party, and/or it’s legal representative dies or becomes legally incompetent, or if the legal representative is dismissed, the attorney remains authorised to continue to act in the proceedings, but the heir or new legal representative may revoke the power of attorney (para 1). In cases mentioned in paragraph 1 of this Article, powers that have to beexpressly stated in the power of attorney (Article 98) shall always cease for anattorney who is not an attorney at law (para 2.)".

When it comes to the deceased party with the proxy, the opinions are divided. The arguments for the current solution point out the fact that it is according to the material legal provisions of the art. 767 par. 3 and item 4 of the Law on Contracts and Torts that regulates the interruption of the *order* [16] since it, as the base for the litigation proxies, does not cease by the death of the issuer. The argument against point out the fact that the material legal provisions of the interruption of the *authorization* (art. 94 LCT) since it ceases with the death of the issuer with exceptions[17] so they point out the exemption that should be read with the restriction, according to the general parties' competences (art. 77[18], art. 82[19] and art. 354. par. 2. item 11. CPC[20]). Against the current solution there is an argument that the question of the court expenses is not regulated when the party whose heirs are not known has died and is being represented by the proxy art. 100 CPC and looses the case.

On the other hand, there is an undivided opinion that, when there is a case on untransferrable rights and there is no justifiable reason to continue the case after the death of the party even if proxy represents him/her.

8.2. SUSPENSION OF THE PROCEDURE

The current solution of the CPC does not regulate the case when the party in the case for the untransferrable rights dies. It seems justifiable to close such a procedure by suspension.

8.3. ADJOURNMENT OF THE PROCEDURE

The purpose of the adjournment institute is to declare, "the last warning" to the passive party. In practice the adjournment is either the consequence of the loss of plaintiffs interest to precede with the case or his/hers negligence. In the first case, the case is closed by the withdrawal of the lawsuit on expiry or the legal deadline. In the latter case, the adjournment is, as a rule, determined on the proposition of the plaintiff for the recurrence and

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[16] Art. 767. para. 3. and item 4. of the Law on Contracts and Torts: " (3) The order ceases with the death of the issuer **only if** it was agreed or if the receiver received the warrant due to his/hers personal relationship with the issuer. (4) In such a case the receiver is obligated to prolong the ordered business if otherwise it could jeopardize the heirs until they are liable to take over the business themselves.

[17] Art. 94. item 3. of the Law on Contracts and Torts: "The authorization **ceases** with the liquidation of the entity, that is the death of the person who signed it, **unless,** the started business cannot be interrupted without the damage to the legal successors or if the authorization is valid even in the case of the death of the issuer, either at his/hers will, or due to the nature of the business."

[18] art. 77. item. 1. CPC: "The party in the procedure can be any individual or entitiy"

[19] art. 82. CPC: "During the whole proceudre the court is obliged to observe wheter the party in the case is liable to do so and is competent to conduct the litigation, whehter the uncompetent party is represented by his/her lawful representative and whetеher the lawful representative has special authorization when such is necessary"

[20] Art. 354. par. 2. item 11 CPC: "…Significant violations of the civil procedure provisions occur…if a person who cannot be a party to the proceedings participated in the proceedings as the plaintiff or defendant, or if a party which is a legal entity was not represented by an authorised person, or if a party who is incompetent of litigation had no legal representative, or if the legal representative or attorney of a party did not have authorisation required for participation in litigation or for certain actions, unless participation in litigation or certain actions was approved later;"

it is, as a rule, approved often after a long procedure to prove the existence of the justifiable reasons for the failure. In practice there are cases when the recurrence is approved several times after the adjournment, which significantly prolongs the procedure. There is a question whether this institute has justified its existence in practice? In case of its abolition there are two possible solutions – to consider the lawsuit withdrawn as soon as the conditions for the adjournment are fulfilled or that the court proceeds with the case with one party and if he/she does not appear to postpone the hearing.

8.4. NEW KINDS OF VERDICTS

Bearing in mind the situations in practice, current solutions in the CPC are only for the commercial cases and institutes prescribed by our CPC in 1929, the possibility for the new kinds of verdict should be considered:

1) *The verdict when there is no dispute of the facts.* In case when from the content of the lawsuit and the petition of the defendant it is obvious that there is no dispute on the relevant facts the court should be authorized to issue a verdict without a hearing and only within the limits according to the art. 3 par. 3 CPC[21]. Such a possibility is currently only prescribed for the commercial cases (art. 496 CPC [22]).

2) *The verdict due to the failure*. Bearing in mind the current legal possibility to rule the case due to the absence, passive defendant who does not dispute the lawsuit and does not appear at the hearing, there is no reason to provide similar solution for the case when the defendant does not argue the lawsuit in the prescribed time limit. The conditions for such verdict would have to be the same as for the verdict due to the absence with no formal need for the plaintiff to officially proposes the verdict and that the petition on the lawsuit is obligatory and the defendant is informed of the consequences of his/hers passivity. There is a dilemma on the conduct of court in the case when according to the lawsuit and presented evidences it is evident that the lawsuit is unjustifiable. Thus, the acceptable solution might be for the court to schedule the prep hearing[23].

8.5. DELIVERY

The current situation in the practice imposes the need to amend the delivery rules. Besides the revision of the current provisions of the way, time and place of delivery, it could be possible to prescribe some new institutes, such as ***agreement on delivery address*** as a mean of prerogative of the delivery address for a particular case or for all legal issues. There are propositions to adopt the rule on the obligation of the party to, after the delivery of the summons for the main hearing, inform himself/herself on next hearings (*"once summoned – always summoned"*) which would unable the court to, when the hearing is postponed and one of the parties is absent (or unjustifiably absent), schedule the hearing for the following day.

[21] Art. 3. para. 3. CPC: " The Court shall not accept disposals of parties that are contrary to enforceable statutes, social order and rules of decency.

[22] Art. 496. CPC: "Where after receiving the reply to the complaint, the presiding judge is satisfied that neither party disputes the facts and there are no other obstacles for decisionmaking, he/she may make a decision without a hearing."

[23] See: Amendments CPC Republic Croatia, art. 331 b.

The similar rule has been adopted in the new CPC BiH. Besides, there are opinions that the rules on personal delivery should be changed in case when a proxy represents the party.

8.6. THE CASE WITH THE SECOND INSTANCE COURT

So far during the discussion on the amendments of the CPC there is a majority opinion that the number of cancelled decisions in the first instance should be limited aiming for the more efficient appeal procedure. The basic rule could be drafted as follows: *The second instance court can cancel the first instance verdict twice and recurrence it to the first instance court for the renewal of the procedure. After that it is obligated to keep the hearing and close the case with the effective decision on the appeal.*

During the discussion it was pointed out, it seem justifiable, that this rule should be followed by special conditions: that the lawsuit was not changed in the meantime, that the first instance court has acted according to the previous order of the second instance court[24] and that the first instance procedure was closed by the relevant decision on the subject of the case.

Nevertheless, such a solution allows number of other questions that should be answered. They essentially relate to the time limits of the effective decision, presenting the evidences and facts at the hearing with the second instance court and the possibility to cancel the second instance court decision following the appeal procedure.

8.6.1. The time limits for the effectiveness of decision and new facts and evidences with the second instance court

The effective decision relates to the said legal consequence that is evident from the facts existing at the time of the main hearing. The question of the time limits of the effective decision of the second instance court would depend on the possibility of the party to use new facts and evidences with it.

If we look at the expressed majority opinion to impose rules that new facts and evidences in the appeal can only be presented under the conditions currently prescribed in Art. 421 para 1 item 9[25] in conjuction with Art. 422 para 2[26] CPC, than the same rule should be valid for the hearing with the second instance court. So, the procedural authorization of the parties would be reduced and new facts and evidence could be presented only if the party upon the closure of the proceedings with the first instance court finds out new facts or finds or comes into the possession of the new evidences that would result with the more favorable decisions if they were used in the previous proceedings. Since such a possibility should not be denied to the parties than the time limits should be compatible with the moment when the hearing is closed with the second instance court.

It would be necessary for the Law to define more completely and precisely the very words “new facts” and “new evidences” regarding the objective circumstances (their

[24] The reason is to prevent the first instance judge to “transfer” the more complex cases to the second instance court.

[25] Art. 421 para 1 item 9 CPC: "A trial completed by an effective court decision may be repeated upon the request of a party: … if a party learns about new facts or finds or obtains the possibility to use new evidence, which could have, caused a more favourable decision for such party had it been used in the previous procedure.

[26] Art. 422 para 2 CPC: "…only if a party was unable, through no fault of his/her own, to present such circumstances before the previous procedure was finished by an effective court decision."

occurrence) and subjective circumstances (when the party finds out of their existence and possibility to present or use them with the court). There are propositions to objectively reduce subjective circumstances in as much to reduce so called “apologetically reasons” and to deny unscrupulous party to use them if he/she could find out of their existence earlier should he/she acted with the necessary diligence.

8.6.2. The possibility to refute the decision with the second instance court

During the discussion on the amendments of the CPC there was a doubt whether the effective closure of the case with the second instance court would lead to the violation of the right to appeal. The question is significant and it would be further observed even though it seems that such a right would be provided by the rule that against the decision of the second instance court there is a possibility of filing the revision.

9. DRAFT CONCLUSIONS

The project conducted by the Judges Association of Serbia in cooperation with the Supreme Court of Serbia and Comparative Law Institute is aiming for previous, trough the expert discussions, during a reasonable period, examination of the possibilities, definition of the strategy, basic concept and method of amendments followed by the draft Code according to the defined strategy. Such an approach since it considered the opinion of the expert public and provides the creative role, leads to the realization of the right measure and valid reform of the civil procedure.

According to the analysis of the material so far collected from the expert public it could be preliminary said that most of the propositions on these issues is as follows:

1) There is a need to amend CPC for the purpose of more efficient procedure.

2) Even in the prep phase the vast participation of the expert public on the doctrine and practical issues should be provided.

3) While considering possible amendments, besides international obligations, all our specific issues should be considered and the solutions functioning in more developed countries should be considered carefully since they would not lead to more efficient procedure in our country.

4) The codification is desirable as a final objective, but it is not possible at the moment due to the institutional crises, negative state, social and economic conditions and lack of thorough regulative in the area of the material legislature.

5) The proposed amendments should be divided into groups to the ones possible without fulfilling the preconditions (short-term), the ones that impose the amendments of other regulative and the ones not possible in the short-term period due to the overall social and economic background. The corrections of the CPC should be immediately amendment by the fist group and continue to work on the preparation of the amendments of other regulative and providing the conditions for further amendments of the CPC.

6) The amendments should not be radical but moderate and gradual, considering that the efficiency of the procedure in the quantitive sense (the duration of the cases) does not prevail other principles and does not impede the possibility to access the court and justice.