

PROCEDURAL LEGAL STANDING (LEGITIMATIO AD PROCESSUM)

Abstract

The procedural legal standing (*legitimatio ad processum*) in the continental procedural systems is not standardized legal institute of the civil procedural law, so it is a creation of the theory of the civil procedural law and judiciary. The legal gap of the institute procedural legal standing makes this institute a real enigma of the modern civil procedural law. This thesis is due to the fact that the legal standing is narrower institute from the legal interest, and a broader institute from the substantive legal standing (*legitimatio ad causam*). That 's why it is a real challenge is to answer the question does the procedural legal standing has its own independent process function vis-à-vis the legal interest and substantive legal standing (*legitimatio ad causam*), and what is the technique for its determination?

Key words: *procedural legal standing (legitimatio ad processum), substantive legal standing (legitimatio ad causam), legal interest.*

I. INTRODUCTION

Today the civil procedural legislation does not regulate some of basic procedural legal institutes at all. This situation is particularly expressed in field of the procedural legal standing (*legitimatio ad processum*), which as a special authorization deriving from the right to a lawsuit, as a legal institute, is currently created through the theory and judicial practice. Because of this, the perceptions of the existence of the procedural legal standing are divided into two sets of theories: theories that completely negate the existence of procedural legal standing and theories that regulate procedural legal standing as a separate legal institute. Hence, the subject of this paper will be the technique for determining the procedural legal standing in the condemnatory, declaratory and constitutive systems of legal protection to prove that the procedural legal standing should differ from the substantive legal standing (*legitimatio ad causam*) and the legal interest.

II. PROCEDURAL LEGAL STANDING (LEGITIMATIO AD PROCESSUM)

The institute procedural legal standing is not legally regulated, and there are dilemmas about the issue of its independent process function.¹ Because of this, the institute procedural legal standing is a creation of the theory of civil procedural law and judicial practice.² Hence, the prevailing opinion is that the institute procedural legal standing has an independent process function and as such it can be analyzed from two aspects: the procedural legal

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¹ Konrad Hellwig, *Lehrbuch des deutschen Zivilprozessrechts*. (A. Deichert, Leipzig, 1912) 70-73.

² Omar White Ward, *Teoria general del proceso* (Suprema de Justicia Escuela Judicial, Costa Rica, 2008) 83-88.

standing as an element of procedural legal subjectivity of the parties and the procedural legal standing as a special authorization deriving from the right to a lawsuit.

The procedural legal subjectivity of the parties is consisted of three elements: the ability to be a party, the litigation capacity and the procedural legal standing and in some cases it is also consisted of the postulatory ability. The procedural legal standing as an element of procedural legal subjectivity of the parties is a general, positive and absolute assumption that should give an answer to the question of who and against whom is authorized to conduct litigation.³ Contrary to the ability to be a party and the litigation capacity that exist in an abstracto regardless of the litigation, the procedural legal standing is an attribute that answer the question which person is authorized to be a party in particular litigation. Hence, the procedural legal standing is an unconditional, exclusive authorization of the party to conduct litigation. The procedural legal standing as an element of procedural legal subjectivity is the result of the principle of cost-effectiveness, since the irrational functioning of the judiciary would occur if everyone for everything has the authorization to conduct litigation.⁴

The procedural legal standing except as an element of the procedural legal subjectivity can also be considered as a separate authorization deriving from the right to a lawsuit. The procedural legal standing as a special authorization arising from the right to a lawsuit is: a dispositive authorization of the holder of the civil subjective right, a particular authorization other than the civil subjective right, a hypothetical category and a category on which the admissibility of the trial and the meritorious decision-making depends.

The procedural legal standing as a dispositive authorization of the holder of the civil subjective right arising from the right to a lawsuit is not an obligation i.e. it is only an opportunity of the holder's violated, challenged or threatened civil subjective right to activate the mechanism for civil-judicial protection by filing a lawsuit.⁵

The procedural legal standing is a separate authorization different from the civil subjective right. The theory of the civil procedural law generally accepts the theory of abstract right to lawsuit, that means that, the right to a lawsuit is separated from the civil subjective right. Hence, the conclusion that the procedural legal standing, as an authorization arising from the right to a lawsuit, is not an independent civil subjective right, which means that the holder can not deny or alienate from his authorization. Hence, the procedural legal standing is an inalienable authorization that belongs to the holder who claims that posses a particular right.⁶

The existence of the procedural legal standing is decided by the court after the procedural legal relationship has arisen and after the occurrence of the dispensence on the basis of the facts in the lawsuit, where the court starts from the fact that the plaintiff's claims about the existence of a particular material and legal situation are true. For this reason, the procedural legal standing in its legal nature is a hypothetical category.

On the existence of the procedural legal standing, the court takes care of the official duty⁷, but also upon the parties' objection for lack of procedural legal standing during the whole first instance procedure until the final decision is made. If the court finds that the plaintiff does not have an active procedural legal standing i.e. that the defendant is not passively legally processed, the court will reject the lawsuit. However, in the judicial practice due to insufficient theoretical competence of the judges, examples can be found in which the

³ Arsen Janevski., Tatjana Zoroska-Kamilovska, "Civil procedural law, Litigation law." (Faculty of Law Justinianus Primus, Skopje, 2009) 196.

⁴ Eduardo Couture, "*Fundamentos del derecho procesal civil.*" (Ediciones Depalma, Buenos Aires, 1997) 71-72.

⁵ Nicolas Jeandin, "*Les parties au procès, substitution et pluralité.*" (2009) 7.

⁶ Siniša Triva, Dika Mihajlo, "*Građansko parnično procesno pravo.*" (Narodne novine, Zagreb, 2004) 314.

⁷ Dika Mihajlo, "*Građansko parnično pravo - Parnične radnje.* .", (Narodne Novine, Zagreb, 2008) 382.

court instead of rejecting the defendant's lawsuit for lack of procedural legal standing irregularly rejects the complaint as unfounded.⁸ Hence, the procedural legal standing is a process presumption on which is based the permissibility of the trial and the merit decision making since the right to legal protection in the litigation is a pre-request for a merit decision. For this reason, the procedural legal standing is a condition for the realization of the right to a trial (*ius dicere*) which will result in a decision on the merits.

The procedural legal standing as an element of the procedural legal subjectivity and an authorization that arises from the right to a lawsuit can be defined: actively as an authorization of the plaintiff against the defendant to conduct litigation in which he will file a specific lawsuit and passively as a legal position of the defendant against whom a particular plaintiff is authorized to conduct such litigation. The procedural legal standing, as an element of procedural legal subjectivity, and an authorization arising from the right to a lawsuit should be distinguished from the substantive legal standing (*legitimatio ad causam*) and legal interest. This arises from: 1) the specificities in the technique for determining the procedural legal standing; 2) the possibility the procedural legal standing and the legal interest in the litigation will not coincide; and 3) the different process function and the assumptions for the occurrence of the procedural legal standing and the substantive legal standing.

III. THE TECHNIQUE FOR DETERMINING THE PROCEDURAL LEGAL STANDING

The contemporary civil procedural law does not accept, the view that the procedural law should refer to the substantive law in order to establish the existence of the procedural legal standing. This stems from the fact that the technique for determining the procedural legal standing depends primarily on the occasion for which the legal protection is sought. Therefore, the technique for determining the procedural legal standing should be considered separately in the condemnatory, declarative and constitutive systems of legal protection.

In the contemporary civil procedural law the procedural legal standing in the condemnatory litigation differ from the substantive legal standing because of the specific technique for its determination and because of the possibility the authorization for conducting the litigation to be transferred to a person who is not actually authorized. Namely, for the existence of the procedural legal standing for conducting condemnatory litigation, the court regularly decides, starting from the plaintiff's thesis that the claims about the existence of certain material-legal situations or some of its properties or authorizations are true, that is why the the procedural legal standing for conducting condemnatory litigation is a hypothetical category for whose existence it is concluded on the basis of the law. On the other hand, the existence of the procedural legal standing for conducting condemnatory litigation does not relate exclusively to the subjects of the civil legal relationship, since the authorization to conduct the litigation can be transferred to a third party on the basis of a law or on the basis of a party's agreement. In such situations, the procedural legal standing is a broader notion than the substantive legal standing, since it belongs to subjects that are not really authorized to conduct the concrete condemnatory litigation.⁹

A typical example of transferring the authorization to conduct litigation to a third-party based on the law is the *actio popularis* (lawsuit brought by a third party in the interest

⁸ The decision of the European Court of Human Rights, Fifth Section, decision on the admissibility of the appeal No. 32715/04 by Abdula Jusufovski v. the Former Yugoslav Republic of Macedonia.

⁹ Dušica Palačković, "*Parnično procesno pravo*." (Pravni fakultet Kragujevac, Kragujevac, 2004) 110.

of the public as a whole¹⁰) and its modified subtypes of lawsuits for the protection of collective rights and interests and environmental lawsuits requiring abstract condemnatory legal protection.

A special case in which the authorization to conduct a litigation does not belong to the subject of the disputed civil subjective right is in the case of singular material-legal succession during the litigation (alienation of an object or right for which a litigation is already pending).

The transfer of the authorization for conducting litigation on the basis of a agreement between the parties is allowed in the German procedural law. Namely, Art. 266 and 325 of the Deutch Zivilprozessordnung permit the transfer of the authorization for conducting litigation on a third party on the basis of an agreement between the plaintiff and the third party without transferring the right itself.

Considering the fact that the declaratory lawsuit is a means of activating the state system for legal protection even before the occurrence of the violation of the civil subjective right, the legal basis of the declaratory lawsuit is most often based on facts that depend on the legal interest for conducting the litigation. Hence, the conclusion is that the authorization to conduct the declaratory litigation most often arises from the legal interest of the plaintiff to conduct the specific declaratory litigation and that he should prove it (the subjective burden of proof falls on him). In such cases, the legal interest represents an additional legal basis of the procedural legal standing for conducting declaratory litigation. In the declaratory litigations, usually the authorization to conduct the litigation is based on a proven legal interest on the plaintiff's side, but it also may arise ex lege. Sometimes the procedural legal standing for conducting declaratory litigation may be directly or indirectly recognized by the law to the plaintiff. In such situations, the plaintiff does not need to prove his legal interest for conducting declaratory litigation in concreto. The law directly recognizes the plaintiff's authorization to conduct litigation, for example in the fatherhood, motherhood, opposition and tortious litigations. The law sometimes indirectly (based on a court decision) grants the plaintiff authorization to conduct a litigation, for example, when the court that administers the hereditary procedure will issue a decision instructing the heir to conduct a lawsuit in order to determine the existence of a certain legal relation that is a presumption for the exercise of the inherited rights. Due to the fact that the procedural legal standing, as a hypothetical category of civil procedural law is not regulated by the law, the issue of the procedural legal standing for conducting declaratory litigation essentially reduces to the issue of the legal interest for conducting declaratory litigation. However, it seems much more correct to consider that the legal interest is one of the constitutive elements and an additional legitimate basis of the procedural legal standing for conducting declaratory litigation since the authorization to conduct declaratory litigation can sometimes arise from the law, and sometimes even from a court decision.¹¹ Because of this, the plaintiff falls under the subjective burden of proving the active and passive procedural legal standing in a specific declaratory litigation only if it does not arise from the law or from a court decision. In such cases, the plaintiff should make a claim that he is seeking legal protection with certain content because his civil subjective right is jeopardized and makes it likely that if his claim is adopted he will have some legal benefit. In this way, the plaintiff tries to prove to the court that he has a legal interest in conducting the actual declaratory litigation since there are circumstances that cause uncertainty and legal insecurity, for which he requires the court to

¹⁰ See Article 1047 и 1048 од Закон о obaveznim odnosima Republike Hrvatske, Narodne novine br. 35/05, 41/08, 125/11 and Article 143 Law on obligations, Official Gazette of the Republic of Macedonia no. 18/01, 4/02, 5/03, 84/08, 81/09 и 161/09.

¹¹ Dika Mihajlo, *Građansko parnično pravo, Stranke, njihovi zastupnici i treći u parničnom postupku* (Narodne Novine, Zagreb 2008) 74.

determine the existence of a civil subjective right, the civil legal relationship or the truthfulness of a document (positive declaratory lawsuit), or not to determine the existence of a civil subjective right, civil legal relationship or the truth of a document (negative declaratory lawsuit).

The legal authorization for conducting declaratory litigation sometimes is also recognized by the law to third parties that are not subjects of the disputed material-legal relationship. For example, the Center for Social Work is authorized ex officio to initiate a declaratory litigation for determining paternity¹² or, however, the public prosecutor and any other person that have a legal interest may require a nullification of a contract¹³. In these cases, the law recognizes the procedural legal standing to such parties in a functional sense, because they are not really authorized to conduct the specific declaratory litigation.

Given the fact that the subject matter of the constitutive litigation is the plaintiff's request to the court to make a decision which will change the content of the existing civil legal relations, the procedural legal standing for conducting constitutive litigation is a hypothetical category for whose existence ex lege is concluded.¹⁴ This stems from the fact that subjects can not cause changes in all existing civil legal relations based on a unilateral declaration of will. Although the procedural legal standing for conducting constitutive litigation is usually lawfully presumed, in certain rare cases the constitutive legal protection may be required on the basis of a proven legal interest. The procedural legal standing for conducting constitutive litigation most often is directly recognized to the plaintiff by the law and as such it overlaps with the substantiative legal standing. Thus, in some cases, the law explicitly determines which persons have the procedural legal standing to conduct the specific constitutive litigation (for example, in divorce litigation), and in other cases, because of an obvious omission, it does not contain complete solutions or does not at all contains a solution of the problem who has a legal authorization to conduct the specific constitutive litigation (eg, in the litigation for annulment of the court settlement). In some rare cases, the right to seek constitutive legal protection is also recognized to the entities that have proven that they have legitimate interest. This is especially specific in the special family litigation for marriage annulment, because of the fact that the legal interest in seeking annulment of the marriage has a person who will prove that there was some reason that could require annulment of the marriage even before its conclusion. Such a reason could be, for example, bigamy. In this situation, the legal interest of the plaintiff would have the significance of an additional legitimate basis for seeking constitutive legal protection. As same as in the condemnatory and declaratory litigation, in the constitutive litigation, it is possible the law to permits the procedural legal standing to belong to third parties that are not legally authorized in concreto. A typical example of this would be the possibility for the public prosecutor to file a lawsuit for annulment of a marriage.

From the technique for determining the the procedural legal standing, we can conclude that the authorization to conduct the litigation can arise ex lege or on the basis of a proven legal interest of the plaintiff. In addition, the authorization to conduct condemnatory and constitutive litigation usually arises ex lege, and the legal interest in these litigations is only exceptionally an additional legitimate basis, unlike in the declaratory litigation in which the authorization for conducting the litigation arises when the plaintiff will proof the legal interest.

¹² See Article 60 Law on Family, Official Gazette of the Republic of Macedonia no. 80/1992, 9/1996, 38/2004, 33/2006, 84/2008, 67/2010, 156/2010, 39/2012, 44/2012, 38/2014, 115/2014, 104/2015 and 150/2015.

¹³ See Article 101 Law on Obligations, Official Gazette of the Republic of Macedonia no. 18/2001, 4/2002, 5/2003, 84/2008, 81/2009, 161/2009 and 123/2013.

¹⁴ Sinisha Triva, Mihajlo Dika, "*Građansko parnično procesno pravo*." (Narodne novine, Zagreb, 2004), 408.

IV. THE RELATIONSHIP BETWEEN THE PROCEDURAL LEGAL STANDING AND THE LEGAL INTEREST

The procedural legal standing has an independent process function vis-à-vis the legal interest.¹⁵ In some cases it is possible that certain entities have a legal interest, and have no the procedural legal standing. This happens when the law explicitly determines the persons who are procedurally authorized to conduct the litigation. In such cases, even if a third party has a legal interest in initiating a particular litigation, he can not do so because he hasn't the procedural legal standing (for example, the solidary debtor can not initiate a lawsuit asking for annulment of the award rendered by the elected court although the final award undoubtedly has a reflex effect on him). In other cases, however, the opposite situation is encountered, when subject has the procedural legal standing, but does not have the legal interest for conducting the litigation. This happens when the requested type of legal protection is not allowed, as the law provide more adequate type of legal protection (for example, the plaintiff has no legal interest to conduct declaratory litigation when he can conduct condemnatory litigation) or when the plaintiff's legal interest in conducting condemnatory litigation is denied because there is a notarial enforcement title for the same claim or a debit. However, it seems to be the strongest proof that the process legitimation should not be equated with the legal interest in leading the litigation, we have in Art. 347 and 380 of the Law on Litigation Procedure which distinguishes the impermissibility of the remedy because it was submitted by an unauthorized person and the inadmissibility of the remedy due to lack of legal interest. This, under the same conditions, should also apply in the lawsuit section.

V. THE RELATIONSHIP BETWEEN THE PROCEDURAL LEGAL STANDING AND THE SUBSTANTIVE LEGAL STANDING

In the process theory and the judicature of the continental civil litigation law, there are two views concerning the relationship between the procedural legal standing and the substantive legal standing: the material-legal and procedural-legal perception.¹⁶ According to the material-legal understanding (accepted in France), the procedural legal standing is contained in the institute substantive legal standing and as such it does not have independent process function, and according to the procedural-legal perception (accepted in Germany, Austria, Spain) the procedural legal standing has an independent process function. In the contemporary civil procedural law, the procedural legal perception is increasingly accepted, according to which the procedural legal standing and the substantive legal standing differ in the assumptions for their occurrence and according to their different right protection function.

The procedural legal standing and the substantive legal standing have a different right protection function, the procedural legal standing is a hypothetical category (the plaintiff's theses are true), and the substantive legal standing is a category of the right protective certainty (the facts are verified by the court).

CONCLUSION

The procedural legal standing as a creation of the theory of the civil procedural law and judiciary is a fundamental element of procedural legal subjectivity and an element deriving from the right to legal protection. In this way, the procedural legal standing is

¹⁵ Aruca Montero., "*La legitimacion en el proceso Civil.*", (Madrid Editorial Civilis, Madrid , 1994) 49.

¹⁶ Maria Isabel Ramalho, "*Legitimidade para agir (doutorado).*", (Pontificia Universidade Catolica, Sao Paolo, 2007) 27.

understood as an independent procedural institute of the civil procedural law, and it is necessary to be distinguished from the substantive legal standing and the legal interest. The strongest evidence that the procedural legal standing differs from the legal interest and the substantive legal standing is the specific technique for its determination. From the technique for determining the procedural legal standing, can be concluded that the authorization to conduct the litigation can arise ex lege or on the basis of a the plaintiff's proven legal interest. The legal interest, in most cases in the declaratory litigation, is an additional legitimate basis of the procedural legal standing, which is much less common in the condemnatory and constitutive litigation, where the authorization for the litigation arises ex lege. In this way, on the theoretical level, the procedural legal standing and the legal interest are distinguished, although the real difference between the procedural legal standing and the legal interest in the litigation should be sought in the judiciary. At the same time, from the technique for determining the process legitimation it can be concluded that the procedural legal standing should differ from the substantive legal standing.

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