

# Abuse of Procedural Rights Prevention as an Element of Judge and Parties Cooperation Principle in Civil Procedure

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For the first time in the course of reforms of 2014–2017, the Ukrainian legislation introduced the institute of abuse of procedural rights prevention. Though, this is only a part of the principle of good faith and cooperation between the court and the parties, which is deeply analyzed in this paper.

**Keywords:** civil procedure, abuse of procedural rights, parties, court, administration of justice, principle of cooperation.

## Piktnaudžiavimo procesinėmis teisėmis prevencija kaip teisėjo ir šalių bendradarbiavimo principo dalis civiliniame procese

2014–2017 m. vykdant reformas pirmą kartą Ukrainos įstatymai įvedė piktnaudžiavimo procesinėmis teisėmis prevencijos institutą. Vis dėlto tai tik dalis sąžiningumo ir teismo bei šalių bendradarbiavimo principo, kuris išsamiai analizuojamas šiame straipsnyje.

**Pagrindiniai žodžiai:** civilinis procesas, piktnaudžiavimas procesinėmis teisėmis, šalys byloje, teismas, teisingumo vykdymas, bendradarbiavimo principas.

## Introduction

The main purposes of the current Ukrainian reforms of judiciary and litigation are to create procedural mechanisms to ensure effective, fair, impartial and timely protection of rights and freedoms before the court<sup>1</sup>. The goal of civil procedure was changed – the criteria “effective” was added, which puts the litigation in new frames of its development.

Therefore, the abovementioned has necessitated the introduction of an institute of abuse of procedural rights prevention for the first time in the legislation of Ukraine. It should be noted that prior to the

<sup>1</sup> Strategy of reforming the judiciary, court proceedings and related legal institutions for 2015–2020. URL: <<http://zakon2.rada.gov.ua/laws/show/276/2015>>.

entry into force of the CPC 2017, which contains the relevant powers of the court to prevent abuse of procedural rights, as well as to apply measures of procedural coercion to violators, such phenomena have become widespread in court practice. Abuses of procedural rights mostly concerned filing by the parties of numerous motions, identical or very similar in content in order to significantly delay the examination of the case; failure to appear in court without good reason and being late to court for the same purpose; as well as submitting the same statements with the purpose of manipulating the automatic system of case distribution in courts, which ensures the impartiality of judges, and so on. This has led to serious problems in court proceedings, to a general decline in confidence and respect for the judiciary and judges.

Therefore, the new wording of the CPC, namely the provisions of Articles 44 and 143, provides for a list of actions that may be regarded as abuse of procedural rights, as well as measures of procedural coercion to induce persons to stop such abuse and prevent the creation of unlawful obstacles to the administration of justice<sup>2</sup>.

At the same time, case law research shows that the positive effect of the introduction of a given institute can be nullified by the absence of common approaches to the application of its norms, the lack of clear criteria for evaluating the parties' conduct as such which demonstrates abuse of procedural rights, as well as the lack of the relevant sound and proportionate means of response.

In our opinion, consideration should also be given to introducing not only a negative reaction to the conduct of the parties in the process, but also a positive one, in the form of an incentive to fulfill the procedural obligations of the parties in good faith. This requires a more comprehensive approach, in particular, the consolidation of the principle of cooperation between the court and the parties, one element of which is conscientious performance by the latter of their procedural duties.

## **1. The Legislative Regulation of Abuse of Procedural Rights Prevention in Civil Proceedings in Ukraine**

The CPC of Ukraine lacks a consolidated term “abuse of procedural rights”, but does enumerate a list of actions contradicting the task of civil proceedings, among which there are: filing of a complaint against a non-appealable court decision, against a decision which is not valid or has expired (exhausted); filing a petition (application) to resolve a matter that has already been resolved by the court in the absence of other grounds or new circumstances; statement of knowingly unreasonable recusal or other similar actions aimed at delaying or obstructing the consideration of a case or execution of a court decision; filing multiple claims against the same defendant (s) with the same subject matter and on the same grounds, or filing several claims with the similar subject matter and on similar grounds, or committing other actions for the purpose of manipulating the automatic division of cases between judges; submission of knowingly unsubstantiated claim; filing a claim in the absence of a matter of dispute or in a dispute that is obviously artificial; unjustified or artificial combination of claims for the purpose of changing the jurisdiction of the case or knowingly unreasonable involvement of the person as the defendant (co-defendant) for the same purpose; concluding a settlement agreement aimed at the detriment of the rights of third parties; deliberate failure to notify persons to be involved in the case.

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<sup>2</sup> Civil Procedure Code of Ukraine in edition of the Law on amendments to the Commercial Code of Ukraine, Civil Procedural Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts No. 6232 (eff. 02 October 2018). URL: <<https://zakon.rada.gov.ua/laws/show/1618-15>>.

In accordance with Art. 143 of the CPC of Ukraine, in case of abuse of procedural rights the court must apply measures of procedural coercion, namely a fine. This measure is applied by the court in case of non-performance of procedural obligations, in particular evasion of actions, assigned by the court to the participant of the trial; abuse of procedural rights, committing acts or allowing inaction to obstruct judicial proceedings; failure to notify the court of the inability to provide evidence required by the court or failure to produce such evidence without good cause; failure to comply with a decision securing a claim or evidence, failure to provide a copy of the revocation to the claim, appeal or cassation appeal, response to the revocation, objection to another party to the case within the time limit set by the court; and violations of the prohibitions on the use of audio-technical devices and the taking of filming, video-, sound recording during the settlement of a dispute involving a judge (in accordance with part 1, Article 148 and part 9, Article 203 of the CCP).

It is worth agreeing with the opinion that any actions, even those not listed in part 2, Article 44, which contravene the task of civil justice, as well as testify to the unfairness of litigants and their representatives, can and should be recognized as abuses of procedural rights<sup>3</sup>. At the same time, we do not agree that the court is obliged to take measures to prevent abuse of procedural rights, as referred to in part 4, Article 44, in particular, to apply the penalty provided for in Article 143. As the case-law shows, the courts do not apply it even in cases, where the abuse of procedural rights is obvious (see part 3, Article 3). In view of this, we propose to direct the actions of the court and the parties and their representatives at acting in good faith in the process with a view to comprehensively accomplishing the task of civil justice and the resolution of a civil case. In particular, given that the CPC enshrines an extremely effective mechanism for influencing parties' behavior, which, unfortunately, has not yet been fully implemented by the courts, namely the imposition of legal costs on a party who has alleged abuse of procedural rights under the provisions of Part 9 Article 141 and item 1, part 4, Article 135 of the CPC.

These provisions give the court the right to impose the costs, in whole or in part, irrespective of the outcome of the settlement of the dispute, on the party which abused the procedural rights or if the dispute arose out of its wrongful actions. The court can also impose, as a measure of securing legal costs with respect to the circumstances of the case and by request of the defendant, obligation to deposit a sum of money in the account of the court, in order to reimburse the defendant's potential expenses for professional legal assistance and other costs incurred by the defendant in connection with the examination of the claim (providing costs for professional legal assistance). Such legal costs securing shall apply where the claim is manifestly ill-founded or other evidence of abuse of the right to sue are present.

At the same time, other states' practices have similar mechanisms to induce a party to act in good faith in a judicial process, in particular, the right of the court to take into account party's behavior when allocating litigation costs<sup>4</sup>.

<sup>3</sup> IZAROVA, I.; KOROTENKO, T. Prevention of Procedural Rights Abuse: A New Experience of Ukrainian Judges. In *Polski Proces Cywilny*, No. 1/2019, P. 25.

<sup>4</sup> Please, see more in various jurisdictions: TAELEMAN, P. Abuse of procedural rights: Regional report for Belgium – The Netherlands. In TARUFFO, M. (ed). *Abuse of procedural rights: comparative standards of procedural fairness*. Kluwer Law International, 1999, p. 125 et seq.; DONTI, A. Abuse of procedural rights: Regional report for Italy and France. In TARUFFO, M. (ed). *Abuse of procedural rights: comparative standards of procedural fairness*. Kluwer Law International, 1999, p. 125 et seq.; HESS, B. Abuse of procedural rights in Germany i Austria. In TARUFFO, M. (ed). *Abuse of procedural rights: comparative standards of procedural fairness*. Kluwer Law International, 1999, p. 151 et seq.; MENDEZ, FR. Abuse of procedural rights? Spain and Portugal. In TARUFFO, M. (ed). *Abuse of procedural rights: comparative standards of procedural fairness*. Kluwer Law International, 1999, p. 181 et seq.; HAZARD, GC. Abuse of procedural rights: Regional Report for United States. In TARUFFO, M. (ed). *Abuse of procedural rights:*

## 2. Court Practice of Prevention of Abuse of Procedural Rights in Civil Cases

It should be noted that cases where the courts apply the above-mentioned provisions to prevent abuse of procedural rights and measures of procedural coercion are extremely rare in the judicial practice.

In particular, we would like to draw attention to such a court decision, which was reviewed by the court of appeal and taken for review by the Supreme Court of Cassation<sup>5</sup> (example 1). In this divorce case, the plaintiff filed an application to end the proceedings, “since he had decided to maintain the marriage relationship”. Plaintiff’s representative, who was the lawyer, supported this statement, stating that it was the plaintiff’s right to ask the court to close the proceedings, and subsequently, after the court had explained the grounds of Article 255 of the CPC of Ukraine, began to interpret them to the plaintiff and the defendant at her discretion. Such actions were regarded by the judge as an abuse of procedural rights by the lawyer, which were expressed in the statement and interpretation of the chairman’s actions when going to the conference room regarding the court’s clarification of the requirements of Art. 255 of the CPC of Ukraine. As a result, the court ruled that it had closed the civil proceedings at the request of the plaintiff and at the same time found abuse of the procedural rights of his representative’s lawyer.

At the same time, the court did not apply any procedural measure, in particular, a fine for violation of the CPC requirements. Therefore, the main issue arose when appealing this decision, since the separate order recognizing the representative’s procedural actions as containing abuses of procedural rights was not rendered by the court, and the final decision in the case only indicated that it was an abuse of procedural rights, without the use of procedural coercive measures. According to the CPC, such a decision is not subject to appeal separately from a court decision, and in this case the consideration of the case ended with a court order to close the proceedings.

In another case, the court recognized the actions of a lawyer who “expressed themselves in court being late for 19 minutes, and not to adduce any proper and admissible evidence of this fact”<sup>6</sup> (most likely implied validity of the reason for the delay and apology – author, example 2), as abuse of procedural rights. Again, the court did not apply any measure of procedural coercion to the offender.

No measures of procedural coercion were applied even in a case in which abuse of procedural rights was obvious. Such an abuse became widespread just before the appropriate changes were made and the institute of non-abuse of procedural rights was introduced, namely, the filing of several claims against the same defendant (defendants) with the same subject matter and on the same the grounds, or the filing of several claims with a similar subject matter and on similar grounds, that is, committing actions aimed at manipulating the automatic distribution of cases between judges - a system, which acts in Ukraine to guarantee the independence and impartiality of the judiciary (Example 3). In particular, information from an automated record keeping system in court confirms the existence of several identical claims, which can serve as a proper confirmation of this fact. Instead, the judge of the Obolonsky district court of Kyiv also did not apply any measure of procedural coercion in his decision<sup>7</sup>.

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*comparative standards of procedural fairness*. Kluwer Law International, 1999, p. 43 et seq.; TANIGUCHI, J. Abuse of procedural rights: A Japanese perspective. In TARUFFO, M. (ed). *Abuse of procedural rights: comparative standards of procedural fairness*. Kluwer Law International, 1999, p. 215 et seq.; OTEIZA, ED. Abuse of procedural rights in Latin America. In TARUFFO, M. (ed). *Abuse of procedural rights: comparative standards of procedural fairness*. Kluwer Law International, 1999, p. 191 et seq.

<sup>5</sup> The decision of the Obolon District Court of Kyiv from April 15, 2019. <<http://reyestr.court.gov.ua/Review/81164235>> and the decision of the Kyiv Court of Appeal from May 10, 2019. <<http://reyestr.court.gov.ua/Review/81639084>>.

<sup>6</sup> The decision of the Obolon District Court of Kyiv from April 24, 2019. <<http://reyestr.court.gov.ua/Review/81391423>>.

<sup>7</sup> The decision of the Obolon District Court of Kyiv from November 7, 2018. <<http://reyestr.court.gov.ua/Review/77770067>>.

It should be taken into account that the amount of the fine can range from 0.3 to 3 sizes of the subsistence minimum for able-bodied persons, which is respectively from 576.30 UAH. up to 5763.00 UAH (at the rate of the National Bank of Ukraine it is approximately from 19 euros to 198 euros) or up to 10 subsistence levels for able-bodied persons in case of repeated or systematic actions of a person, i.e. 19210.00 UAH, which is respectively 662 euros). At the same time, in our opinion, it is difficult for the courts to reconcile the amount of the fine with the abuse of procedural rights.

At the same time, the CPC enshrined the right of the court to impose the costs, in whole or in part, regardless of the outcome of the settlement of the dispute on the party who abused the procedural rights. In practice, these provisions are not often used, but their potential is not fully utilized by the courts.

In particular, we would like to draw attention to the case (example 4), in which the courts of first instance have repeatedly considered disputes between two individuals over the performance of cash loan debt commitments, the collection of inflationary losses, interest on annual use and interest rates from the overdue loan amount starting from 2013. This forced the court in its decision of 24 June 24 2019<sup>8</sup> to note that since the decision of the Pershotravensk city court of Dnipropetrovsk region of 31 October 2018, which was left unchanged by the decision of the Dniprovsk court of appeal of 16 April 2019, the plaintiff's claims against the defendant to recover inflation sums, interest on the use of money and interest on the annual to be partially satisfied; to meet the claim for recovery of the monthly interest after 1 September 2014 and 4% (not 3%) per annum was denied with a legal justification, but despite this, the plaintiff again filed a claim asking the court to collect monthly interest and 4% per annum, calculating these payments, so the court found it necessary to warn the plaintiff of the consequences of misusing the procedural right to file a knowingly unsubstantiated claim. At the same time, he did not apply any measures of procedural coercion and, in the division of costs, referred to Article 141, did not take into account the provisions of paragraph 9, made no comment on the imposition on an abusive person of any legal costs.

### **3. Ways to Ensure the Fair Conduct of the Parties and Their Representatives in the Case with a View to Ensuring the Realization of the Main Task of Civil Justice**

We should support the idea, that the concept of abuse to a significant extent is based on the assumption of abusing the procedural rights claiming at the same time that there is necessity of observing the principles of fair and loyal proceedings both by the court and the parties, which constitutes the transposition of the substantive concept of *bona fide* in the procedural area<sup>9</sup>. The loyal cooperation of the court and the parties in the course of the trial is a continuation of the implementation of this traditional approach of good faith, which allows the main task of civil justice to be fulfilled.

At the same time, it should be noted that the procedural law of Ukraine does not provide any explanation of what can be considered as a fair discharge of procedural obligations, as well as any statements of the parties on their fair participation in the case, as, for instance, the Polish Civil Procedure Code<sup>10</sup>,

<sup>8</sup> The decision of the Pershotravensk city court of Dnipropetrovsk region from June 24, 2019 <<http://reyestr.court.gov.ua/Review/82623512>>.

<sup>9</sup> GAJDA– ROSZCZYNIŁSKA, K. Abuse of procedural rights in Polish and European civil procedure law and the notion of private and public interest. *Access to Justice in Eastern Europe*, 2019, No 2 (3), p. 53–85.

<sup>10</sup> In the Polish Code of Civil Procedure (*Polish CCP*), which was adopted on 17 November 1964 and is still in force. The Polish Code of Civil Procedure of 17 November 1964. *Polish Journal of Laws* of 1964, No 43, item 296 as amended.

which since 3 of May 2012 was amended by the following wording: ‘The parties to and participants in the proceedings shall carry out the procedural steps in accordance with good practice, provide explanations as to the facts of the case truthfully and without concealing anything and file evidence’).

It makes sense if, in the future, the person is responsible for the breach of the good faith performance of his or her obligations and the corresponding obligations to act in the process.

We also cannot combine the two following grounds of the procedural rights abusing: the abuse of the right to the proceedings (as in *example 4*) and the abuse by taking procedural steps during the proceedings (all other examples 1, 2 and 3, described in this paper).

At the same time, the subjective criteria give us the opportunity to define the abusing of rights by the representatives-advocates (as in *examples 1 and 2*), parties (as in *examples 3 and 4*) and by the court (as in all examples, because the court did not apply measures of procedural coercion to the offenders, in which their unfair treatment of their powers manifested)<sup>11</sup>. We definitely agree that the notion of abuse of court powers is much more proper<sup>12</sup>.

Therefore, implementing the abovementioned provisions in Ukrainian legal doctrine and the law will lead to effective prevention of procedural rights abusing. In particular, according to the draft, amending the Civil Procedure Code of 27 of November 2017, the court discovering the abuse by the party of the procedural right may in its decision: impose a fine on the abuser; or irrespective of the result of the case, increase the costs of the proceedings to be paid by the abuser or even impose on the abuser the obligation to reimburse all the costs, proportionately to the delay in the case consideration caused by the abusing; or at the request of the opposing party: a) oblige the abuser to pay the costs of the proceedings increased by a proper amount reflecting the amount of work done by the opposing party to participate in the proceedings resulting from the abuse, however not higher than twice the amount of the costs; b) oblige the abuser to pay the interest due on the said amount in the rate increased proportionally to the delay in settling the case caused by the abuse, however not higher than twice the amount’<sup>13</sup>.

We may use the abovementioned approach to define the responsibility of parties and their representatives for the procedural rights abusing in the CPC of Ukraine, as well as to introduce the criteria of their procedural steps’ assessment.

## Conclusions

Preventing abuse of procedural rights is extremely important and urgent.

It is also worth supporting the proposal to distinguish between two approaches to the court’s response to abuse of procedural rights in the process: those who do not have a representative and have no legal education (example 4) and those who are represented in the case or who have a higher legal education degree<sup>14</sup> (see Examples 1 and 2). An additional argument for this may be that abuse can harm not only parties and participants, in particular their personal interest in the cause and integrity, but

<sup>11</sup> See FENTIMAN, R. Abuse of procedural rights: The position of English Law. In TARUFFO, M. (ed). *Abuse of procedural rights: comparative standards of procedural fairness*. Kluwer Law International, 1999, p. 43 et seq.

<sup>12</sup> NORMAND, J. Final Report. The two approaches to abuse of procedural rights. In TARUFFO, M. (ed). *Abuse of procedural rights: comparative standards of procedural fairness*. Kluwer Law International, 1999, p. 242.

<sup>13</sup> The Polish Code of Civil Procedure of 17 November 1964. *Polish Journal of Laws* of 1964, No 43, item 296 as amended. See also WEITZ, K. System koncentracji materiału procesowego według projektu zmian Kodeksu postępowaniacywilnego. In MARKIEWICZ, K. (ed). *Reforma postępowania cywilnego w świetle projektów Komisji Kodyfikacyjnej*, 2011, CH Beck, s. 11.

<sup>14</sup> IZAROVA, I.; KOROTENKO, T. Prevention of Procedural Rights Abuse: A New Experience of Ukrainian Judges. In *Polski Proces Cywilny*, No. 1/2019, P. 25.

also the administration of justice as a whole, confidence in the judiciary and the security and stability of the state's legal system.

At the same time, the responsibility of the participants must be based on clearly defined criteria for evaluating their actions, so it is necessary to determine the specific obligations that they must observe in the course of the case, in particular, following the example of the Polish law, as an obligation to act in the process and carry out procedural actions in accordance with established practice, to give clarification of the facts of the case and to present evidence truthfully, without hiding anything from the court.

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18. The decision of the Obolonsky District Court of Kyiv from April 24, 2019. <<http://reyestr.court.gov.ua/Review/81391423>>.
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## **Abuse of Procedural Rights Prevention as an Element of Judge and Parties Cooperation Principle in Civil Procedure**

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### **S u m m a r y**

For the first time in the course of reforms of 2014–2017, the Ukrainian legislation introduced the institute of abuse of procedural rights prevention, in particular, the provisions of Articles 44 and 143 of the CPC of Ukraine provide for a list of actions that can be considered as abuse of procedural rights, as well as measures of procedural coercion aimed at inducing individuals to end such abuse and to prevent unlawful obstruction of justice.

This important step was urgently needed in the jurisprudence in which extremely unfortunate cases of such abuse have recently spread. At the same time, in the author's view, the urge to act in good faith in the procedural obligations of the parties requires a more comprehensive approach, in particular, the consolidation of the principle of cooperation between the court and the parties, the element of which is the conscientious performance of their procedural obligations.

## **Piktnaudžiavimo procesinėmis teisėmis prevencija kaip teisėjo ir šalių bendradarbiavimo principo dalis civiliniame procese**

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### **S a n t r a u k a**

2014–2017 m. vykdant reformas Ukrainoje pirmą kartą šios šalies įstatymuose nustatytas piktnaudžiavimo procesinėmis teisėmis prevencijos institutas. Ukrainos CPK 44 ir 143 straipsniuose pateiktas veiksmų, laikytinų piktnaudžiavimu procesinėmis teisėmis, sąrašas, taip pat nustatytos procesinės priemonės, kuriomis siekiama paskatinti asmenis nutraukti tokį piktnaudžiavimą ir užkirsti kelią neteisėtai kliudyti vykdyti teisingumą.

Šio svarbaus žingsnio skubiai reikėjo teismų praktikoje, kurioje pastaruoju metu ypač padaugėjo apgailėtinų tokio piktnaudžiavimo atvejų. Autorės manymu, raginant sąžiningai veikti vykdant šalių procesinius įsipareigojimus labai reikia išsamesnio įstatymų leidėjo požiūrio, visų pirma įtvirtinti teismo ir šalių bendradarbiavimo principą, kurio vienas iš elementų yra sąžiningas jų procesinių įsipareigojimų vykdymas.