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CIVIL PROCEDURE AS A LEGAL FORM OF JUDICIAL LAWMAKING

Introduction

Recent years have witnessed the continuous increasing of role of courts and judges in modern societies. Under the traditional understanding of the doctrine of the separation of powers, the main and the only function of courts is the application of statutes. According to Ch. Montesquieu, the courts and judges are only the mouth which pronounces the words of the statute (fr. *bouch de la loi*)¹. However, these words were written by Ch. Montesquieu in the 18th century, when courts were totally dependent on the King. The situation in the 19th century was completely different. But even today, these words are often used as an argument by the judges against criticism for one or another judgment – it is not our fault, we have just applied the law – *dura lex, sed lex*. Nevertheless, the majority of those who are involved in adjudication process argue that the ideas of Ch. Montesquieu no longer correspond to the real situation. Of course, even today the main function of the courts in civil proceedings is adjudication of legal disputes by the way of applying legal rules to established facts of a civil case. But this main activity of the courts has acquired a completely new content. The application and interpretation of law has moved from a mechanical, positivistic way into a creative process. The courts are becoming real actors in the political process because the judgements of the courts influence all spheres of the life of the society. Creative application and interpretation of law by the courts during the 20th century transformed the courts from mere adjudicators into creators of new legal rules. Today, increasingly more authors speak about the fact that the courts, together with the legislator and the executive power, create the law, and that we have a new form of lawmaking – judicial lawmaking (judge-made law). This fact requires not only a re-evaluation of the traditional understanding of the doctrine of the separation of powers, but also a new vision regarding the sources of law and the place of courts in the society.

The question of judicial lawmaking has never been in the focus of attention of the doctrine of law in Lithuania. Nevertheless, there are several reasons to start a discussion on this matter. First, Article 2 of the Code of Civil Procedure of Lithuania provides that one of the purposes of civil procedure is “interpretation and development of law”. What does this “development of law” mean – creation of new rules, modification of the existing rules or just a literal, textual

¹ Montesquieu Ch. De l’esprit des lois. Paris: Vedel edition, 1964, p. 164

interpretation? Second, the reality shows that courts in fact create law and sometimes even in a very active manner, e.g. the activity of the Constitutional Court during the last several years. Third, despite the fact that the Constitutional Court in its decision of March 28, 2006¹ mentioned the importance of precedent, there still are many lawyers in Lithuania who deny precedent as source of law. But if the “development of law” means lawmaking, why then do we tend to deny precedent as a source of law?

The aim of this article is to overview the different doctrines related with the nature of the interpretative activity of courts, to try find and answer to the question whether or not the courts create legal rules, and to discuss the limits and legitimacy of the lawmaking activity of courts.

II. Different Doctrines Regarding Judicial Lawmaking

The adjudication process consists of three stages: establishment of facts, determination of the applicable legal rule to these facts, and the interpretation and application of the legal rule to established facts. In simple civil cases, the adjudication is a mere procedure of syllogism – in such cases it is not difficult to determine the applicable rule and such rule, normally, does not need any interpretation. However, in complex (hard) civil cases, the courts are faced with two problems. First of all, it may be difficult to determine an applicable rule. Second, even if the court determines an appropriate legal rule, the applicable legal rule often needs interpretation. Statutory interpretation has several different methods, the employment of which could lead to different results². By using one or another method of statutory interpretation, a court may discover not only different meanings of a statutory rule, it may also create a new rule. For example, proponents of the so-called dynamic statutory interpretation argue that only by dynamic interpretation the courts will be able to ensure adaptation of statutory law to the changed circumstances and to act as an intermediary between the legislator and the real life.³ However, there are different answers to the question whether or not the courts create new rules when interpreting statutes. At least four theories could be mentioned.

According to the first – the so-called declaratory theory – the courts never create any law, because the function of the courts is not to make a new law, but to declare the existing law. The main argument of this theory is the supremacy of the parliament – only the parliament, elected by the citizens, could act as a lawmaker. This doctrine completely identifies law with the written law and assigns the judiciary with only an interpretative function. On the other hand, the interpretative function of the courts is based on textual positivism, which dominated in Europe until

¹ Valstybės žinios, 2006, Nr. 30-1051

² E.g., Cueto-Rua J.C. *Judicial Methods of Interpretation of the Law*. New Orleans: Louisiana State University Press, 1981, p. 18-19

³ Eskridge. W. N. *Dynamic Statutory Interpretation*. Cambridge, Mass.: Harvard University Press, 1994, p. 50-51

the end of the Second World War. This doctrine was supported by some famous judges of the United Kingdom, including Lord Devlin, Lord Simonds¹. The doctrine also prevailed in Continental Europe, especially in the former socialist countries, until the middle of the 20th century. However, this doctrine is criticized as unrealistic – the real life disproves this theory. For example, in the former USSR and other socialist countries, the supreme courts issued so-called explanations which, though formally not considered as law, in reality were a source of law and lower courts based their own judgments on these explanations.

The second doctrine recognises the reality and argues that sometimes the courts create the law. The lawmaking function of courts is based on the creative interpretation of statutory law. The decline of formalism in judicial process occurred in Europe after the Second World War. Today the courts in Europe often overtly make and change law.² Nevertheless, the proponents of this doctrine, including Lord Radcliffe and Lord Scarman from the United Kingdom, support the lawmaking function of the courts only under one condition – the lawmaking by the courts must be occasional, imperceptible, the court may not speak openly about its own lawmaking function. When creating law, the courts must be very cautious, they may not create the law in an arbitrary way because the parliament in such cases may intervene and restrict the judicial powers. The main criticism of this doctrine focuses on the suggested secret way of such lawmaking: the adjudication procedure is based on the principle of publicity, thus the courts must act openly, including in lawmaking.³

The third doctrine argues that the courts create the law, and lawmaking is one of the functions of the courts. At the same time, the supporters of this doctrine recognize that the judicial lawmaking has some limits and may be developed only within these limits. For example, according to the well known former Justice of the United States of America Supreme Court B. Cardozo, the courts could create law only in the event of a gap in law.⁴ Today this doctrine prevails in the United Kingdom and even in Continental Western Europe. For, example, there is a general agreement in the United Kingdom that the court should not intervene in those cases where the legal rules are clear, also where a serious legal reform is necessary and it will be impossible to solve a problem by a court judgement. In such complex situations, only the parliament could take the responsibility, and the courts must restrain themselves from lawmaking in socially sensitive areas. The courts must also refrain from lawmaking in such situations where certain questions are outside the experience of a judge, and the judge is not capable of creating new effective legal rules because of the lack of

¹ Bingham T. *The Business of Judging. Selected Essays and Speeches*. Oxford: Oxford University Press, 2000, p.25

² Kühn Z. *Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement* *In The American Journal of Comparative Law*, 2004, Vol 52, p. 532-534

³ Devlin P. *The Judge*. Chicago: University of Chicago Press, 1981, p. 2, 5, 17

⁴ Cardozo B. *The Nature of the Judicial Process*. New Haven, Conn., 1921, p. 89

personal knowledge and experience. In any case, the lawmaking function of the courts must be performed very carefully, step by step, without sudden leaps.¹

The fourth doctrine argues that lawmaking is a function of the courts, and the court must perform this function in a very active way. Some of the most famous representatives of this doctrine include Lord Denning from the United Kingdom² and the former President of Israeli Supreme Court A. Barak. They supported a very dynamic and creative type of judicial lawmaking.³

It is clear that the first and last of the doctrines represent the extreme positions. The first is criticized as unrealistic. However, the last doctrine is also criticized as a dangerous one. The main arguments of such criticism are as follows. Active judicial lawmaking could lead to a transformation of the courts from the “least dangerous “branch of state power⁴ to the “most dangerous” branch where judges start to act as politicians⁵. Second, unrestricted judicial lawmaking could lead to unpredictability, unforeseenability, ambiguity and chaos because the judge will be totally free – without any restriction by either the statute or precedents, it will only be up to the judge how to decide a case. Third, very active judicial lawmaking will provoke a conflict between courts and the parliament. Fourth, the majority of judges do not possess the necessary knowledge and experience for effective lawmaking. Fifth, judges do not have enough time for the function of lawmaking.⁶

III. Areas of Judicial Lawmaking

The recognition of the fact of judicial lawmaking does not mean that the courts create law in each case. In the so-called simple civil cases, the role of court is also very simple – to apply a rule of statutory law to the established facts⁷. In such cases, the judge acts in a rather formalistic way because he is able to decide a case solely on the basis of legal syllogism. However, there are some areas in which courts may not act in a formal way and the syllogism may not be used as a method. First of all, the function of the judge becomes complicated in the event of a gap in law. In such cases, there is no rule which could be found in the statute, and the judge must act in an innovative and creative manner. Let us take an example. The Law on Commercial Arbitration of

¹ Bingham T. *The Business of Judging. Selected Essays and Speeches.* Oxford: Oxford University Press, 2000, p.26

² Denning A. *The Discipline of Law.* Oxford: Oxford University Press, 2005, p. 25-31

³ Barak A. *The Judge in Democracy.* Princeton, N.J.: Princeton University Press, 2006, p. 56-58

⁴ Powers S. P., Rothman S. *The Least Dangerous Branch? Consequences of Judicial Activism.* Westport: Praeger Publishers, 2002, p. 1-2

⁵ Leisham R. *Against Judicial Activism: the decline of Freedom and Democracy in Canada.* Montreal: McGill Queen’s University Press, 2006, p. 135-136

⁶ Dam S. *Lawmaking Beyond Lawmakers: Understanding the Little Right and the Great Wrong (Analyzing the Legitimacy of the Nature of Judicial Lawmaking in India’s Constitutional Dynamic)* *In Tulane Journal of International and Comparative Law*, 2005, Vol. 13, p. 139-140

⁷ Greenwalt K. *Constitutional and Statutory Interpretation.* *In The Oxford Handbook of Jurisprudence and Philosophy of Law.* Edited by Coleman J. and Shapiro S. Oxford: Oxford University Press, 2004, p. 269

Lithuania of April 2, 1996¹ does not provide any rules regarding the validity of the arbitration clause in the event of the assignment of rights or transfer of debt. In one civil case, the creditor had assigned the rights to a new creditor. The contract provided an arbitration clause. The new creditor initiated an arbitration case against the debtor. The later argued that the arbitration clause was not valid because the rights were assigned and the new creditor was not a party to the arbitration agreement. However, the Supreme Court of Lithuania ruled that the assignment of contractual rights had no impact on the validity of the arbitration agreement, consequently the arbitration clause was valid in respect of the new creditor. This means that the Supreme Court has not only fulfilled the gap but also created new rule².

The second area of judicial lawmaking is the situations where the judges use judicial discretion. Judicial discretion is described as authority vested on the courts to make a choice between two or more conceivable lawful alternatives.³ For example, according to Article 78 of the Code of Civil Procedure of Lithuania, the renewal of an expired time limit depends on the discretion of the judge. It is up to a judge to decide which reasons of the expiration of a time limit are serious and which are not. The analysis of the case law revealed several rules created by the court when applying and interpreting Article 78 of the Civil Procedure Code. For example, in one case, the Supreme Court of Lithuania ruled that Article 78 must not be applied in a formal way, and if a time limit expired by only one day, the time limit must be renewed.⁴ The most recent examples of the judicial law making in Lithuania are judgments of the Supreme Court of regarding interpretation of Article 6.250 of the Civil Code by which the Supreme Court extended the right to non-material damage to close relatives of the deceased.⁵

The third sphere of judicial lawmaking is the interpretation and application of the general principles of law and so-called open norms (general clauses), like good faith, justice, reasonableness, fundamental human rights, etc. In this area, the practice of the European Court of Justice, the European Court of Human Rights and other international tribunals could be mentioned. In Lithuania, the practice of the Constitutional Court is an example of judicial lawmaking expressed in creative interpretation of constitutional principles. The practice of the Supreme Court of Lithuania also offers examples of judicial lawmaking by interpreting the general principles of law. For example, the Supreme Court, based on the constitutional principle of equality before law (Arts. 29 and 38 of the Constitution), has extended the application of Part 2 of Article 35 of the Law on

¹ Valstybės žinios, 1996, Nr. 39-961

² Judgment of the Supreme Court of Lithuania of May 31, 1999, Case No 3K-3-4/1999

³ Judicial Discretion in European Perspective. Edited by Wiklund O. Stockholm: Norstedts Juridik, 2003, p. 85

⁴ Judgment of the Supreme Court of Lithuania of April 6, 2007, Case No 3K-3-141/2007

⁵ For example, Judgment of the Supreme Court of Lithuania of February 27, 2008, Case No 3K-3-150/2008; Judgment of the Supreme Court of Lithuania of September 26, 2007, Case No 3K-3-351/2007; Judgment of the Supreme Court of Lithuania of Mat 15, 2006, Case 3K-3-330/2006

Employment Contract regarding provisions for childcare leave to be applicable in respect of a child's father.¹

IV. Advantages and Disadvantages of Judicial Lawmaking

The recognition of the reality that the courts sometimes or even very often make law is not without a problem. From one point of view, the courts must be active, to work hand in hand with the legislator, and to secure the adaptation of statutory law to social needs. Very passive, very formalistic court does not correspond to the general interests of the society. The judge is under the obligation to decide a civil case on the basis of law. The judge can not be compelled to think about global national or international problems, the solving of which is the duty of politicians. However, in the event of necessity, the judge has both the right and duty to change legal rules or to make an exception from them. But before doing so, the judge must always ask himself about the possible consequences of such an intervention into the sphere of the legislator.² This allows to conclude about the necessity of the judicial self-restraint – judicial lawmaking without any self-restraints and without any limits means the abuse of power and dictatorship.

From the other point of view, very active or even aggressive intervention of the courts into lawmaking activities may disturb the checks and balances between the branches of state power. The activist position of the courts is often the cause for a negative reaction from the legislator, thus sometimes courts and legislators act not as social partners but as competitors. Whenever the courts are trying to decide very complex and socially sensitive questions in an innovative manner, there is always a risk of a conflict between the judiciary and the whole society. As an example, the conflict between the United States of America Supreme Court and President F. Roosevelt in 1933–1937 could be mentioned here.³ Today we also may find many examples of the overriding Supreme Court judgements by the Congress of the United States of America.⁴ The Lithuanian examples of such conflicts between the courts on the one side and the legislator and the society on the other are the recent decisions of the Constitutional Court regarding citizenship as well as its other controversial decisions. Very active courts are no less dangerous for the society as the passive ones.

¹ Judgment of the Supreme Court of Lithuania of April 6, 2007, Case No 3K-3-141/2007

² Honoré T. The Role of Judge. *In* Law, Morality and Rights. Edited by Stewart M.A. Doredrecht: D.Reidel Publishing Co, 1983, p. 43-44

³ Jacob H.. Courts and Politics in the United States *In* Courts, Law and Politics in Comparative Perspective. Edited by Jacob H. New Haven and London: Yale University Press, 1996, p. 12

⁴ Eskridge W.N. Overriding Supreme Court Statutory Interpretation Decisions *In* The Yale Law Journal, 1991, Vol. 101, p. 331-455

Much has been written about a reasonable balance between activism and passivism of the courts¹. Nevertheless, such reasonable balance is not easy to achieve, because the position of the courts in the society depends on a whole range of economic, social, cultural, and other factors. For example, the activism or passivism of courts to a great extent depends on the quality of statutory law: if the quality of the statutory law is not good, there are many contradictions and inconsistencies in the law system, thus the courts must be more active. It is also obvious that in the period of drastic economic and social transformations, the position of the courts is likewise undergoing change. For example, the courts of many post socialist countries, including Lithuania, are criticised for their passive role and sometimes for their disability to interpret and apply old legal rules to completely changed circumstances². The position of the courts also depends on the ability of politicians to agree upon one or another important social or legal issue. When the politicians are not able to reach an agreement, they are willing to leave a gap in the law or to solve a problem by making a compromise, thus leaving the decision of controversial questions to the courts.³ It is also very important to mention that the notion “judicial activism” has at least two different meanings. First of all, we could speak about the policy-orientated judicial activism when courts base their judgement on political arguments (this often happens in the practice of Constitutional Courts). Such kind of judicial activism is criticised, because in such a situation it is difficult to draw a distinguishing line between the courts and the legislator. However, the second –so-called argument-orientated – type of judicial activism is a result of the statutory interpretation, and the content of this activism to a great deal depends on the interpretation methods used by the court.⁴

The second problem related with judicial lawmaking is the question of the legitimacy of the judge-made law. The opponents of judicial activism and judicial lawmaking argue that the judicial lawmaking lacks legitimacy. Only parliament, elected by the citizens, has the legitimate

¹ E.g., *Judicial Activism in Comparative Perspective*. New York: St.Martin’s Press, 1991; Nicol D. *EC Membership and the Judicialization of British Politics*. Oxford: Oxford University Press, 2001; Stone Sweet A. *The Judicial Construction of Europe*. New York: Oxford University Press, 2004; Hirschl R. *Towards Juristocracy. The Origins and Consequences of the New Constitutionalism*. Cambridge, Mass.: Harvard University Press, 2004; Martin R.I. *The Most Dangerous Branch: How the Supreme Court of Canada has Undermined Our Law and Our Democracy*. Quebec: McGill-Queen’s University Press, 2003; Carrese P.O. *The Cloaking of Power. Montesquieu, Blackstone, and the Rise of Judicial Activism*. Chicago: The University of Chicago Press, 2003; *The Rengquist Court: Judicial Activism on the Right*. Edited by Schwartz H. New York: Hill and Wang, 2002

² Kühn Z. *European Law in the Empires of Mechanical Jurisprudence: the Judicial Application of European Law in Central European Candidate Countries* *In Croatian Yearbook of European Law and Policy*, 2005, No 1, p. 55-73; Emmert F. *Administrative and Court Reform in Central and Eastern Europe* *In European Law Journal*, 2003, Vol. 9, No3, p. 288-315;

³ Krystyna Daniel. *Stressing Judicial Decision: Judicial Interpretation versus Judicial Policy-Making In Stressing Legal Decisions*. IVR 21st World Congress, Lund, Sweden, 12-18 August, 2003/ edited by Biernat T. Cracow: Polpress Publisher, 2004, p. 153-171

⁴ Lech Morawski. *Stressing – The Controversy between Judicial Passivism and Activism*. *In Stressing Legal Decisions*. IVR 21st World Congress, Lund, Sweden, 12-18 August, 2003/ edited by Biernat T. Cracow: Polpress Publisher, 2004, p. 47-58

power to make law. Judges are not elected, hence, they cannot legislate. Nevertheless, the supporters of judicial activism and judicial lawmaking have some strong counter-arguments. First, in most states judge are appointed by the parliament or government, i.e. judges are vested with the power to make law by democratically elected representatives. For example, according to the liberal theory of statutory interpretation, the parliament delegates the right to make law to the courts.¹ Others argue that a difference must be made between a lawmaking by statutory interpretation and a lawmaking by the legislator. The courts make new rules on the basis of the existing legal rules, and a new rule is a result of statutory interpretation. Judicial lawmaking is always an expression of reasoned lawmaking based on various legal arguments. Lawmaking by the legislator, on the contrary, is not a process of legal reasoning. Legislation is a political process and is primarily based on political issues.²

V. The Judicial Precedent as a Tool for Judicial Lawmaking

The recognition of the fact that the courts make the law gives rise to a new question – by what methods and tools may the courts engage into lawmaking activity? In former socialist countries it was common for the supreme court to issue the so-called explanations of the application of laws. For these reasons, even the judgments of the supreme courts in concrete cases were of no importance. It is difficult to find any reference to concrete judgements of a supreme court in the former Soviet doctrine of law. The lower courts and the doctrine of law in former socialist states made references only to the explanations of the supreme courts. Due to these reasons, the doctrine of judicial precedent was totally rejected. Such practice was continued by some post socialist states even after 1990.³ The same happened in Lithuania as well – the Senate of the Supreme Court used to periodically issue explanations on the application of laws. Lithuania invented even a new tool in this area which had not been known in the Soviet Union – consultations of the Supreme Court. And only in 2006, the Constitutional Court in its decision of March 28, 2006 ruled that there could be only one tool of lawmaking – the judicial precedent. Of course, there is nothing new in such a ruling of the Constitutional Court – the doctrine of judicial precedent had been *de facto* recognized by the Lithuanian doctrine of civil procedure long before this decision. Nevertheless, this decision of the Constitutional Court is important because now the doctrine of judicial precedent is recognised in Lithuania *de jure*. However, recognition of the doctrine of judicial precedent *de facto* and *de jure* is

¹ Eskridge. W. N. Dynamic Statutory Interpretation. Cambridge, Mass.: Harvard University Press, 1994, p. 112-113

² Feeley M.M., Rubin E. Judicial Policy-Making and the Modern State. Cambridge: Cambridge University Press, 2000, p.338

³ Kühn Z. The Authoritarian Legal Culture at Work: the Passivity of Parties and the Interpretational Statements of Supreme Courts *In* Croatian Yearbook of European Law and Policy, 2006, No 2, p. 19-26

not enough for the effective functioning of the doctrine of *stare decisis*. It is not clear what judicial precedent we have in mind –authoritative (binding) or persuasive.¹ The modern doctrine of law argues that there is no single notion of judicial precedent. There are at least four or even five different legal systems in the world which understand the judicial precedent in a different way. For example, the judicial precedent as a source of law is recognised today in most Continental European countries, but the importance and notion of judicial precedent in common and civil law are still different.² It is not clear at the moment to which legal system of judicial precedent Lithuanian legal system belong.

The second problem which arises from the fact of recognising judicial precedent is the effectiveness of this doctrine. The principle of *stare decisis* is a workable tool only if some conditions are fulfilled. There is a number of such conditions, including the high qualification of lawyers and judges, systematisation, publication and annotation of precedents, accessibility of precedents, consistent and non-contradictory practice of the Supreme Court, the relevant quality of the doctrine of law, the relevant style of legal teaching, etc.³

The third problem is that, unfortunately, the judicial precedent has considerable disadvantages. As an example of the disadvantages of the judicial precedent, it is possible to mention its retroactivity⁴. The second problem which diminishes the importance of the precedent and legitimacy of the judicial lawmaking is the possibility of the courts to depart from the precedent – the so-called overruling.⁵ Consequently, the doctrine of law must discuss not only advantages but disadvantages of the judicial precedent as well.

Conclusions

The reality shows that courts often act as lawmakers. However, the lawmaking activity of the courts is different from the lawmaking activity of the legislator. The new rules created by the courts are a result of creative interpretation of the statutory law and the general principles of law. A new rule created by a court judgment is a result of various methods of statutory

¹ Shiner R.A. Precedent, Discretion and Fairness *In Law, Morality and Rights*. Edited by Stewart M.A. Dordrecht: D.Reidel Publishing Co, 1983, p. 94-95

² Interpreting Precedents. Edited by MacCormick N., Summners R.S. Dartmouth: Aldershot, 1997; Hondius E. Precedent and the Law *In Precedent and the Law . Reports to the XVIIth Congress International Academy of Comparative Law, Utrecht, 16-22 July, 2006*. Edited by Hondius E. Brussels: Bruylant, 2007, p. 9-14; MacCormick N. The Significance of Precedent *In Acta Juridica*. Cape Town: Juta and Co, 1998, p. 174-187

³ Even in the classical example of precedential legal system like USA the problem of the internal inconsistency and contradictions of the Supreme Court and often overruling is mentioned as serious problem: Lee T.R. *Stare Decisis In Historical Perspective: From the Founding Era to the Rehnquist Court In Vanderbilt Law Review*, 1999, Vol. 52, p. 647-735

⁴ Cross R. Precedent in English Law. Oxford: Oxford University Press, 1977

⁵ Dunn P.H. How Judges Overrule: Speech Act Theory and the Doctrine of *Stare Decisis In The Yale Law Journal*, 2003, Vol. 113, p.493-531

interpretation. On the other hand, a new rule created by the courts is a result of legal reasoning provided in a court judgement passed in a concrete civil case. This new rule is always a result of the interpretation and application of law to concrete established facts in a concrete civil case. Due to this reason, this new rule serve as the basis for a new judgment only in the same kind of civil cases. The recognition of the doctrine of precedent is a new important step in the Lithuanian doctrine of law and court practice. This recognition requires new steps to be taken in order to ensure the effective functioning of the doctrine of judicial precedent.

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