

CONSIDERATIONS ABOUT THE CIVIL ACTION IN THE NEW CIVIL PROCEDURE CODE

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Abstract: *In the modern age, regarding the opening of a civil trial, we operate with multiple concepts (or rights?): “the free access to justice”, “the right to refer to the court”, “the right to action” etc. In the last 150 years, important theories of great value have been in this area, which revolutionized the civil proceedings law. The “free access to justice” is a fundamental right established in all the democratic states’ legislation: we all have the right to refer to the Jurisdictional Power of the State. The access to justice represents a guarantee for the exercise of all the other rights and liberties: the guarantee that potential conflicts shall be settled in a peaceful manner, by an impartial judge. Art. 21 of the Romanian Constitution provides, in paragraph 1: „Any individual can refer to justice....”*

Key words: access to justice, civil action, conditions.

1. Introduction

In principle, any petition addressed to justice generates a trial and an analysis from a court.

Therefore, the unstamped petition, the petition addressed to a court with no jurisdiction, the petition of a mentally incompetent individual – all these initiate a trial, a resolution from a judge. We find that, although any petition generates a trial, not every petition can generate a viable trial.

We have to ask for the fulfilling of certain minimal conditions that could indicate, *de plano*, if the plaintiff could be right or he/she is committing an abuse. To be provided with the right to action means to fulfil the necessary conditions for the court to be bound to hold in substance.

Thus, we come to discuss also about the existence of “the right of action”- the right to receive a substantive decision. The right of action is connected with a certain claim, with an actual litigious circumstance. The right of action, without confusing it with the subjective right submitted for trial, is a priori “associated” or “enclosed” with a claim pertaining to a specific individual.

Therefore, the right of action is independent of the subjective right submitted for trial; the right of action is recognized before examining the material right existence.

If the petition was rejected as ill – founded, it means that a substantive ruling was issued and that the right of action was recognized prior to the substantive claim. Whatever the solution in substance, it involves the right of action recognition!

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Prestigious Romanian authors consider that the right of action is “a complex right of legal standing and which contains a multitude of prerogatives”: referring to the court, requesting evidence, defence statement, the right of action allowance, the right to exercise the means of appeal, etc. [1-5].

2. Legal definition and the consequences arising from it.

For the first time in our legislation in effect, the New Civil Procedure Code offers a definition for the civil action in art.29: “The civil action is the assembly of the legal means provided by the law to protect the subjective right assumed by one of the parties, or another judicial circumstance, as well as to ensure the parties’ defence in trial.”

We notice that the New Civil Procedure Code places the independence of the civil action in relation to the subjective right submitted for trial, defining the action as an “assembly of legal means”.

Therefore, the New Civil Procedure Code does not make the distinction between the standing right of action (the general petition right, access to justice) and the material right of action (the right to receive from the court the defendant’s conviction), less modern and so controversial in the Romanian theory of law.

We mention that in the actual judicial language, law practitioners also use the term action to mark the actual petition addressed to the court with the aim of exploiting or defending a right in court (the summoning petition).

Nevertheless, the New Civil Procedure Code makes the distinction between action and petition, the petition being the document (the writ) by which the right of action is exercised (30 New Civil Procedure Code); not any petition expresses a right to action.

According to the New Civil Procedure Code, the action comprises two categories of standing means: the ones for the protection of the subjective right claimed by one of the parties and the ones for ensuring the parties’ defence in trial.

Therefore, the lawmaker expresses the idea according to which defence is also a civil action type of manifestation. Moreover, art. 31 fundamentally classifies types of defence in court, which can be: substantive or procedural.

The substantive defence types are those whereby the adverse party’s subjective right is contested, the judicial report’s existence is denied; these have as purpose the rejection of action as ill - founded, either the defendant is successful in demonstrating that the state of affairs is different from the one presented by the plaintiff, or he succeeds in fighting against the adverse party’s judicial conclusions.

The procedural defences are those means of defence by which the defendant, without fighting against the plaintiff’s substantive claims, aims to achieve judgement deferral, reconstruction of certain documents, reversal of summoning petition or its rejection as inadmissible.

3. Action conditions

Establishing the action conditions is one of the most difficult problems of present science.

There are four traditional conditions for the right of action: capacity, asserting a right, quality and interest.

Currently, as regards capacity, foreign theories and legislations relinquished its inclusion in the mentioned category, departing from the observation that it is not a special condition for the right to action existence, but a general condition, prior to the right to action.

Therefore, some legislations, not few in number, expressly provide only “interest”

and “quality” as conditions for filing the action: France, Belgium, Italy, Portugal, the Geneva canton in Switzerland, Brazil, Venezuela (Code de procédure civile – art.31, Code giudiciare – art.17, Il codice di procedura civile –art.101, Código de processo civil –art.2, Loi de procédure civil – canton de Geneve, Código de processo civil – art.3, Código de Procedimiento Civil – art.16) , etc.

The New Civil Procedure Code (art. 32), specifies the general conditions to exercise civil action: “(1) Any petition can be submitted and sustained only if its author:

- a) has the standing capacity according to the provisions of the law;
- b) has legal standing;
- c) submits a claim;
- d) justifies an interest.

(2) The paragraph (1) provisions apply accordingly for the defence as well.”

3.1. Standing capacity

The capacity condition is detailed in the chapter entitled „Use and exercise of procedural rights”

The provisions of art. 56, 57 make the distinction between:

The standing capacity of use: “the capacity to be a party in a trial”: the ability to have any standing rights and obligations.

The standing capacity of exercise: “the capacity to stand trial”: the ability of the individual who has the use of a subjective right to exercise or defend it in trial, personally or through a representative (authorised individual).

According to art. 56 of the Code, the law does not require the individual to have competence of exercise in order to *be a party* in the civil trial, *the capacity of use being* sufficient. The standing capacity of use is a legal reflex of the capacity of use as governed by the New Civil Code (art. 34-48) both for natural and legal persons.

The legal judicial representation is brought under regulation for minors up to 14 years old and for the legally incapacitated persons. For the 14 year old minors, authorisation and assistance are brought under regulation.

Also, for emergency situations, until assigning a legal representative, the special trusteeship is brought under regulation – see art. 58 New Civil Procedure Code.

The New Civil Procedure Code, in art. 40, stipulates that the petitions from an individual with no legal standing capacity are null or reversible. On the other hand, art. 57 paragraphs 3-4 of the New Civil Procedure Code refers only to the sanction for the lack of capacity of exercise – which can be invoked at any stage of the trial – and expressly provides the procedure reversibility sanction. However, the law provisions the court’s ability to set a court hearing date to cover this lack by having the action confirmed by a representative, before enforcing the sanction – see art. 57 paragraphs 5, 6 of the New Civil Procedure Code.

3.2. Legal standing (*legitimatio ad causam*)

In the New Civil Procedure Code, the Romanian lawmaker specifies the legal standing condition and – for the first time in our legislation – defines this concept:

„Art. 36. The legal standing results from the identity between the parties and the litigious judicial report subjects, as it is submitted for trial. The existence or non – existence of the asserted rights and obligations are a matter of substance.”

This definition of the lawmaker corresponds with the traditional one given by the Romanian judicial theory: the legal standing represents an identity between the plaintiff and the holder of subjective right submitted for trial, between the defendant and the individual bound in the substantial law relation.

However, the law notices that the rights initially alleged by the plaintiff are just hypothetical and cannot deem equivalent the legal standing and the existence of a subjective right, which is verified in a later process: the stage of substantive examination.

The legal standing condition is mentioned in many civil procedure codes, but the attempt to define the concept resulted in many twists and controversies (France: NCPC – art.31, Belgium: Code judiciaire – art.17; Brasil: Código de processo civil, etc).

The current French theory defines the legal standing as the power of judicial title by virtue of which the plaintiff asks the judge to examine the basis of the claim.

As we have asserted, the access to justice is unconditioned. However, this does not mean that any request, formally correct, binds the court to pronounce on the claim's substantive. Any individual can address the court, but not every individual can receive a rule on the substantive of every claim. By the "legal standing" condition, the avoidance of jurisdictional solutions for the general and diffused interests of certain groups is mainly intended.

This is the legal standing which justifies the "quality" acknowledgement between the right to action conditions.

The quality to action signifies simply the idea of relation. A relation of logical identity is between the plaintiff's actual persona and the abstract persona to whom the law acknowledges the action; identity between the actual defendant persona and the one against whom the law granted the action. Lacking this relation, the pronouncement upon the claim's substantive is obstructed.

We emphasise, however, that the law establishes that relation; based on this connection, the law acknowledges the "quality", "capacity", „possibility" of an individual to ask for the substantive rule on

a certain claim, in opposition to an individual or a category of specific persons.

The judge is the one who verifies in each distinctive case if we are in the presence of that „relation", „connection" requested by law and wherefrom the existence of „legal standing" is deducted.

This verification is done based on the reasons in fact and in law invoked by the parties (through summons and counterstatement), as well as based on the interpretation of certain legislative texts.

The examination of the "legal standing" is done within a phase prior to deciding on the merits; if the judge establishes that the parties do not have active or passive legal standing, he rejects the action without prejudice to the litigious right (article 40 of the New Civil Procedure Code).

We emphasize that the Romanian lawmaker, in the article 37 of the New Civil Procedure Code, also acknowledges an extraordinary legal standing in certain cases. This text constitutes an *exception from the rule that the interest of acting shall be personal*.

The New Civil Procedure Code also regulates, in the article 38, the subrogation possibility of the legal standing. The legal subrogation of the legal standing can take place in case of legal person succession or reorganization.

The conventional subrogation takes place as a rule in case of an assignment of claim or of selling a litigious right.

The one who acquires rights and obligations, materially shall acquire – as the case may be – active or passive legal standing. The consequences of the legal standing subrogation and the effects of the court order are stipulated in the article 39 of the New Civil Procedure Code.

3.3. The submission of a claim

Indeed, in most situations, the plaintiff

submits a claim, motivating that he/she is the holder of a subjective right, which he/she wishes to improve or protect by appealing to justice. The reliability of their statements is verified at the moment when the court examines the merits of the litigation.

However, it was rightfully observed that situations which are not a direct expression of certain subjective rights are improved through the legal action: the case of possession actions, presidential orders, etc. [4].

Moreover, acknowledging the inexistence of a right is required in certain situations. In these cases, the court does not deny the existence of the right to act, the decision on the merits of the litigation is not refused because the plaintiff does not assert a subjective right.

Therefore, the plaintiff shall only have to coherently submit a claim, shall have a real request addressed to the court, even if this is asserted in a negative form or targets the taking of certain temporary measures, etc.

The phrasing chosen by the lawmaker in the article 32 of the New Civil Procedure Code is much more appropriate and encompassing with regard to the judicial practice than the expression previously used in the classical Romanian doctrine – „the assertion of a right” – for expressing the same condition.

3.4. The interest

In doctrine, the interest is defined more often as the benefit, material or moral advantage which the plaintiff wishes to obtain after the trial.

The New Civil Procedure Code does not define the interest but it specifies its conditions: the interest shall be determined, legitimate, actual and existing, direct and personal (article 33). We specify that doubts and opposite opinions were expressed within the judicial doctrine

regarding the necessity of attaching all these characteristics.

The lack of legal interest draws the rejection of the action according to the article 40 of the New Civil Procedure Code.

Determined and legitimate

The interest of acting shall be a real and clearly determined one because the role of the judge is not that of offering judicial consultations on certain theoretical and hypothetical issues.

The idea that the interest shall be legitimate or judicially protected was expressed; the interest shall have a basis in the objective right, without being able to be acknowledged for protecting certain legal relationships which are not in accordance with the law in force, with the rules of social cohabitation.

Actual and existing

The justification of these requirements is found in the necessity of ensuring fluency of the jurisdictional activity, which cannot be accomplished if we burden the courts with preventive trials for hypothetical problems.

The New Civil Procedure Code accepts certain categories of exceptions through the articles 33-34 when a request can be submitted, even if the interest is not actual and existing or even if the due date that affected the debt or the obligation submitted for trial was not yet reached: in order to prevent the violation of a threatened subjective right, in order to prevent the production of an imminent damage and of one which could not be repaired etc. The actions promoted in this type of situations have a preventive character. We emphasize that the texts (articles 33-34) which stipulate them are of strict interpretation and shall be applied prudently.

Personal

This characteristic forbids us in principle to act on behalf of other individuals; an immediate connection between the pursued benefit and the person who acts in justice is required.

It was correctly estimated that this condition cannot be firmly conceived within the modern legislation [4].

Therefore, as we explained above, the article 36 of the New Civil Procedure Code also refers to cases of exception when the right to act of certain institutions or persons who do not have a personal interest for the cause is acknowledged.

4. Conclusions

Without denying the close connection between interest and quality, we consider that these maintain their autonomy in all situations.

The fact that the law grants first of all the one who claims was – personally and directly – injured by the action/inaction of a determined person, the authorization to obtain a decision on the merits, does not lead to the overlapping of the two conditions pertaining to the right of action.

The difference between the legal standing and the legal interest is also reflected by the acknowledgement of certain exceptions from the rule:

- either the lawmaker grants an extraordinary legal standing to certain persons (usually public institutions), who did not suffer a direct and personal damage;
- or denies the legal standing of certain individuals who are injured and who have an interest in obtaining a solution on the merits.

In the first category of exceptions, the cases in which the Ombudsman, the Public Ministry (prosecutor) or the minor protection institutions can start an action for protecting the rights of certain persons

can be exemplified (see article 1 paragraph 3 from Law no. 554/2004 of the contentious administrative matters, article 92 of the New Civil Procedure Code, Law no. 272/2004 regarding the protection and promotion of child's rights, etc). On the other hand, the ones who have passive legal standing, accounting for another person are: parents, teachers, principals in the cases stipulated by the articles 1372-1374 of the New Civil Code.

In the second category of exceptions we can exemplify the case of the mother-in-law who files an action for evacuating the son-in-law from the apartment – her property, but does not file an action for divorce against him although she could justify an equally great interest for evacuation; also, we mention the example of the action in establishing maternity that can only be filed by the child or by his/her heirs according to the conditions stipulated by law (article 423 of the New Civil Code).

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