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Social Context of Civil Process for Sustainable Development

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Abstract

This paper focuses on the existing mechanisms for the participation of vulnerable persons, including persons with disabilities and children, in civil disputes. As modern democratic society develops the concept of a social state, ensuring equal conditions for the participation of vulnerable persons in civil turnover is essential. Hence, the aim of the study is to identify existing legislative gaps and challenges that prevent the participation of vulnerable persons in civil disputes. Humanity has agreed on a sustainable development plan, in which social sustainability is set as one of the main goals. However, modern civil procedure law is mainly based on the codification of the 19th century, which in turn originates from Roman law. Since then, public relations have changed and modern technologies are constantly developing. The concept of a digital judge, smart contracts, and a blockchain system has already emerged. Therefore, the regulations of civil proceeding do not respond to modern challenges, and it is necessary to update civil procedure legislation in order to provide an equal platform for the participation of vulnerable persons in civil disputes. The purpose of the article is to review the rules of civil procedure law in terms of a social context based on the international approaches, practices, and research. Through a mixed-quantitative, qualitative, and general research methods, as well as comparative analysis, specific recommendations are introduced that will bring civil dispute resolution closer to sustainable development plans and ensure the equal participation of vulnerable persons in civil dispute.

Keywords: Civil process, sustainable development, vulnerable person, children

Introduction

Civil relations are constantly changing, although their governing rules remain largely the same. The civil procedure legal framework was created after the end of feudalism and during the formation of a new economic formation in society. It is widely acknowledged that civil law, created by Napoleon, is focused on the bourgeoisie, while German civil law is tailored towards businessmen. Accordingly, the primary recipients of civil law are wealthy individuals, as civil codes predominantly ensure guarantees of their economic freedom (Zweigert & Koetz, 2000). In ancient Rome, people could not imagine communication via the internet, whereas today there is active discussion about granting legal subjectivity to artificial intelligence (Eidenmüller & Wagner, 2021). The concept of a legal and social state has already been developed, and its main leitmotif being the equal protection of all members of society. In this regard, attention is increasing towards the rights of vulnerable persons and their implementation mechanisms.

It should be noted that the tendency to consider all members of society in civil turnover is observed not only in law but also in economic science. The doctrine of "laissez-faire" is no longer popular, as it implies a policy of minimal government interference in the economic affairs. Instead, the theory of pluralism is gradually gaining traction, implying the coexistence of diverse qualities and interests. According to economists, "Adam Smith's principle of the invisible hand" can be successfully replaced by John Forbes Nash´s equilibrium theory, suggesting that the best strategy for society involves considering not only personal interests but also the interests of others (Kharitonashvili, 2021). Since law and economics influence each other, the mentioned economic doctrine demands a corresponding legal approach considering the interests of all members of the society.

The social and economic formation has a decisive impact on the form of civil procedure. Capitalist - mercantile society is built on obvious inequality and favors the financially privileged. However, it is undeniable that pure capitalism is no longer relevant. In this situation, the existence of mechanisms to protect public interest in civil proceedings is crucial.

Civil process, as a form of implementing civil justice, has its primary purpose: the court, delegated state power from the people, and civil process should be for the people and not for the "doctrine" (in Europe) or the "grammar of law" (common law) (Holland, 1968). Broadly speaking, decisions about matters of public interest affect not only the psychology of the individual, but also the entire society. Often this influence can be hidden, (Clermont, 2016)

as any procedural detail or tool that may seem insignificant at first glance can fundamentally alter the outcome of the dispute itself. With regard to the Code of Civil Procedure, there is a historical dogma that civil procedure is an exclusive prerogative of state jurisdictions. However, in recent years, multiple legal systems have shown an increased tendency to "privatize" civil proceedings (Fabbi, 2013). Procedural law does not change and is the same for all types of disputes (Guarnieri, Pederzoli & Thomas, 2002/1), as it is public law and contains rules about unwaivable procedural rights. That is why the Code of Civil Procedure provides mechanisms that cannot be negotiated, as they aim to protect weaker parties. However, for example, the fragmented reception that took place in Georgia, allowed for procedural agreements on a number of unwaivable procedural rights, thereby highlighting the issue of protecting vulnerable subjects.

Society has expressed interest in the rights of vulnerable persons, including the disabled and children in the 20th century, as the idea of social sustainability matured. In the technological era, UN established 17 goals and 169 tasks of sustainable development (UN, 2015). Amongst these goals is social equality achieved by creating equal opportunities for people of all ages and abilities. These goals will become mere aspirations unless each country's legislation creates the necessary mechanisms to implement them, including in civil proceedings. If the State is focused on sustainable development, it cannot be achieved without the creation of appropriate legislation. One of the goals of sustainable development is to focus on the welfare of society. A prosperous society ensures that each of its members is equally protected and has equal opportunities to assert their rights. Currently, countries are striving to become social states. Therefore, if society seeks to create social states, it must also make the civil process social. Hence, it is especially important to create a platform for vulnerable persons to participate in civil disputes, as civil procedure law is an instrument for implementing civil rights.

Based on the above, this paper discusses the problems of the social context of civil disputes, aiming for the equal participation of vulnerable persons in civil relations and towards achieving social sustainability.

1. Capacity Reform in Georgia

In Georgia in the 11th century, during the reign of David The Builder (nephew of Mariam Bagration Doukas, Queen of Byzantium), great attention was paid to the protection of vulnerable disabled people. The king even opened special treatment houses for them (Javakhishvili, 1908). It is also worth noting that the high development of procedural culture in Georgia has historically been confirmed. From the monument of the 11th century "Deed of Opiz", the following stages of the process can be seen: "Before the trial took place, the king received the disputing parties, listened to them, and appointed the trial of

the case, for which he summoned the proper persons" (Chkonia, 2014). The independent culture of Georgian law was halted by the Russian occupation. After joining the Soviet Union, Soviet legislation became widespread in Georgia. There was no private property, and the civil process was uniquely inquisitorial. Here, the court was searching objective truth. After the collapse of Soviet Union, Georgia started creating its own legislation, which is mainly on the basis of reception. The observation proved that legal institutions taken from different cultures without adaptation to Georgian culture were ineffective.

On December 26, 2013, the parliament of Georgia ratified the UN Convention on the Rights of Persons with Disabilities by a declaration on Article 12. Despite the declaration on equal rights of legal personality, the parliament of Georgia undertook a fundamental reform of the institution of capability based on the N2/4/532,533/08.10.2015 decision of the constitutional court of Georgia. The norms about capacity in civil code and other laws were acknowledged as unconstitutional. The parliament of Georgia had six months to determine the complex modification of capability and bring the legislation into compliance with the court decision. As a result, the innovative regulation of capacity came into force on April 1, 2015.

In the old model, the Civil Code of Georgia restricted individuals due to “spiritual illness” limiting their freedom to obtain the civil rights and obligations by their own free will. An incapable person was not entitled to engage in relation with third parties; they were unable to make deals because their will was invalid. On their behalf, the guardian provided transactions. Also, the marriage of an incapable person was prohibited without considering their individual mental abilities.

The new social capacity model fundamentally replaced the old approach. According to the new model, all persons are capable. Capacity is a right, which may be restricted by law only in exceptional cases. In all other cases, persons with psychosocial needs may be provided with a supporter, rather than a substitute for their rights. According to the support model, individuals have the ability to assert their rights, but they may need assistance at some point. Participation in civil turnover of persons with psychosocial needs is ensured based on a court decision. A supporter is appointed by the court and has only the rights directly indicated by the court decision.

Consequently, there are three main authorities involved in obtaining the status of support receiver and the implementation of capacity system: 1. A multidisciplinary group of the bureau of expertise which studies the possibilities of a person with psychosocial needs. The main function of the multidisciplinary group is the individual assessment of persons. 2. The judiciary system which makes a final decision and relies on the reports of the multidisciplinary group. 3. The agency of the Ministry of Health which is

responsible for the execution and monitoring of the process. During this process, the involvement in civil proceedings of persons with psychosocial needs is also an important factor that the old so-called "medicine model" completely excluded.

Furthermore, the status of a special applicant was also established. According to Article 5.2 of the Civil Procedure Code of Georgia, parties and participants with disabilities are entitled to the rights and opportunities granted under the Georgian Law on the Rights of Persons with Disabilities for the purpose of participating on an equal basis with others in the administration of justice, including the option of participating as a special plaintiff.

The conception of special plaintiff is defined by the Georgian Law "On the rights of persons with disabilities". It highlights that organizations with the status of special plaintiffs are authorized to conduct administrative and civil disputes, as well as to apply to the relevant agencies. Thus, this is especially if the case concerns the elimination of discrimination against persons with disabilities and/or is essential in this area for the development of legal practice. According to the law, a special plaintiff protects disabled persons without their legal representation, but in such a case, a power of attorney for representation is required. However, the issue is problematic since the Power of Attorney should be certified by a notary who checks the will of PWD. The case remains unresolved for such individuals who have psychosocial needs, cannot express their will, and do not have supporters. The concept of special plaintiff created a new status of civil dispute participant, the purpose of which is to protect the rights of weak persons. While the participation of the prosecutor in the civil process in Georgia has been abolished, in French and Italian law, the prosecutor is considered a successful defender of the public interest during specific proceedings. The specified burden has been transferred to the judge, although in a rather small amount. However, in some cases, due to the adversarial principle, it is insufficient and necessary to involve other bodies which can defend the public interest.

2. Children's Procedural Rights in Georgia

The need to protect children´s interests in civil proceedings arose in connection with civil disputes involving them. The law provides mandatory participation of guardianship authorities in disputes related to children, although the civil process does not recognize a procedural status corresponding to their participation. This problem was solved by the courts with a recommendation that determined the participation of these bodies in the proceedings as third parties without an independent claim. However, the interest of such third parties and the interest of these authorities are completely different. Accordingly, the issue of protecting children and vulnerable persons´ interests remains relevant.

In the Post-Soviet period, along with the formation of a market economy and private property, the concept of adversarial civil proceedings became a symbol of freedom. However, the legislator gave priority to the balanced use of the two basic procedural principles: the adversarial principle and the inquisitorial principle (Liluashvili, Liluashvili & Khrustali, 2014). This balance is especially evident towards the rules regulating family disputes due to their specificity. Article 354 of the civil procedure code of Georgia allows the court to determine the circumstances of the case at the initiative of the court only for the consideration of family cases. This solution has proven particularly far-sighted today because the court is using this article by analogy in family disputes related to children. However, the use of this principle in non-family disputes where children are involved is not established.

Based on the Convention on the Rights of Children, the Code of Child's Rights was adopted in 2019. Recently, the state has defined a framework for intervention in relation to child´s rights. According to Article 81 of the Civil Procedure Code of Georgia, a minor has the right to apply to the court for the protection of his/her rights and legally protected interests. For the claim filed by the child, a simplified form of claim was developed. Article 51 of the Civil Procedure Code of Georgia required specialization of persons involved in the process related to the protection of the rights of minors. In a dispute related to the protection of minors, a judge, a lawyer, a social worker, and/or another appropriate invited expert must be specialized in the methodology of the relationship with minors and other related matters.

In addition, it was determined that when making a decision, the competent authority must take into account a high standard of justification which will necessarily indicate the best interests of the child. According to Article 251^1 of the Civil Procedural Code of Georgia when making and substantiating the judgment with regard to a case related to the minors' rights, the court shall give priority to the best interests of a minor. In order for the best interests of a minor to be given priority, the court judgment must be substantiated according to the appropriate basic criteria defined by Article 81(3) of the Code of Children's Rights.

Subsequently, this is also somewhat paradoxical because in the absence of a public interest defender, the legislation directly obliges the judge to give preference to one side based on age. Instead of solving the problem, this solution exacerbates it, as it puts one side in an advantageous position instead of ensuring equality of parties.

It is noteworthy that Articles 183 and 186 of the Civil Code require that immovable property and movable property worth more than 1,000 GEL, belonging to a child, can be disposed by the parent only in accordance with the best interests of the child. Hence, this is with permission of the court. The need for mandatory judicial control is prompted by regrettable examples in

judicial practice of parents violating children´s property rights. In addition, this approach creates an imbalance in legal institutions and civil turnover, since judicial control over the transaction and its prior approval are part of preventive justice. Thus, this is usually carried out by notaries in continental law countries.

The mentioned regulation establishes a new type of civil proceedings, but the Civil Procedure Code of Georgia still does not contain any rules regarding these disputes. The code does not specify the form of the application that should be submitted to the court, the form of proceedings, the form of the court's consent, the decision enforcement mechanisms, or the method of monitoring. Most importantly, the procedural legislation does not determine which principle must be used - inquisitorial or adversarial. Due to the high public interest and the obligations imposed by international conventions, it is clear that the inquisitorial principle should be applied in relation to these disputes.

Additionally, there is a different approach towards parents and guardians. Such transactions by guardians are subject to administrative control - the consent of the guardianship agency is required - instead of the consent of the court for the parent. This creates indirect discrimination of children with parents and children under care. Therefore, it is necessary to regulate the above-mentioned issues with the norms of the Civil Procedure Code.

3. Participation of Vulnerable Persons in Civil Disputes as a Necessary Condition for Social Sustainability

The term “vulnerable person” does not only refer to individuals with disabilities because vulnerability is often closely related to socioeconomic status, including factors such as race, gender, age, etc. (Wisner et al., 2003). "Quality of life" is a subjective characteristic that is difficult to precisely define. The constitutional concept of the social state is becoming more and more important. Accordingly, in this context, the social function of the civil process becomes more relevant. According to the author of the Austrian Civil Procedure Code of 1895, Franz Klein (Oberhammer & Domej, 2005) civil proceedings should be based on fundamental truth, rather than the truth presented by the parties. Franz Klein's fundamental idea was directed against the civilian process as "war without red lines" (Klein & Pro Futuro, 1891). Here, the judge is a passive observer of the litigants who manipulate reality in favor of their own goals (Van Rhee & Uzelac, 2012). It is worth noting that after 100 years, disputes involving the participation of vulnerable persons confirm the correctness of this opinion. The tendency of such an approach is slowly emerging in modern European countries. For example, according to the opinion of procedural civilist of continental law, Marcel Storme, "a competitive process without effective control is like promoting the

competition of different cultures, which is generated in an environment where the litigation process is perceived as a battlefield without rules." (Storme, 2005)

However, it should be noted that this control is not similar to that of the Soviet definition of "objective truth". It should be used strictly in relation to the principle of disposition, so that the court does not exceed the autonomous will of the parties. In this regard, the most balanced approach is expressed in the ALI/UNIDROIT principles, which advocate for the principle of equality of parties based on providing equal status to participants and interventionist judicial discretion (ALI/UNIDROIT, 2005).

The latest European approach, which has not yet been reflected in national legislations, creates a wider mechanism for the participation of vulnerable persons in the civil process through the principle of proportionality emphasized by ELI/UNIDROIT. According to rule 5, (1) The court must ensure that the dispute resolution process is proportionate. (2) In determining whether a process is proportionate, the court must take into account the nature, importance, and complexity of the particular case and of the need to give effect to its general management duty in all proceedings with due regard for the proper administration of justice (ELI/UNIDROIT, 2021).

For the social sustainability of modern social relations, there is a need for a procedural concept focused on the interests of all members of the society, ensuring a common goal of law and justice in general - justice and equality. Therefore, it is advisable to introduce civil procedures with social content. The social principle involves creating equal opportunities for vulnerable persons to protect their rights under equal conditions with others, which does not necessarily mean the victory of the strong. Thus, the introduction and development of this concept may serve as the starting point for justice.

It should be noted that social sustainability is considered as one of the areas of sustainable development. It is defined as follows: "Social sustainability derives from actions in the main thematic areas, which include the social sphere of individuals and societies, the development of capabilities and skills." In this sense, social sustainability integrates traditional social policy areas and principles such as equity and participation in health-related issues, needs, social capital, economy, environment and concepts of happiness, well-being, and the quality of the life (OISD).

To make civil dispute resolutions more social, time frames must be set for civil disputes involving vulnerable individuals. There should be no exceptions when discussing vulnerable cases in court. It is advisable to resolve these cases promptly, within the one-month timeframe established in paragraph 2 of Article 59 of the Civil Procedure Code of Georgia. Another important step towards accessibility would be the removal of the obligation to pay state fees for the aforementioned disputes. In addition, an important issue

is the distribution of free legal aid to ongoing civil disputes involving vulnerable persons.

Due to the social role of the civil process, the introduction of the amicus curiae brief in civil proceedings would be a step forward. It should be noted that the existence of an amicus curiae brief in civil proceedings is recommended by the 13th principle of the ALI/UNIDROIT model "Principles of International Civil Procedure". Although the Code of Civil Procedure of Georgia does not provide for the amicus curiae brief, it is already used by the Supreme Court in Georgian judicial practice. Hence, this is considered as a positive precedent. The introduction of amicus curiae brief in civil proceedings would be appropriate as it would lead to the certainty regarding the procedural status and legal basis of the participants. Also, it would emphasize the importance of social interest in civil proceedings. Most notably, it would be effective to submit the opinion of an "amicus" to the court, especially in disputes related to the rights of persons with disabilities.

Conclusion

The purpose of this paper was to discuss the role of civil dispute resolution procedures in achieving social sustainable development goals. As the study showed, there are factors in civil procedure approaches that impede these goals. Accordingly, the following recommendations were made for the legislative framework to ensure the equal participation of vulnerable persons in civil proceedings in terms of social sustainability:

1. Reduce the state fee in civil disputes.
2. Decrease the time set for the consideration of the case.
3. Implement the amicus curiae brief in civil disputes to ensure the representation of societal interests before the court.
4. Extend free legal assistance.

Regarding children's participation in civil disputes, clear procedural guarantees of children's participation in civil disputes should be established. This clearly determines the body that defends the public interest in the process of exercising children's rights. In order to solve the general problem of court overcrowding, control over children's property transactions should be transferred to a notary, who is considered as a gatekeeper.

The civil process should be perceived from a social point of view and develop a social approach to disputes with societal importance or those related to vulnerable persons. This may provide a forecast for the development of the social civil process in the future. This will be beneficial for both society in general and its individual members, ultimately contributing to the achievement of social sustainable development goals.

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