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THEORETICAL CONSIDERATIONS ON THE CONCEPT OF PART IN CONTEXT - CIVIL CODE

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Abstract: *The subjects of law, bound by substantive law relationships, enter into new relationships of a procedural type, from creditors or debtors they become plaintiffs or defendants and together with the plan of substantive civil law relationships in this context the plan/level of civil procedural relationships also emerges. In this context, we will examine the concept of "parties", trying to define it and to determine the theoretical and practical interest of this approach.*

Key words: *Civil Code, part, plaintiffs, defendants, proceedings.*

1. Introduction

In the area of civil material / substantive law, the subjects of law come into civil relations/connections as holders of rights and obligations.

Sometimes, in the context of these relationships, conflict situations arise, claims are issued, and breaches of subjective rights or legitimate interests are discovered.

Then, to defend individual rights allegedly infringed or to promote the interests allegedly ignored, the subjects of law (people) turn to the competent state authorities called upon to enforce, with the power of state authority, the provisions of the laws of matter.

The subjects of law, bound by substantive law relationships, enter into new relationships of a procedural type, from creditors or debtors they become plaintiffs or defendants and together with the plan of substantive civil law relationships in this context the plan/level of civil procedural relationships also emerges.

Some authors consider that the level of procedural relations represents the plan of sanctions in the substantive civil law relationships. In reality, however, between the substantive civil law relationships plan and the procedural relationships, there are situations of mutual interdependence and influence, but not of dependence and one-sidedness in regard to a plan or the other.

The bond is often achieved through the civil action, meaning that the right of action arises in the context of substantive civil law relationships and by its means a procedural relationship is triggered. But it must also be taken into account that the sentence ruled in the lawsuit refers to substantive civil law relationships.

It is also considered that the lawsuit is not always caused by a conflict in the area of substantive law, as for example divorce or separation concluded amiably.

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Finally, we also consider that the right to go to court is a component of the civil capacity, accessible to any person and it can be activated when it can justify an interest which legitimates the use of the right of action, which cannot be justified only by reference to the rights and obligations in the sphere of substantive civil law relationships.

But the right to action once exercised produces the specific transfiguration of substantive civil law relationships in the procedural plan as follows: the creditor becomes plaintiff, the defendant becomes debtor, the creditor's claim forms the object of the lawsuit and the motivation of the claim becomes the cause of the lawsuit.

We can say that, essentially, everything is built on the foundation of conflict arisen in the sphere of substantive law which, by its "displacement" in the scope of procedural law becomes litigation, and its protagonists were called litigants, meaning those participating in the process, who formulate contrary legal claims in contentious proceedings.

Along with the court, the parties are the main characters of the civil process, the lawsuit being inconceivable without them.

A distinguished theoretician of civil procedure states that the court is "one of the indispensable subjects of judicial activity", emphasizing in this sense the fact that "*In its simplest form, the lawsuit involves the participation of at least three parties: the court, a person who makes claims and another one defending himself/herself*" [12].

In complete contrast to the previously exposed doctrinal opinion, the renowned professor Ion Deleanu argues that <<the judge is not - and cannot be! - a party in the court. She/He cannot be considered "part" at least for the reason which is as obvious as possible that this would cause the inadmissible confusion between "the judge" and "the party". Not "part" in the report of proceedings, s/he does not have "procedural rights and obligations" but "powers" and "duties" specific to "authorities" [8].

As to this claim, we ask ourselves the legitimate question: If s/he is not part of the process, which is the standing incumbent upon a judge?

We cannot avoid the appreciation that s/he, as subject of the civil proceedings, is a main participant invested with certain rights specific only to him/her, among which, in the foreground, is to deliver the solution in the process (*juris dictio*). We could say that the judge is the participant with the leading role in the civil lawsuit.

At a certain stage of the process, we find a participant who exercises authority and does not promote any interest of his/her own in the lawsuit. Similarly, we sometimes find the prosecutor as participant, who intervenes as a supervisory body to maintain order and legality, promoting an interest in this position.

Moreover, from a structural point of view, the fundamental element of the civil trial is represented by the court that is invested by law with the attribute to decide on the trial through diverse hearing reports and orders, "uttering" the final sentence.

Other subjective elements in the structure of civil proceedings are the parties, namely the legal subjects that make claims against each other, claims covering the rights and obligations in the sphere of substantive civil law relationships material.

These claims, whose settlement falls in the responsibility of the judge form ZA - as already mentioned - the object of the lawsuit. Motivating these claims, respectively their reasoning, forms the cause of the lawsuit.

In summary therefore, the subjects of the civil trial are the court and the parties showing their subjective component,

together with the objective component, i.e. the object and cause.

In this framework, we conclude in the sense of showing that the plaintiff and the defendant are the main parts of the process and the court is "a vital issue" in the realization of judicial activity, thus giving shape and substance to the maxim "if the lawsuit is necessary to the parties, the parties are also necessary in the lawsuit ".

In what follows, we will examine the concept of "party", trying to define it and to determine the theoretical and practical interest of this approach.

2. "The characters' in the civil trial. Parties and third parties in relation to the civil lawsuit.

The Civil Procedure Code in effect not only defines the notion of "party", but also the terms used to refer to "party" are different, respectively under the name of Book II "Contentious procedure", Title I is entitled "Parties", where in article 41 paragraph (1) we find explicit reference to the concept of "party" in the sense that "*Any person who has the use of civil rights may be part in the court*"; so that in art. 47 and art. 48 mention is made of "plaintiffs" and "defendants"; and art. 112 states that the request for summons shall indicate the name of "parties"; so, according to art. 109 anyone "*claiming a right against another person*" must submit an application before the court; while according to Art. 274 and art. 276 we find the term "party" also in art. 275 and art. 277 referring to "the defendant" and "the plaintiff".

Likewise, Book III "General provisions relating to non-contentious proceedings" in art. 331 clarifies that in this procedure shall be settled applications which are not "seeking to establish a hostile right towards another person" but which require the mediation of the court in order to be settled.

From the analysis of the above mentioned articles, it can be easily seen that the Romanian legislator oscillates in using the terms "party", "plaintiff" and "defendant" without specifying their content, concept which was also found in the procedural laws adopted in the nineteenth century as well as in some recent legislations.

The situation is reflected in the rules of the New Code of Civil Procedure, the more so since many of them take over those of the old Code. Thus, the provision that any person who has the use of civil rights may be sued, formulated in Article 44 Paragraph (1) of the Civil Procedure Code in force is found in Article 55 (1) of the New Code of Civil Procedure but slightly modified.

Also, if the code of civil procedure in force referring to the parties, in articles 47 and 48, nominates plaintiffs and defendants, the New Code of Civil Procedure, in Article 54, under the title "Listing" writes that "the plaintiff and the defendant are parties, and under the law, also the third parties involved voluntarily in the process."

But in the New Code of Civil Procedure, as well as in the Code of Civil Procedure in force, although the terms "party", "plaintiff" and "defendant" are used, the content of these terms is not specified.

Therefore, the role of defining the concept of "party" was taken over by reference books and jurisprudence, which has led to controversies both on the definition of that term and the conditions required in order to be a party in the lawsuit or to exercise civil action.

3. Definition of the notion of party

The reference books are not unanimous regarding the definition of the concept of

part in the civil lawsuit, so among the Romanian authors, a field of doctrinal controversies was opened, one which also persists today.

The first definition was supported by A. Hilsenrad and I. Stoenescu [9], who considered the "conflicting interests" of the characters among whom the dispute arose and who defined the parties as those people who express contrary interests, in that at least one of them "claims to have a right to claim against the other, who has overruled this right. " These authors have pointed out the existence of a material sense and a procedural meaning of the concept of party.

Thus, in the substantive sense, the notion of party designates all people engaged in a civil lawsuit, among whom there are substantive civil law relationships and in the procedural sense it means all the people engaged or not in a lawsuit, no matter whether among them there are substantive civil law relationships or not.

Subsequently, other authors [19] have emphasized the importance that substantive civil law relationship before the Court has in shaping conflicting interests. Thus, it was proposed that the term "party" receive a broad and a narrow sense. In a restricted sense, narrow would mean that body or that person holding the rights and obligations to be decided, the body or person who will be affected by the judgment to be pronounced in the case brought before it. Thus, the quality of plaintiff or defendant pertains solely to the subjects of the substantive legal relationship. This thesis was reaffirmed also by Ph. D. Professor V.M. Ciobanu and E. Oprina [16].

Regarding the broad sense of the term, it would also include "all the other bodies or people receiving at the trial, the quality of party by virtue of certain explicit legal provisions".

Another author [1] launches a doctrinal idea according to which, although he does not define the notion of "party", from the statement it still follows that the elements of civil action and civil trial seem to be confused, respectively states that "a civil action cannot be conceived without the existence of at least one person who addresses the court, requiring the defense of a legal claim that s/he pretends to have, or of an interest protected by law.

With the exception of non-contentious procedure (which does not seek to establish an opposing right towards another person), the civil action also implies the existence of a person who is sued because s/he allegedly violated or disputed the right stated, or with regard to whom it is desired to obtain an interest protected by law ".

To the doctrinal controversy regarding the definition of "party" one may add the opinion expressed by the author FI. Măgureanu who states [15] that the person claiming infringement or disregard of the subjective right and the person opposing these claims have the quality of parties of the civil action, that the people or bodies to whom the law acknowledges the right to pursue action are also parties, and the third parties entering the process, on their own initiative or that of the initial parties also obtain the quality of parties.

In a relatively recent paper [17] , the definition of "party" is formulated with arguments, as "those individuals with conflicting interests whose rights and obligations are subject to the civil trial."

This definition is intended to harmonize all opinions expressed in the doctrine and it is this feature that marks its gaps and draws our criticism.

We oppose this definition the arguments which take the form of questions: What happens in case of abandoning the trial, of the civil trial obsolescence or giving up on the subjective right?

Another opinion pertains to the prestigious procedure scholar, Ph. D. Professor Gratian Porumb who notes that the definition of the party is to be examined only in the procedural aspect and that "the question whether between parties there is indeed a legal dispute or a right of the plaintiff has been violated or challenged by the defendant, it is to be determined by the instance, by a court order. Even if through the sentence, the lack of the right stated is ascertained, the participants in the civil trial, in the roles mentioned, keep the quality of parties in the process that actually existed." [18].

This opinion was repeated with additional arguments by Ph. D. Professor Ion Le [13] reiterating the idea that the only important sense in analyzing the rules governing the conduct of civil proceedings is the procedural one.

Arguments were developed by the above-mentioned author in the monograph entitled "The participation of parties in the lawsuit" [11] , namely:

- from the analysis of the provision in art. 41 paragraph (1) of the Civil Procedure Code in force [correspondent to art. 55 para. (1) of the new Code of Civil Procedure] brought under discussion, it unequivocally results that the acquirement of the quality of "party" cannot be conditioned by the verification of the condition that the person be the holder of a right or obligation which forms the content of the substantive civil law relationship;
- in relation to art.274 Code of Civil Procedure in force [correspondent of art. 447 para. (1) of the new Code of Civil Procedure], the applicant whose action has been dismissed by lack the subjective right stated in court also has the quality of party, and, therefore, they will be ordered to pay the court charges
- the justification for acquiring the status of "party" in determining the existence or nonexistence of a subjective right can only be achieved by accepting the procedural meaning of party.

Analyzing the foundation and the doctrinal arguments to this view, we rally to it and we hold that in the contents of exercise capacity of each person there is also the constitutional right to address the court and, consequently, by exercising this right, the person acquires the status of being "a party" in the process.

However, we note that through the request for summons, the applicant identifies another part of the trial, usually the state of defendant. Thus, the term "party" is purely procedural, being used as such in our legislation.

In support of this thesis, we can invoke the Romanian case law which held that "By means of party we imply the person who sued and the one against whom it was acted, and their successors in title." [22]

More recently, the Supreme Court of Justice by Decision no. 828/2000 [21] found that 'party' "means the person having one of the procedural attributes that can be held and took part in the trial of a cause."

Likewise, it is necessary to invoke in promoting the thesis that we also make reference to scholarly studies from abroad, namely to the French, Italian, Spanish and Latin American doctrine. In this respect, we show that the French authors Gerard Cornu and Jean Fozer [6] argue that the term "party" is definitely a procedural concept, defining it in relation to the parties of the process: "Parties can be considered only those that are linked through the trial, the parties in the trial, just as other people are parties in a contract."

The more recent French doctrine [2] noted that the applicant is the one who took the initiative of taking legal action and the defendant the one against whom the claim was filed.

The same concept is embraced by the majority of the Italian doctrine and we will

restrict ourselves here to quoting the famous Italian procedure scholar Piero Calamandrei who, when referring to the conditions regarding the procedural relationship, shows that these conditions must exist in order to obtain a certain decision, favourable or unfavourable, on demand, while the conditions of the action relate to the procedural relationship that preexists the trial. Therefore, the quoted author states that the conditions of the procedural relationship are requirements relating to the establishment and development of the procedural relationship, independent from the substantial foundation of the demand [3].

It is necessary to also mention the opinion of the Italian author Crisanto Mandriola, [14] according to whom the parties, respectively the attribute of party, exist with "the only condition of the existence of a process."

In mentioning the foreign authors who agree with the doctrinal opinion to which we also rally, we ought to mention Chiovenda [5], Goldschmidt [10] , Redenti, Rosenberg [20] , Eduardo Carlos, Couture. Here we will also remember the Columbian procedure specialist A. Camacho [4] who held that "the attribute of part is acquired by the mere fact of intervention in the trial, without considering the fact that the person is or is not the holder of the substantive relationship".

4. Theoretical and practical interest of determining the concept of part

Being acquainted with the content of the concept of "part" is a prerequisite in determining the rights and obligations of the participants in the proceedings, given the fact that there is one individual class/individualized by statutory rights and obligations for each party and a general category of rights and obligations applicable to all parties in the civil trial.

At the same time, determining the concept of part is of interest in relation to the fact that the judgment only produces effects in regard to the people who have participated in the judicial activity as parties, as well as in resolving procedural pleas, namely: lack of quality plea, lis pendens plea and res judicata plea.

5. The role of parties

The structure of a civil trial and the principles governing the administration of the justice process determine the position of the parties in the dispute. The whole course of the civil proceedings is governed by the provisions that impose rules of procedure that ensure the protection and enhancement of the litigants' rights and interests.

In civil cases, the parties always have a contradictory position in complying with the adversarial principle and the plaintiff and the defendant may present the court all the reasons in fact and law on which they support their claims and defenses. Of course that the applicant - after s/he filed an application for summons - will try by all means allowed by the law to prove her/his claims and the defendant will adopt, in particular, a defensive position.

Sometimes, however, the defendant may, in his/her turn, issue claims against the plaintiff, by way of a counterclaim, thus leaving her/his defensive position. In such a situation (*judicium dulex*), the parties acquire dual roles in the process, both being due to have the quality of plaintiff and defendant.

It is necessary to note the crucial role that the plaintiff plays in the lawsuit in that s/he triggers the dispute and thereby assumes the attribute of party, as well as the fact that s/he gives, in principle, the attribute of parties to others in the trial, thus triggering

the principle of availability. Exercising the role of trigger in the process, the applicant assumes the risk that, when her/his claims prove unfounded or when the action was wrongly pointed, to take the consequences which are decided by the judgment to be given in the cause. Likewise, s/he assumes the risk that results from exercising in bad faith or exercising abusively the civil action.

It is observed that, during the civil trial, the parties may change their procedural position like, for example, when exercising remedies and when the one who promotes the appeal becomes caller, recurrent, objector, claimant in revision, and the party subject to the appeal is called respondent.

6. Issues relating to non-contentious procedure

The reference books [17] have expressed the opinion that, although the fundamental rule of the civil trial is a contradiction between the interests of litigants, the principle governing the contentious procedure, however, states that there are situations in case of some of the non-contentious proceedings in which the contradiction is not obvious such as: adoption, the procedure for correcting the particulars in the register documents, amicable divorce, the division of joint property during marriage, the declaration of disappearance or alleged death.

The above-mentioned processes are justified by "reasons related to the special importance of rights and the necessity of enforceability erga omnes of decisions." The author quoted remarked, however, that "at the deep level of interest that governs the proceedings of subjects from the aforementioned category of processes, we will notice that somewhere there is an element of contradiction, of divergence or at least non-convergence".

As for us, we reject the idea and point out that in the situations mentioned above, when an element of contradiction occurs in the actual wording of the request for summons or in the objections raised by people involved in the process, the process is shifted within the legal proceedings so that the court invested with the non-contentious application will reject it under art. 335 of the Civil Procedure Code in force (corresponding to Article 524 of the New Code of Civil Procedure).

From the perspective of the New Code of Civil Procedure, it is required that we proceed to a thorough analysis of this problem, having in view especially the very name given to this institution by the new procedural law, namely of non-contentious legal proceedings.

7. Parties and third parties

As mentioned earlier in this chapter, "parties" in the civil procedural relationship are the subjects of the substantive civil law relationship so, most often, the civil procedure relationship "moulds" on the substantive one.

Third parties (*penitul extranei*) are people who are outside the procedural report, and being outside of it, the court order to be given will not refer to them, except for the situation in which these people get involved in the process becoming parties as such.

However, "some people - firstly considered to be third parties - are still parties, because they are, broadly speaking, represented in the process" [7] , like for example, solidary joint debtors, among whom the presumption of tacit trust mandate functions pursuant to art. 1443 of the Civil Code, as well as spouses among whom the assumption of tacit trust mandate also functions, pursuant to art. 345 of Law no. 287/2009 on the Civil Code (in Book II, Title II, Chapter VI, entitled "Patrimonial rights and obligations

of spouses' and thus makes the distinction between the various matrimonial regimes (sometimes there is the assumption of tacit trust mandate between spouses).

With the development of the civil trial, it is likely that the original demarcation between parties and third parties alter the separation criteria, as when, for example, the death of one of the parties occurs, followed by an assignment of rights under dispute, the transferee is going to acquire the quality of party in the trial, or in case of voluntary and forced intervention in the trial when the intervener becomes a party.

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