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Procedure Institutions Reformed through the New Romanian Civil Procedure Code: Legal Bases and Prospects

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Abstract
Adopted in 2010 and enforced in 2013, the new Civil Procedure Code does represent not just the *successor* of the ancient Code which was issued in 1865, but as well the final achievement of a reforming tendency exerted upon the civil procedure. This mutation was continuously carried on during the 20th century and was increasingly deepened during the first decade of the 21st. The procedure of the system which was instituted through the ancient Code, in spite of undoubtedly having proved its intrinsic value and apart from the many changes it had gone through due to successive enforcements within the current legislation of the 20th century, had come to see itself, during the recent couple of decades, challenged through the argument that it had lacked to provide an appropriate answer to the requirements of a civil justice that ought to have been modern. This incriminating adjective means the cumulated existence of the following assets as *desiderata*: efficiency, celerity, predictability and a strict consequentiality for its uttered solutions. In respect to these demands, the actually enforced regulation does institute a lot of procedural forms and mechanisms which are innovative and do obey to, simultaneously, two inspiring commandments: the first one is, for the justice of system, to increase the promptitude of uttered answers; the second one is to ensure, for the jurisdictional action, the highest quality. In the accurate performing of the civil lawsuit, some institutions of procedure bear a high importance. To reform them consisted either in integrating some solutions that were longtime since agreed upon by doctrine and jurisprudence (a fact which looks like a natural evolution) or, on the contrary, in inserting some absolute innovations which, even since they were simple drafts, might have been the occasions for intense contradictory arguments. This latter case is, precisely, the reason why, should we dedicate a study to the norms that are parts of these recently aggregated institutions, we ought to less insist upon what was crystallized as achieved constants in the law's theory and in judicial practice. Instead, we should aim to correctly outline the functioning mechanisms of the new procedure's instruments.

Keywords: *civil lawsuit, reform, New Civil Procedure Code, institutions, legislation*

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Preliminary issues

The need to reform the fundamental institutions of civil procedure was determined by a series of requirements imposed by the case law of European courts, then established by doctrine and incorporated, in time, into legal rules dictating principles. With the new Code of Civil Procedure, which entered into force in 2013, several fundamental principles of the civil trial, such as the free access to justice and the right to a fair trial within optimal and predictable time, which were not mentioned in the previous code, lay at the basis of reform. Naturally, the use of these principles and, in particular, jurisprudential arguments generated by the former, imposed the reconfiguration of major procedural institutions. The effective application of such principles designed to have the effect of deciding cases with celerity, a reasonable duration of trials and a unitary case law, as well as predictable judicial practice, led first of all to an intervention of the legislature on two fundamental institutions – the jurisdiction of courts and appeals. Equally, however, this reconfiguration of the civil trial, determined by the substantial intervention of the legislature on the two major institutions would not have led to the attainment of the goals if it had not been accompanied by the establishment of adequate procedural mechanisms meant to ensure effective, optimal development of legal proceedings and to prevent, before the end of the trial, the emergence of non-unitary practices in the same matter.

Thus, new regulations were introduced in the new code regarding the legal regime of procedural exceptions, the rules on the prorogation of jurisdiction, while other regulations aimed at the possibility of introducing, ex officio, a third party in the trial, the reconfiguration of the civil trial stages and the focus on the written preparatory stage of the trial. New procedural means were introduced in order to ensure the celerity of legal proceedings, such as the estimation of the duration of trials and the contestation regarding the delay of the trial. The new code also includes provisions to ensure unitary practices while establishing effective mechanisms in this matter. They concern the appeal on points of law – an institution existing in our civil procedure - and the possibility of referral to the High Court of Cassation and Justice for a preliminary ruling on points of law – a new procedural institution. These interventions of the legislature on important procedural institutions are supplemented by better regulations on certain matters, within the same declared aim of the new code drafters, namely the acceleration of trials. The rules on the continuity of the panel, the summons of the parties or the possibility of adjourning the trial by mutual agreement of the parties, enjoy the advantage of a more rigorous drafting.

Aspects relating to the jurisdiction of courts

The Romanian legislature has been constantly concerned with the jurisdiction of courts. In the application of the 1865 Code of Civil Procedure, the legal rules governing the material jurisdiction of courts were subject to constant change, with the aim of ensuring a balance of the distribution of competences between district courts, tribunals, courts of appeal and the High Court of Cassation and Justice. The reconfiguration of jurisdiction began with new judicial system established by Law no. 59/1993 amending the Code of Civil Procedure, continued with substantial changes brought by the Government Emergency Ordinance no. 138/2000 for the amendment and completion of the Code of Civil Procedure, Law no. 219/2005 approving the Government Emergency Ordinance no. 138/2000 and ended with Law no. 202/2010 on measures for the acceleration of trials and Law no. 71/20011 for the enforcement of Law no. 287/2009 on the Civil Code. An uninspired moment of the legislature's intervention was the adoption of the Government

Emergency Ordinance no. 58/2003, approved and amended by Law no. 195/2004, which, while attempting to assign the competence of deciding on first and second appeals to the courts of appeal, and the High Court of Cassation and Justice, severely disrupted the course of the trial by overloading the role of these courts. The Government Emergency Ordinance no. 65/2004, approved with amendments by Law no. 493/2004, fosters the way back to the regulation prior to the Government Emergency Ordinance no. 58/2003.

All these legislative interventions attempted to adapt the procedural system to the new requirements of deciding cases with celerity and even anticipated a series of solutions of the legislature that may be found in the new code. The material jurisdiction of courts has been completely restructured by the new code, in order to ensure the flowability of judicial proceedings and the prerequisites for achieving a unitary practice. While observing the goals set by the legislature, the solution was that district courts should decide on small claims, less complex cases, which are common in practice, and tribunals should become courts with unlimited jurisdiction as original jurisdiction courts. The way of regulating jurisdiction in the new code assigns unlimited jurisdiction to tribunals as first instance courts and district courts become exceptional courts in civil matters (Belegante, Ghinoiu, 2010: 18; Leş, 2010: 243-245).

This redistribution of functional jurisdiction of courts would have been ineffective, even harmful in achieving the goals of the reform process, if it had not been linked to the restructuring of appeals. Moving original jurisdiction from district courts to tribunals impliedly led to the assignment of competence to decide on the first appeal to courts of appeal, since the first appeal is the common appeal. Likewise, by relating the provisions governing the original jurisdiction of tribunals to those regarding the object of the second appeal, one achieves the possibility for the supreme court to decide on appeals in the most important matters, considered as such by the very nature of the cases or value of the object. By regulating the grounds for cassation, which cover only issues of illegality, and by its exclusive assignment within the jurisdiction of the Supreme Court, the second appeal became the extraordinary appeal ensuring the exercise of a control of legality and the interpretation and unitary enforcement of the law. This change of jurisdiction is undoubtedly useful, given the criticism of the previous code that favoured the emergence of a non-unitary practice.

Similarly to the previous code, the first appeal is qualified as the only ordinary and devolutive appeal, and under the new code it becomes the main reformation appeal. Thus, the first appeal is lodged against the judgments of district courts and tribunals as courts of original jurisdiction, and is decided by the next higher court. Unlike the previous regulation, the law rarely suppresses the first appeal. Basically, the cases where the judgments of the first court are exempt from the first appeal and only the second appeal may be lodged against them, are limited and usually address procedural incidents. On the other hand, in accordance with article 459(1) and article 466(1) Code of Civ. Proc., the first appeal prevails over extraordinary legal remedies. These provisions consecrate the character of common legal remedy of the first appeal, and the rule of lodging the first appeal against the judgment of the first instance court, which ensures the principle of the double degree of jurisdiction.

Another novelty is the impossibility of lodging the second appeal subsequent to the first appeal. Thus, in many cases, for reasons depending on the reduction of the duration of the trial and the effectiveness of justice, the new code suppressed the legal remedy of the second appeal, not the first appeal, thus ensuring a double trial on the merits of cases.

In line with the opinions expressed in specialist literature, we consider that this latter solution is justified only if it concerned a series of minor disputes, without raising important legal issues, since, as we have said, the most important effect of the change of jurisdiction is the assignment of the common jurisdiction in the matter of the second appeal to the High Court of Cassation and Justice, which thus naturally fulfils its function of practice unification of the whole country by deciding on the second appeals (Ciobanu, 2009: 79-80). But the new code refers to several categories of cases in which the first appeal is the only remedy, without the possibility of lodging the second appeal against the judgment given on the first appeal. The category of these disputes was considerably enlarged by the provisions of Law no. 2/2013 on measures to reduce the workload of courts, and to prepare the implementation of the Code of Civil Procedure, a normative act that intervened a few days before the entry into force of the new Code of Civil Procedure. By this normative act, one could not lodge the second appeal against a number of judgments of tribunals as original jurisdiction courts, and of courts of appeal, as appellate courts, second appeals that were to be decided by the High Court of Cassation and Justice.

If the exclusion of the remedy of the second appeal in the matters originally envisaged in the draft of the new code was considered reasonable in relation to the purpose of relieving the workload of the supreme court, the tendency of the legislature, expressed even before the entry into force of the new code, to except from the control of legality, by way of the second appeal (and therefore, the control achieved by the supreme court), a series of disputes, was pertinently criticized (Ciobanu, 2013: 1036). Thus, the criticism addressed to the previous regulation and aiming at the completion of the trial before the courts of appeal, subsists in the new regulation by numerous exceptions established by the legislature on the exercise of the second appeal against the decisions of the courts of appeal. While examining the legal provisions in force, one can notice that, in a series of litigations, the judgment is given either by a tribunal, as an appellate court, or by a court of appeal, deciding on the first appeal without the possibility of bringing the second appeal before the supreme court. This solution, although it has the advantage of proximity of justice to the citizen, will be a source of non-unitary practice (Zidaru, 2013: 284), and the mechanisms for the unification of practice, even improved by the new code, will have to prove their effectiveness in a much more consistent way than they have done so far.

The new Code of Civil Procedure alters the legal regime of raising the exception of lack of jurisdiction, taking over the changes already brought to the previous code by Law no. 202/2010 on measures for the acceleration of trials. In the regulation prior to Law no. 202/2010 the legal regime of the exception of lack of jurisdiction differed in relation to the character of the violated jurisdictional norm, according to the type of lack of jurisdiction: absolute or relative, of public order or of private order (Ciobanu, 1996: 442-443). The legal regime of the exception of lack of jurisdiction of public order, namely the exception of lack of material and territorial jurisdiction of public order (exclusive and territorial) was altered. Thus, if the general lack of jurisdiction of courts may still be raised by the parties or by the court at any stage of the case, the lack of material and territorial jurisdiction of public order may be raised by the parties or by the judge at the first hearing at which the parties are legally summoned before the first instance court (article 130 Code of Civ. Proc.). Under the previous code, it was widely accepted that the lack of material and territorial jurisdiction of public order, being absolute, could be raised at any time during the trial.

The change of the regime for raising the exception of lack of exclusive material and territorial jurisdiction in the new Code of Civil Procedure was imposed by the need to

decide cases with celerity and within a reasonable time. Thus, as deemed, the possibility in the old code of raising the exception of lack of material jurisdiction at any stage of the trial, even directly in the first or second appeal caused the instability of the procedural relations and delayed, sometimes without any justification, the trial in the event that it was admitted for the first time, directly, in an appeal (Zidaru, 2010: 254).

However, from the moment they were inserted into the draft of the new code, the changes brought to absolute jurisdiction were subject to doctrinal criticism, since it was considered that the changes affected the whole view on the regime of the jurisdiction of public order, with consequences on the rules governing such competence and on access to a degree of jurisdiction. It was also noted that the solution could lead to the substitution of some courts with regard to the powers of others and that was not in compliance with the principles governing the matter of absolute jurisdiction. Basically, the difference given by their nature disappears, the difference between absolute and relative lack of jurisdiction (Deleanu, 2009: 54). It was also pointed out that, although the wish of the "reforming" legislator was to ensure the celerity of judicial proceedings, the new regime of the absolute lack of material and territorial jurisdiction, leads to the sacrifice of traditional and essential principles of judicial proceedings (Leş, 2011: 17; Chiriazi, 2011: 79-80).

The new code includes a practical solution regarding the legal regime of raising the exception of lack of material, even territorial jurisdiction of public order, determining the court and the parties to examine the question of jurisdiction at an early stage of the trial, as even its specificity requires. In this way it ensures the full application of the rule of the prevalent examination of procedural exceptions and of those that render unnecessary the investigation of the case on the merits.

For the examination of competence, the law establishes the obligation for the judge to verify at the first hearing and to determine whether the court has general, material and territorial jurisdiction, while recording in the interim judgment the legal grounds on which he ascertains the competence. Thus, in addition to the new regime of the lack of jurisdiction and correlated with the need to raise the lack of jurisdiction on the first day of hearings, the jurisdiction must be expressly found at an early stage of the trial in the first instance. The novelty is given by the mentioning in the interim judgment of the ascertainment of one's own jurisdiction, the judge being motivated to undertake a careful examination.

The consequence of the new code would be that the absolute lack of jurisdiction, except the general one, is covered if it was not raised within the statutory period. It was yet considered that the time limit within which one could raise the exception could not be, in practice, a decision given at a single hearing, and the only requirement was to raise it at the first hearing at which the parties are legally summoned, the settlement may occur after the clarification of the aspects that determine the jurisdiction (Zidaru, 2010: 261).

After the entry into force of the new code, the exception of lack of jurisdiction of the first court, even of public order, cannot be raised directly in the appeal, since, according to the legal text, the exception of lack of material and territorial jurisdiction of public order must be raised only before the court of first instance (Deleanu, 2009: 57; Chiriazi, 2011: 80; Zidaru, 2010: 265-268). The lack of jurisdiction of the court, either of public or private order, may be raised as a criticism in appeals, but only if it was previously raised as provided by law. Only the lack of exclusive material and territorial jurisdiction may provide grounds for the second appeal if it was raised as provided by law, not the relative lack of territorial jurisdiction, since the law provides as a cassation ground only the violation of the jurisdiction of public order of another court. Under the rules of the

new code, the possibility of raising the exception of lack of material and territorial jurisdiction in appeals, if the lack of jurisdiction of the first instance court is raised (Deleanu, 2009: 57; Chiriazi, 2011: 80), cannot be supported by text arguments (Zidaru, 2010: 265-268). In matters of prorogation of jurisdiction, the novelty of the regulation is contained in the second thesis of paragraph 1 of article 123 Code of Civ. Proc. which stipulates that the prorogation operates even if the accessories, additional and incidental claims were under the material or territorial jurisdiction of another court, except insolvency claims. The problem to which the drafters of the new code find this solution is not new in our doctrinal and jurisprudential writings. Under the rules of the previous code ("accessory and incidental claims come within the jurisdiction of the court deciding on the main claim") there have been debates on whether the prorogation also operates in cases where accessory and incidental claims were under the absolute jurisdiction of other courts or, more than that, other bodies with jurisdictional powers, and the response of most doctrine and jurisprudence was in the sense of accepting the prorogation of jurisdiction (Ciobanu, 1996: 434; Leş, 2010: 287). The solution proposed by the new code is justified by reasons regarding the proper administration of justice and the need of a unitary settlement of certain related legal relations.

Another express provision, new in nature, that we will also find in the matters of conflicts of jurisdiction points out that the prorogation intervenes for incidental and accessory claims when the competence to decide on the main claim is established by law in favour of a specialized section or a specialized panel.The new Code of Civil Procedure expressly regulates the possibility of a conflict of jurisdiction between the specialized sections of the same court, thus ending some controversies in the legal literature (Deleanu, 2007: 95-98; Coandă, 2008: 118-129; Sas, 2008: 152-163; Pîrvu, Istrate, 2008: 165-170), and a conflict between the specialized panels of the same court. Thus the conflict between the specialized sections of the same court is settled by the section of the higher court, corresponding to the section before which the conflict arose. The conflict between two sections of the High Court of Cassation and Justice is settled by a Panel of five judges. The same applies to the specialized panels.

Trial-related aspects

The forced introduction in the case, ex officio, of other persons constitutes a new form of intervention in the civil trial and, at the same time, in a procedural situation derogating from the principle of availability, in that the introduction of a third party in the trial is not performed on the initiative of the parties, but the initiative of the court.

Thus, pursuant to article 78 Code of Civ. Proc., in addition to the situations expressly provided by law where the judge must order ex officio the introduction of other persons in the case, even if the parties do not consent, when the legal relation brought before the court requires the introduction of a third party, the judge will submit this issue for debate between the parties. The new aspect is not this contradictory discussion of the parties, but the penalty imposed if the parties do not agree with this initiative of the court. If none of the parties requires the introduction of a third party and the judge considers that the dispute cannot be settled without the participation of the third party, he will reject the request without ruling on the merits.

The judgments of first instance and appellate courts enjoyed the major intervention of the legislature in terms of the written preparatory stage. The changes to civil procedure by GEO no. 138/2000 highlighted the written stage of the civil trial, so that, by submitting the main procedural applications, the full outlining of the procedural

framework was ensured from the very beginning of this stage of the civil trial. The new code has brought changes in this respect by establishing a separate procedure for verifying and regulating the claim form, followed by its communication to the defendant so that he can formulate the defence, the communication of the defence to the claimant so that the latter can formulate a response to the defence, all before the first hearing is established. The same applies to the first or second appeal, even if the penalty is not equally effective.

As compared to the previous code the novelty is that, on the one hand, the written stage integrates the verification of the claim form for the purpose of remedying its shortcomings and, on the other hand, the written stage takes place entirely before the first hearing in an administrative procedure which does not involve the presence of the parties before the court. Another new aspect for this stage concerns a possible sanction that may be administered by a judge. The sanction for non-compliance of the claimant with the requirements of the judge in the regularization procedure is the annulment of the claim form by an interim judgment given in the council chamber. The verification and regularization procedure for the claim form is made by the judge who hears the case.

The stages of civil proceedings were resystematized for greater coherence and effectiveness. The new code formally divides the stages of the trial into two sub-stages, the investigation and the debate on the merits of the case. The novelty is that the investigation is conducted, from January 1, 2016, in the council chamber, under conditions of restricted publicity, the parties participating in the hearing only with their representatives, defenders of the parties, witnesses, experts or other such persons whose participation in the trial is allowed by the court.

Another novelty is the preparation of the first appeal file or, where appropriate, of the second appeal file by the court the judgment of which is challenged, a provision established with a view to relieving the courts of judicial review of this procedure, thus ensuring the celerity of appeals. But, as has been done with respect to the investigation stage in the council chamber, Law no. 2/2013 postponed the application of the provisions on the preparation of the file by the court the judgment of which is challenged, until 1 January 2016, and until then the provisions of the law substituting the provisions of the Code shall be applied. The provisional procedure established by the law reducing the workload of courts is different given that the regularization of the first or second appeal request is made by the court which is to rule on it. Likewise, the specific elements of the regularization procedure on appeal, versus the regularization of the introductory claim, are given by the annulment of the request at the first hearing, a solution imposed by the conception of the code with regard to the court preparing the file.

Duration of trials and unitary judicial practice

A constant concern of the legislator of the new code, as results from the reconfiguration of the previously presented procedural institutions, was to ensure an optimal and predictable duration of trials. A new mechanism working for this purpose is established under article 238 Code of Civ. Proc., according to which "at the first hearing when the parties are legally summoned, the judge, after hearing the parties, shall estimate the time needed in the trial-related investigation, based on the circumstances of the case, so that the case may be decided within an optimal and predictable time". The estimated duration of the trial is recorded in the interim judgment and may be reconsidered only on serious grounds.

In order to ensure celerity, the adjournment of trial dates for lack of defence is exceptional and may be ordered at the request of the party concerned, on serious grounds

which are not attributable to the party or his representative. Delay by mutual agreement of the parties can only be approved once during the trial, and the lack of diligence of the parties after such a delay is sanctioned by suspending the trial. Celerity is also ensured by express provisions such as those under art.icle 241 Code of Civ. Proc. During the investigation stage, the judge may set short time limits, even from one day to another, and there are new ways to announce the parties, i.e. alternatives to the classic summons procedure: telephone, telegraph, fax, electronic mail or any other communication means ensuring, where appropriate, transmission of notification and acknowledgment of receipt.

To ensure an adequate act of justice, the principle of continuity, stipulated under article 19 Code of Civ. Proc., - the judge can only be replaced during the trial on serious grounds - is emphasized by article 214 which provides that if the replacement takes place after the parties were heard, the case is reopened and the debates resumed. Deciding the case within an optimal time, requirement of a fair trial, needs, in addition to the formal estimation of the duration of the trial and the regulation of flexible procedural mechanisms, the establishment of an instrument meant to remedy the excessive duration of the proceedings. In this respect, the new code has established a preventive mechanism (Deleanu, 2013: 511) of verification by regulating the contestation regarding the delay of the trial. Through it, any interested party may invoke the violation of the right to a trial within an optimal and predictable time and may require legal measures so that this situation will not occur. In accordance with article 522, the contestation may be filed when the court disregarded the obligation to decide the case within an optimal and predictable time by failing to take measures established by law or by failing to perform, ex officio, where the law requires, a procedural act necessary in the case, although the time elapsed since the latest procedural act would have been sufficient for taking the measure or performing the act. If such a contestation is admitted, an interim judgment is pronounced, which is not subject to appeal, ordering the necessary measures to remove the situation which caused the delay of the trial.

Another goal of reform in procedural matters was the need of unitary interpretation and application of the law by all courts. As a result of what has been said above, the distribution of competences between the courts and the configuration of appeals can ensure the premises of a unitary case law, but for the remedy of non-unitary solutions in the same matter, it is necessary to establish separate instruments capable to intervene effectively and available to the supreme court, the only court with a declared role in the unification of judicial practice. The appeal on points of law preserves its previous physiognomy in the new code and continues to represent the main mechanism for regularizing non-unitary practice materialized in legal issues that have been addressed differently by the courts. At the same time, an appeal on a point of law is a mechanism with a fairly high inertia with regard to its commencement, also lacking *ex tunc* effects, on cases that were differently decided by the courts, cases that constituted the very reason of its initiative.

This was the reason for introducing in the new code the possibility of referral to the High Court of Cassation and Justice for a preliminary ruling on points of law. Through this new instrument the intervention of the Supreme Court is ensured with regard to the unitary interpretation and application of the law in a precautionary manner, in a *pending* case, not definitively decided as happens in the appeal on points of law (Spineanu Matei, 2013: 1007). Unlike the appeal on points of law, which has no effect on the decisions generating it, the ruling on the point of law in the preliminary ruling procedure is binding on the court which started the procedure, and the latter applies it in deciding the case.

The source of inspiration for the Romanian legislature was the model of the request for a preliminary ruling referred to the Court of Justice of the European Union and provided for by the Treaty on the Functioning of the European Union, although the plans where the two mechanisms operate are different, as well as the new French Code of Civil Procedure and the new French Code of Judicial Organization, with the specific mention that in French law the Court of Cassation gives an opinion that is not binding on the court which required it (Deleanu, 2013: 385; Leş, 2013: 770-772). In the preliminary ruling procedure our supreme court gives a decision which solves the point of law, which is binding on the court that required it, from the date of the decision, and on other courts from the date of the publication of the decision in the Official Gazette of Romania. As in the case of the appeal on points of law, the decision has the role of ensuring the unitary, consistent application of the law, and is binding on all courts, the difference residing in the effect produced in the litigation in relation to which it was pronounced.

While analyzing some of the procedural institutions that were subject to reform through the new Code of Civil Procedure - perhaps the most important in the general reconfiguration of civil proceedings - we have tried to capture the innovations designed to justify the amendments, as well as some criticism of the solutions proposed by the new code, that should not be found in the case law generated by the new regulations. The latter (the actual practice of courts) will eventually validate the new solutions proposed, and if, by these solutions, the purposes stated while drafting the new code are achieved, the reform process can be considered a success.

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