

The Need for Entrenchment in Civil
Proceedings of Independent Principle
of Combining Adversariality of Parties
with Procedural Activity of Court

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The Need for Entrenchment in Civil Proceedings of Independent Principle of Combining Adversariality of Parties with Procedural Activity of Court

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Annotation

In the context of a general problem of optimizing legal proceedings, the author in his paper researches the adversary nature, functional authority and the role of court in an adversary legal lawsuit, aiming to improve the existing model of the national civil proceeding. With due regard to a balance of public-law and private-law interests in judicial proceedings, the author proves the necessity to single out a combination of adversariality of parties with procedural activity of epy court as an independent principle.

Keywords: civil proceeding principles, adversary nature, procedural activity of court, principle of combination of adversariality of parties with procedural activity of court

Problem Statement

A retrospective consideration of the development of legislation and legal thought in civil legal proceeding, and evaluation of its current state make it obvious that a new search for an adequate civil proceeding model is expedient, with substantiation

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The Need for Entrenchment in Civil Proceedings of Independent Principle of.....

of its basic characteristics, effective schemes of the procedural activity of the court and trial participants.

The present democratic reforms in Ukraine have an immediate impact on the need for further formation and upgrading of the national judicial organization, raising public justice efficiency, revision of procedural legislation, and creation of a court system based on the European standards of justice. When developing and adopting the effectual Civil Procedure Code (CPC) of Ukraine, including its provisions concerning the main principles of civil procedure, allowance was made for the basic premises of international legal acts ratified by Ukraine.

Specifically, the CPC of Ukraine in effect is based on the civil process principles set out in Article 8 of the Universal Declaration of Human Rights dated December 10, 1948, which confers the right of “everyone to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by constitution or by law” [1]. Additionally, the CPC of Ukraine reflects the main provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, which became an integral part of the national legislation after Ukraine ratified them on July 17, 1997 [2], and Article 55 of the Constitution of Ukraine proclaiming that the human and civil rights and freedoms are protected by the court.

Here a proviso should be made. Tending to discuss the problem in a traditional manner, some authors believe that the European Convention for the Protection of Human Rights and Fundamental Freedoms binds government structures to introduce the principle of “pure” adversariality into their normative field, since the parties may not be deprived of maximal information about proving and evidence [3, pp. 75–77].

This is not exactly right. As S. F. Afanasiev justly notes, the European Court of Human Rights repeatedly makes use of the term of ‘adversariality’ in its

precedential decrees, yet, this does not imply a necessity for an imperative adversary nature of the national judicial proceedings [4, p.21]. Rather, for the Strasbourg judges, procedural equality prevails over adversariality, which is a means to achieve equal opportunities and awareness of the parties as to evidential material of civil cases [5], although some authors are of a different opinion [6, pp. 415-416]. As is evident from a court decision of August 28, 1991 “Case of Brandstetter v. Austria”, S. F. Afanasiev explains, the right to adversary court proceeding means that an opportunity must be provided to be made aware of the evidence and remarks supplied by the other party and to comment on them. The national legislation can ensure compliance with this requirement in different ways. However, irrespective of a chosen method it should guarantee that the other party is informed of remarks made and has a real possibility to express its opinion [7].

Thus, the European Court of Justice does not insist on one concrete national model of justice or another. It can be of any kind – competitive, investigative, or mixed (competitive-investigative or investigative-competitive), provided that a country – signatory to the Convention ensures the parties’ equal procedural rights and duties, and secures their practical materialization [4, pp. 21-22].

In the light of the recent legislative changes affecting civil procedure, the role of the subjective rights of case participants is enhanced as to case circumstances investigation, representation of evidence, and at the same time, examining and proving their cogency before the court. Thus, due to enhanced competitive basis, procedural activity and initiative of the court in the process of proving is partially impaired or even excluded. The amendments and supplements introduced into process adversariality cause emergence of a number of judicial problems, related to the role of the court at the proving stage, in the process of securing evidence, including the issues of commissioning of expert evidence, examining and evaluating the conclusions made [8, pp. 203-204], etc. However, civil process approaching

The Need for Entrenchment in Civil Proceedings of Independent Principle of……

the model of “pure” adversariality and lowered procedural activity of the court in the proving process by no means exclude the need for civil process parties to observe civil procedure and fulfill the tasks, stipulated by the discretionary authority of the court as a public body ensuring a competitive process.

As D. Luspenyk rightly remarks in this regard, despite a considerable weakening of the role of the court in the process of proving, on the one hand, on the other — its role in providing adversariality of procedure has enhanced and to some extent even complicated, since to fulfill the function, a specific procedural action is needed so that the court performed its main obligation — to create conditions for the case participants to comprehensively, fully and objectively investigate the circumstances of a case [9, p. 117].

The State of the Art

The issues of realization, development, and the nature of the adversariality principle in civil proceedings in different periods of time have been dwelt upon in a number of research papers and complex elaborations. In particular, the dynamics of theoretical studies of the problem range is associated with the names of M. G. Avdiukov, M. M. Girshonov, M. A. Gurvich, A. P. Kleinman, V. M. Semenov, V. P. Taranenko, Ye. V. Vaskovskiy, K. S. Yudelson and other scholars. Among the latest research efforts one can mention the works by H. Fazykosh [16], V. V. Komarov [13], V. Yu. Mamnytskyi [10; 11; 12], Yu. V. Neklesa [22], P. I. Shevchuk [14; 15], H. P. Tymchenko [17; 18; 19; 20], S. O. Volosenko [21]. Separate aspects of the legal phenomenon in question have been researched by the author of the present paper [23; 24; 25; 26]. However, the matter of combining and a direct connection between adversariality of parties and the procedural activity of the court taken as a principle of civil legal proceedings is still understudied in the juridical literature.

In the context of the general problem of court procedures optimization, a need emerges to further research adversariality, functional authority and the role of the court in an adversary process in order to improve the existing model of the national civil process. In this connection, the **present paper objective** is substantiation of the need for formalizing in civil legal proceedings of an independent principle of combining adversariality of parties with procedural activity of the court.

The Main Discourse

In the science of civil procedural law in the post-Soviet space, there is quite a widespread opinion about existence of the adversariality principle in civil legal proceedings.

Thus, V. Yu. Mamnytskyi, one of the researchers of the problem, believes on reasonable grounds that the adversariality principle is a historically determined legal phenomenon, since a specific stage of social evolution, depending on the level of its development, socio-economic and political conditions, national specificity and legal traditions, the adversariality principle was evolving, with its content changing and inducing a change of civil legal proceeding models. Besides, the adversariality principle is a legal requirement, imposed on the procedural activity of certain parties to a legal process and a judicial body in evidential activity, whatever the instance which hears a case [12, p. 201].

The term of ‘adversariality’ attracted the attention of many processualist scientists at different times and at different stages of social development, and was debated a lot in scientific literature and educational materials of the Soviet and post-Soviet periods. However, with a constitutional entrenchment of adversariality of parties as one of the basic principles of legal proceedings in Ukraine, the interest of scientists of various procedural jurisdictions in researching of this legal phenomenon grew considerably.

In the period, the majority of civil processualists defined adversariality when coupled with an active procedural status of the court in the evidential process. For example, M. Y. Shtefan characterized adversariality as a broader opportunity for the parties and other persons participating in a case to determine and use in their evidential activity the necessary procedural means, factual information, and confirmatory evidence, as provided for by the CPC. In the researcher's opinion, adversariality determines the entire process of selection, presentation, discovery, involvement, etc. of factual material necessary for court solution of a case. The forms, methods and means of examining that material, as well as the procedural actions of proving entities, the sequence of evidential activities and its legal implications. Assertion of a party's considerations and contestation of evidence, consideration and objections of the other party determine the external form of a civil process, providing it with an opportunity to apply an adversary type of argument, development of the parties before the court. The adversary form of the process is ensured by the active procedural status of the court, which has the rights of the closing decision on the fact in proof and assistance in discovery, if necessary [27, pp. 38-39].

Proceeding from the fact that an unshakable principle of the socialist system of justice and the goal of the process is substantive truth, S. M. Abramov defined adversariality as "combination of initiative and dynamic activity of the parties and the court, aimed at explanation and establishment of real relations of the parties (substantive truth) for passing a lawful and substantiated judgment" [28, p. 16].

According to V. I. Tertyshnikov, the adversariality principle is expression in a competitive manner of initiative and activity of the court and persons participating in a case in their exercise of rights and fulfillment of obligations concerning investigation of the circumstances, relevant to solution of a case, and gathering, examination, and evaluation of supporting or disproving evidence [29, p. 15].

V. Yu. Mamnytskyi, who regards the court evidential activity of the time as needless, gives an original definition of the adversariality principle: a legal requirement resulting from the nature of judicial power and functioning in the field of administration of justice in civil cases. In his opinion, according to the adversariality principle, the parties and other persons participating in a case can take part in a civil proceeding, give evidence in support of their claims and objections, issue motions, use the assistance of the court that has directive, instructive, and securing authority in evidential activity [10, pp. 6, 8-9].

Thus, the content of the adversariality principle is not confined exclusively to the activity and initiative of the parties and other persons participating in a case, but rather is supplemented by the initiative of the court in the process of gathering, examining, and evaluation of evidence.

The scientific approach to the content of the adversariality principle started changing gradually alongside with legislative changes. According to the previous legislation, the adversariality principle as if was neutralized by the principle of objective truth, and the court had to collect evidence on its own initiative. At present, the civil procedural law does not have this norm. However scientists point out that the activity of the court is not lost altogether: the court lends assistance in collection of evidence; it can suggest that persons participating in a case should present additional evidence; the court verifies the evidence and can commission an expert examination, etc. [30, p. 47].

Analyzing the course of transformations of the adversariality principle in the Russian civil procedural law, A. F. Voronov characterizes the new approach to adversariality as progressive conservatism. Article 12 of the CPC of the Russian Federation states that justice in civil cases is administered on the basis of adversariality and equality of the parties. In this case the court, maintaining independence, objectivity and impartiality, takes the lead in the process; explains the

The Need for Entrenchment in Civil Proceedings of Independent Principle of……

rights and obligations to persons participating in a case, and warns them about the consequences of procedural actions taken or not taken; assists persons connected to the investigation in realization of their rights; creates conditions for a comprehensive and complete examination of evidence, substantiation of facts and correct legislative execution in hearing and solving of civil cases. Due to endeavor of many scientists and practitioners, the author remarks, it became possible to stop the anticipated in the 1990s excessive shift in the development of civil law towards pure adversariality [6, pp. 359-360].

Comparing the wording of Article 12 of the CPC of the Russian Federation with that of Article 10 of the CPC of Ukraine, one should acknowledge that the domestic legislators appear to be more modest in their description of the adversariality principle in the article devoted to it. For instance, in accordance with Article 10 of the CPC of Ukraine, civil proceedings are carried out on the basis of the adversariality of parties. The parties and other participants in a case have equal rights to presentation of evidence, its examination and proving its cogency before the court. Each party must prove the circumstances, to which it refers to support its claims or objections, but for the cases, stipulated by the present Code. The court assists in a comprehensive and complete explanation of case circumstances: explains to persons participating in a case their rights and obligations, warns them about the consequences of procedural actions taken or not taken, and assists them in realization of their rights in cases stipulated by the present Code.

Having regard of the revised wording of the adversariality norm, the modern domestic researchers of civil proceeding principles define adversariality through the following components: 1) parties and other persons participating in a case have equal legislative rights to presentation of evidence, its examination and proving its cogency before the court; 2) each party must prove the circumstances, to which it refers to support its claims or objections; 3) the court, maintaining independence,

objectivity and impartiality, assists in a comprehensive and complete explanation of case circumstances, in particular: explains to persons participating in a case their rights and obligations, warns them about the consequences of procedural actions taken or not taken, and assists them in realization of their rights [21, p. 10].

A. Soldatenko, agreeing with the content of the adversariality principle, delivered in Articles 14-17 of the CPC of France, considers that its most important component consists not only in the party's arguments supporting its position, but also those charging the other party. The analyzed principle, in his opinion, is not so much the right of a participant to prove their point by expressing their ideas and proving their cogency, but rather:

- 1) the right of each party to appeal against any of its adversary's allegations;
- 2) the parties' obligation to promptly present their evidence before the court in order to secure the right of other participants to disprove it;
- 3) injunction to hear a case in the absence of the party, to which the legal force of court decision is extended;
- 4) injunction to use arguments, which were not used by the parties before the court in support of their legal, in court judgments;
- 5) injunction to refer in court judgments to a party's arguments, unknown to its adversary, which is devoid in that way of an opportunity to appeal against them;
- 6) the right of the party, absent at the time when the court is taking proceedings, to appeal against their results.

A. Soldatenko believes that the absence of one of the components of the adversariality principle eliminates it altogether [31, p. 13].

A changed character of adversariality brings up the dispute of whether realization of the principle in a new form meets the interests of the parties and other persons participating in the case. It is worth recalling that multiple legal titles at different times published discussions about the expediency of a true adversary nature of

The Need for Entrenchment in Civil Proceedings of Independent Principle of……

processes, introduction of “pure” adversariality and rejection of the objective truth principle. In the scientific community, there are still supporters and opponents of this kind of implantation.

As far back as a century ago, Ye. V. Vaskovskiy emphasized that the “pure” adversariality principle may lead to “a triumph of the strong over the weak — a rich man, who can afford to hire a good advocate, over a poor man having to handle his case himself. And that is incompatible with justice.” [32, p. 98].

That opinion was shared by other scientists of the time. For example, according to G. Verbllovskiy, a practical implementation of the principle of “pure” adversariality can result in “the reign of a heartless formalism, when a conviction is rooted in judges that their mission consists in a mere establishing a formal truth ... An effectual legal technique should combine the adversariality principle with a relevant extent of freedom of the judge to investigate a case and discover the truth” [33, p. 370]. T. M. Yablochkov made an apt remark on the subject: “...do not force judicial defense up the one who does not seek it — that is the meaning of adversariality; while remaining indifferent towards the one who desires defense, but cannot defend himself is neither “adversariality” nor justice” [34, p. 39].

V. A. Riazanovskiy stressed that a civil process should be based on the adversariality principle, however it should be supplemented with the right to intervene in the adversariality of the parties: “interference of the court is allowable, since it helps discover the substantive truth, certainly, with personal rights being reserved, for in a modern lawsuit a person can not be a process object, but is always a subject in it” [35, pp. 66–67].

As much later A. A. Borisova put it, with “pure” adversariality the court is passive as to finding the essence of the matter; it does not investigate the facts of the case on its own behalf, nor does it interfere with the truth-seeking process, but rather passes its judgment on the basis of the material presented by the parties.

According to the researchers, realization of the adversariality principle in that manner would be rational, provided that the parties in a suit are equal, being equally prepared to protect their rights, i.e. having an opportunity to seek professional legal advice, collect all the necessary evidence, etc. [36, p. 53].

To be sure, it is impossible under the current conditions. Here we can agree with the opinion of V. M. Zhuikov, who thinks that with due account for the reality, including the level of legal knowledge and possibility of using qualified legal assistance, a transfer to the idea of “pure” adversariality would be incorrect [37, p. 20].

G. Fazikosh, stating that our civil process to some extent has diverged from the investigative type of legal proceeding, supported by the state in the Soviet time, nevertheless believes that it is not “a standard of competitive justice” yet. Judicial procedure should include mechanisms that would thoroughly guarantee to the parties a possibility to present freely their evidence to the court and prove its cogency, with a secured equality of the parties against each other and before the court [16, p. 29].

Considerations of a renowned Russian scientist and lawyer V. F. Yakovlev on this subject also appear relevant: “One of the main priorities of a judicial reform was adversariality of the parties in a suit. The judge quit acting as a prosecutor; his concern is to give both parties an impartial hearing. Yet, what has time shown? Adversariality began to be opposed to an active role of the court which is wrong. Because there does not exist a true equality: one has power, money, advocates, whereas the other is fighting alone. Thus, an outcome is not difficult to predict” [38, p. 1, 18].

Exploring the trends in transformation of the adversariality principle and objective truth in the civil process of Ukraine, S. O. Volosenko presumes that one cannot regard as violation of the adversariality principle a situation when the court in extraordinary occasions (if doubts occur as to cogency some circumstance of the

The Need for Entrenchment in Civil Proceedings of Independent Principle of……

case) shows initiative in providing proof (in particular, calls for certain evidence on its own initiative). This is expedient when the case circumstances proved by the parties do not remove the argumentativeness of the situation, or when the judge has doubts as to the cogency of the evidence presented by the case participants [21, pp. 10-11].

In this aspect, the reasoning of Immanuel Kant appears topical, as away back in the late eighteenth century this famous originator of the German classic philosophy and liberalism, when speculating about the right of punishment and granting pardon, asked himself a question: “What are the method and the gravity of punishment, which social justice chooses as its principle and standard? The only principle is that of equality (in the position of the pointer on the balance of justice), according to which the court leans toward one party no more than toward the other” [39, p. 425].

The competitive legal proceeding must be optimal in providing an effective defense of infringed or challenged rights and interests, and should reflect the democratic orientation of the civil process. Regrettably, the current state of the judicial system, the legislative system’s flaws, growing court costs, and a low level of people’s legal literacy practically block the access to justice and a true realization of natural persons’ right to judicial protection.

Analyzing international practices of civil legal proceedings, one can say that under the current conditions there is a trend of departure from the “pure” adversariality provisions by broadening of judicial bodies’ authority. The world has already understood the essence of the judge’s active participation in establishing the truth and does not regard it as negligence of the adversariality principle. The example was set by England, the birthplace of a competitive process.

The result of the efforts of Great Britain’s scientific circles at the end of the 20th century was a radical rethinking of the court role in the English civil proceed-

ings. A large contribution into this field was made by Lord Harry K. Woolf who won a widespread appreciation. Under his leadership, several working groups of the total membership of over a hundred people were created to revise the entire civil proceeding law, the outcome of their work being two reports. The reports contained more than three hundred recommendations, which attract attention up to now, since they give an extensive analysis of the flaws of the former English legal proceedings and offer detailed description of the relevant remedies. Among the conclusions, there is a recommendation to confine the uncontrolled features of the adversary system to the framework of a relevant discipline, preserving everything positive, since without an effective judicial control, the competition of the parties turns into “no-rules” fighting.

Despite a large number of judicial reform opponents, inefficiency and disability of the old system of case consideration led to the fact that most of the academic community, judicial staff and lawyers favored the report and the reformist views of H. K. Woolf. Later on the main ideas and proposals of his group were put into practice in the form of the new Civil Procedure Rules of England dated December 17, 1998. The mechanism of court case management, created in accordance with the Civil Procedure Rules, means rejection of the practice when the progress of a civil process traditionally depends solely on the parties. At present, the lead is taken by the court, especially at the preparatory stage which makes it possible to speed up the procedure and cut costs [40, p. 62].

The USA adversary system of civil legal proceeding, which always stood out of the competitive spectrum of the common-law countries' models, in the first place, due to initiative of the parties and their counsels having broad procedural capacity, as well as their independent procedural activity of presenting evidence with minimal involvement of the court, has changed in the recent years towards broadened opportunities of the court as to intervening in competition and administering

The Need for Entrenchment in Civil Proceedings of Independent Principle of……
the process.

As A. Ya. Kleimenov notes, the modern US competitive system of civil procedure constitutes a system for consideration of disputes, which is based on a specific balance between the procedural status of the court and that of persons participating in a case. It allows, particularly at the pre-trial process stage, by application of a series of interconnected procedures including exchange of competitive documents and procedure of pre-trial discovery, identifying and realizing in full procedural initiatives, aimed at bringing to the court's notice their positions as to factual and legal components of a case in order to resolve the dispute during pre-trial preparation or in court enabling the parties (their counsels) to practically control the course of the process [41, p. 14].

This position of the parties, the author remarks, is restricted by the court, the function of which consists not only in an impartial response to the parties' initiatives, but, under certain circumstances, in an active interference with and administering of the process. For this very reason, adversariality in a criminal proceeding of the USA, assuming activity of the parties and passivism of the court, in effect is realized by a strong and authoritative court, since it is this court, which can guarantee observance of the rules of procedural fighting by the parties [41, pp. 14-15].

As paradoxically as it may sound, to our mind, it is the experience of the countries of the Anglo-American legal family that can appear useful in substantiation of the key ideas of the present work. Indeed, the experience of Germany, France and Italy (civil law countries) was traditionally regarded as determining for Ukraine. Our model of civil court procedure was to a large extent borrowed from the provisions of their procedural law, underlain by the so-called inquisitional system of justice, when the court is active in conducting the proceeding: it exerts control over the parties' behavior, takes the lead in hearing, directs having of witness, and affects the evidential material in other ways, focusing the case participants' attention

on circumstances significant for the case, etc. Yet, by no means all the problems can be solved, looking up to the Romano-Germanic legal family only.

A modern civil process is of a “hybrid-type” world over – it can be characterized as “quasi-inquisitional” or “quasi-competitive”, with the relevant problems and criticism of these problems; moreover, it is constantly changing.

For example, a generally recognized, almost axiomatic, principle of competitiveness in the civil procedure of the FRG in the course of time loses its former significance as such. The argument of the parties in the German legal procedure cannot take place without judicial interference, which contributes to the promptitude, efficiency, and equity of hearing. According to some processualists, the adversariality principle gives way to the so-called cooperativity principle, blurring the boundaries between judicial assistance and the adversariality principle [42, pp. 41-44].

The traditional adversariality of the French civil legal procedure in time was also supplemented with court activity. This is related primarily to introduction of a pre-trial judge into a judicial process. His functions include, firstly, control over process development by setting the appropriate terms for performance of legal acts by the parties, secondly, investigation of factual circumstances [43, pp. 102-111].

In this regard, the experience of England and America (coupled with the knowledge of justice in the Romano-Germanic legal family) allows identifying a general trend of civil legal procedure at the global scale.

A list of competitive capacities of the parties and procedural competences of the court reflects legislative attempts to keep the right balance between adversariality of the parties and activity of the court. This balance penetrates (as many scientists used to say about principles) all of the Code: norms of the parties' procedural activity (as well as those of other persons participating in a case) and the court activity interact, complementing each other. This balance is stipulated by the norm that defines the tasks of civil procedure (Article 1 of the CPC of Ukraine). Although pres-

The Need for Entrenchment in Civil Proceedings of Independent Principle of.....

ently the court is not obliged to establish the truth, but the tasks of civil legal procedure are “fair, impartial, and prompt investigation and solution of civil cases for the purpose of protection of infringed, imperfect, or challenged rights, freedoms or interests...”, and this, from our point of view, presupposes a greater activity of the court. Similar views are shared by other scholars as well [44, p. 60; 45, p. 386].

Therefore, an active procedural authority of the court should not be considered as an exception to the adversariality principle. A combination of competitive and investigative principles, with the former prevailing and the latter preserved in the form of certain active competences of the court [46, p. 8], is going to ensure a balance between public-legal and private-legal interests in a process, a true realization of the people’s right to judicial protection, and to encourage more effectively fulfillment of the key legal procedure tasks and goals.

Conclusions

Considering the above author’s reasoning and conclusions [26], the principle of combining adversariality with the procedural activity of the court can be defined as normative-legal requirements, providing for procedural equality of the persons participating in a case as to the procedure of provision, examination of evidence, and proving its cogency before the court as an element of claim or objection, as well as procedural activity of the court aimed at creation of conditions for a comprehensive, complete investigation of the factual circumstances of a case, ensuring realization of people’s rights and performance of obligations.

Within the format of the present paper, it is impossible to fully elucidate other issues related to the combination of adversariality and procedural activity of the court in a civil legal process which can make the subject of the subsequent research in the field.

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