

Regulating the Procedure of Judging the Appeal in the Civil Law Suit in the Draft Civil Procedure Code

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Abstract: The present study aims at analyzing the dispositions regarding the appeal, as presented in the present form of the Civil Procedure Code², motivated by the fact that recently, the Ministry of Justice has launched a public debate on “The strategy of developing justice as a public service 2010-2014” in which it proposes a set of measures on the functioning of the judicial system and the consolidation of justice independence and integrity. The Ministry of Justice will advance this document of great importance for the justice, to be approved by the Romanian Government, no later than July, 1st 2010. The adoption of a new Civil Procedure Code was imposed by the socio-economic transformations that occurred in our country after December 1989 and by the Romanian accession to the EU on January, 1st 2007, as well as by the changes occurred on the international level, generated by the free movement of people and not only. In this paper we will approach a few theoretical and practical issues related to the unitary application and interpretation of the civil procedure norms regarding the term in which the appeal can be exerted, the summoning procedure, the forms of appeal and the rules that coordinate the judging of the appeal. This objective aims at underlining the need for a better regulation of the forms of appeal in the civil law suit, reducing terms, summoning the litigant parties, so that the judging is made in compliance with the principles of the right to defense and the contradictory principle that govern the civil law suit. By the propositions made regarding the completion of the amendment of the civil procedure norms we intend to actually enable the guarantee of respecting the requests of an equitable law suit, from the perspective of the law suit’s duration in order for the instances in Romania not to be accused of violating article 6 of the European Convention of Human Rights. In the Romanian civil law suit, the appeal is the only ordinary means of appeal, with devolutive character, whose usual object is the control of the judgment on the cause. The draft, among other propositions, institutes the possibility that the susceptible appeal decision can be directly appealed, only for the violation or the faulty application of the material right norms and only in case the parties expressly agree on this.

Keywords: appeal; ordinary appeal; request of appeal; term of procedure; due time; fair trial

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² In this paper the Law on the Civil Procedure Code has been considered, in the form sent to the Romanian Parliament, as well as the strategy of developing justice as a public service 2010-2014.

1. Introduction

The judicial practice has demonstrated that the instances, although they aim at establishing in the judicial activity, the correct situation and facts to which they apply the law in order to make legal and solid decisions, they sometimes make mistakes. In order to reduce these mistakes, the civil procedural law has created a legislative frame on the conditions in which the parties can exert the ways of attack, the circumstances in which the superior judicial instances, legally invested, have the possibility to verify the legality and solidity of the decisions coming from inferior instances and eliminate the possible errors. By exerting the ways of appeal on one side it is accomplished the repair of the mistakes in the decision and on the other side the homogenization in interpretation and application of these decisions as well as a unitary judicial practice. The judicial process in ways of appeal, irrespective of its object- decision taken by the first instance or decision in solving another way of appeal- is always and activity of judicial control, which represents for the parties involved in a civil lawsuit, represents one of the guarantees of the right to defense.

The legislator has been concerned not only with organizing the lawsuit in front of the law court but also to present which are, in certain situations, the ways of attack through which the illegal or not grounded decisions could be eliminated, changed or annulled. Both in the present Code of civil procedure as well as in the Law on the Code of civil procedure (named in the following draft) the appeal is the only ordinary way of appeal in the civil lawsuit and the extraordinary ways are the recourse, appeal in annulment and review. But in case of the appeal, ordinary way of attack provisioned in special laws, the trial is made according to the dispositions in the Code of civil procedure. In the civil lawsuit, after December 1989, following the reform in justice¹ was reintroduced, by Law no. 59 on July 23rd 1993 amending the Code of civil procedure, the Family code, the Law of administrative contentious no.29/1990 and Law no.94/1992² that introduced, in the category of ordinary ways of attack, the appeal and recourse. Subsequently, by the Government Emergency Ordinance no. 138/2000³ amending and completing the Code of civil procedure, approved with the subsequent amendments and completions by Law no219/2005, that led to the introduction of the recourse in the category of extraordinary means of attack and the appeal remained the only ordinary way of attack. In the present, the Code of civil procedure regulates the appeal in articles 282-298 and the project in Book II, Title II with the title Ways of attack, Chapter II named "The appeal" in article 453-468.

¹ By Decree no. 132 on June 19th 1952, the appeal was suppressed and the procedure of recourse was restructured in the sense that it was allowed to verify not only the legality but as well the solidity of the decisions.

² Published in the Official Monitor of Romania, Part I, no.177 on July 26th 1993.

³ Published in the Official Monitor of Romania, Part I, no. 479 on October 20th 2000.

Concerned with the justice, the Ministry of justice launched a political debate named “The strategy of developing justice as a public service 2010-2014”¹ (named in the following the Strategy) that proves to be “*an institutional instrument supporting the tendencies to modernize the functioning of the judicial system and consolidate the independence and integrity of justice*”. The Strategy aims at establishing the conditions for “a transparent judicial act, in due time and at an acceptable cost for the citizens”; in what concerns the specific objectives, they are the finalization of the process for adopting the codes of civil procedure (including the execution of the penalties), perfecting the frae legislation applicable in the justice system, the unification of the judicial practice and improving the professional training of the magistrates etc. and in what regards the directions for action, the coming into force of the codes, elaboration of the laws to implement the codes and the impact studies; accelerating the lawsuits and eliminating the institutional vulnerabilities (simplifying the summoning procedures, including the lawsuits with several parties; eliminating the appeal for some causes; reducing the competence of the High Court of Cassation and Justice etc.).

In this paper we will analyze the way in which the draft of the new civil procedure code regulates: the conditions that have to be fulfilled in the request of appeal, the instance intimation with the request of appeal and the delay in which the appeal can be exerted.

2. The Request of Appeal in the Regulation of the Draft Civil Procedure Code

In what regards the request of appeal, the draft provisions the obligation of the appellant to indicate the given name and the personal identification code² of the parties. We do not know what inspired the author of the draft in provisioning the obligation of the appellant to indicate the personal identification code. Maintaining this provision prevents the access to justice on one side and on the other side it makes the activity of the computerized inventory books of the person. To these the crime of using the personal identification code by anyone is added, in order to give credibility to fraudulent acts. In the practice of the judicial instances, is has been

¹ www.just.ro

² This provision is in contradiction with Law no. 644/November 21st 2001 for protection of people regarding the processing of the personal information and the free movement of this information. According to article 8, al. 1 in this law “the code of personal identification or...can be effected only if: a) the person gave its consent or b) the processing is expressly provisioned by a legal disposition”. The law mentioned above defines in article 3, al. 1, b) the data processing with personal character through automatic or un automatic means such as collecting, registering, organizing, storage, adapting or modification, extraction, consultation, use, reveal by third parties by transmission, dissemination or in any other way, juxtaposition or combination, blocking, erase or destruction.

noticed that in the summoning, the appellant added the personal identification code of the defendant, even if the law didn't stipulate this, but this detail did no service to the judicial instance, as long as the defendant proved in court that he/she had another address at the moment of the intimation. In case of the recourse, the court of judicial control accepted the recourse, annulled the sentence with the consequence of sending the cause to be re judged by the same court, as in first instance, the cause was solved by breaking article 85 in the Civil procedure code, according to which "the judge cannot make a decision on a request until after summoning the parties, except for the cases in which the law stipulates differently. What we want to underline here is the fact that in the request of appeal, the residence or location of the litigant parties have to be correctly provided, for the purpose of fulfilling the summoning procedure and respecting the principles dominating the civil trial, the right to defense and contradictory. In other words, before summoning the court with the request for appeal, the appellant has to know the address or the residence of the intimate and include it in the request. In the practice we noticed that the request cannot be solved in due time even because of the appellant who, either does not indicate his/her residence or doesn't make this specifications regarding the intimate. The persons that do not have the most elementary knowledge of trial in appeal procedures cannot understand the way in which the procedure of summoning cannot be legally fulfilled with the appellant, following the incorrect indication of the address. On the proof the fulfilling the summoning there is the mention "unknown recipient".

The text of the article 474, paragraph 1 of the draft expressly provisions that the request of appeal, among others, will include the grounds and facts which the appeal is based on and article 3 provisions that not fulfilling this obligation is sanctioned with refusal. This sanction is included also in the actual regulation and is applied only if the appeal was not motivated until the first day of hearing. We assert that the elimination of the previous provision regarding the possibility of motivating the appeal until the first day of hearing as being a success. In the present regulation (the grounds for appeal can be presented until latest the first day of hearing) the appellant benefits from the dilatory character of the regulation (Ciucă, 2008, p. 385) that leads to the backwardness of the judgment. Also, the suppression of the appeal by Decree no. 132/1952 was appreciated in the doctrine as being positive (Porumb, 1962, pp.14-15) with arguments such as by maintaining this way of attack the trial is tergiversated, that the litigant parties have to undergo high expenses and that the appeal ensures the judicial control of legality and soundness. We assert the concerns of the Ministry of Justice in elaborating a normative act that eliminates the appeal for some categories of causes. And in the present regulation (article 292, al. 2) and in the draft there is the provision according to which in case the appellant is not motivated, the instance is obliged to pronounce itself based only on the aspects invocated in the first instance (article 463, al. 2 in the draft). We hope that this disposition is eliminated and it will be

expressly provisioned that not motivating the appeal in legal delay is sanctioned with the refusal of the appeal as groundless. Such a solution is regulated in the German civil procedural law (article 522, al. 1 ZPO) in case the request of appeal does not fulfill the conditions of form and especially the motivation of the appeal; the instance will be able to pronounce by making a decision without summoning the parties (Zidaru, 2007, p. 205). Only in this way we assert that the litigant parties will be made responsible and disciplined in exerting the procedural rights in good faith. The transposition of the text of article 292, al. 2 in the text of the article 463, al.2 of the draft will lead to the violation of the two rules regulating the trial of the appeal known as: *“tantum, devolutum quantum apellantum”* and *“tantum devolutum quantum judicatum”*. The appeal being devolutive only for what has been appealed (Les, 2002, p. 558) it is imposed that in the request of appeal, the titular has to motivate clearly and precisely the critiques so that the instance can frame the cause in the procedure, in case the exact grounds are not indicated or indicated in an incorrect manner. The motivation of the appeal is important both for the instance (for example helps establishing the judicial stamp duty) for the intimate as well who is obliged to ask for an injunction invoking exceptions and defends himself. Only in the case in which the appeal is grounded we can talk about respecting the principle of “weapon equality” that ensures the right to a fair trial expressed by the European Court, starting with the *Delcourt* decision issued on January 17th 1970. We find as being incomprehensible the text of article 446, al. 2 that provisions the possibility that the decision susceptible for appeal can be attacked directly with recourse at the instance that would have been competent to judge the recourse against the decision in the appeal. The condition that has to be fulfilled refers to the express agreement of the parties, registered in authentic written or by verbal declaration, in front of the court whose decision is attacked and registered in a protocol. In Romania, as a consequence of the lack of judicial education and not only, the parties exert ways of attack not provisioned by law for some decisions, exert ways of attack in similar cases in which they have lost the trial, formulate groundless complaints to the judge for the case etc. We offer as an example in this case the litigations having as object the pollution tax. Although in practice the pollution tax is not owed, the public finance administration exerts the way of attack of the recourse that is evidently rejected as groundless and being in procedural guilt, the recurrent is obliged to paying the law expenses to the intimate. Why? Because this is the way in which the executive understands how to use all the ways of attack although it knows the fact that it doesn't win.

The new element brought by the draft is the disposition of article 457, al. 5 according to which *“in case the delay for exerting the appeal starts at a different moment than the communication of the decision, motivating the appeal will be made within an equal delay that starts this time from the moment of the communication of the decision”*.

3. The Reclaim Days

In the present regulation (article 248, al. 1) the reclaim days is of 15 days from communicating the decision, if the law does not provide otherwise and the draft provisions in article 455 al. 1 that the “*reclaim days is of 30 days from communicating the decision, unless the law does not provide differently*”. We assert that the 30 days term is excessively big in the conditions in which the text of the article 6 in the European Convention of human rights regulates the right of every person to a fair trial, solved in reasonable delay. These principles have to be respected from the moment of the instance intimation until the solving of the case by a definitive and irrevocable decision and during the enforced execution in case the debtor does not execute the obligation established with executor title. In case the maintenance of the term is not maintained at the level of 15 days, we will have statistic situations that would underline the fact that the parties have been violated the principles mentioned above and they can make complaints in front of the judges and convictions at ECHR. Even if the draft provisions that the appeal has to be motivated in legal delay (the provision in the present regulation, meaning that the appeal can be motivated until the first day of hearing is not included in the draft) we have enough reasons to believe that not enough efficiency is given to the principle of solving the cause in due time. And this is the reason why: the dispositions of the project regarding the admission of the request of appeal (article 458, al. 3-8)¹ do not apply the content of article 6 in the Convention. The text of article 458, al. 3-8 of the draft we notice the “concerns of the author of the project”

¹ (3) “In case the request of appeal doe not fulfill the conditions provisioned by the law, the president of the instance that receives the request of appeal will establish the lacking information and will ask the appellant to complete, modify the request immediately, if present and if possible, or in written if the appeal was sent through mail, fax or courier. The completion or modification of the request will be made within the term of appeal. If the president appreciates that the period of time until the expiration of the term is not sufficient, will grant a short term, of maximum 5 days from the expiration of the term of appeal in which to submit the completion or the modification of the request.

(4) The disposition of al. (3) is applied in a corresponding manner and in case the grounds for appeal are submitted separately from the request.

(5) After the receipt of the request of appeal., respectively the methods of appeal, the president that issued the decision attacked will dispose the communication to the intimate, together with the copies of the documents and weren't submitted at the first instance, with the obligation to attach to the file the statement of defense within maximum 15 days from the communication date.

(6) The instance where the statement of defense was submitted at will communicate it immediately to the appellant, with the obligation to submit the answer to the declaration within 10 days from the communication date. The intimate will take notice of the statement from the file of the case.

(7) The president, after the fulfillment of the term of appeal for all the parties, as well as the terms provisioned in articles (5) and (6) will refer the file to the instance of appeal, together with the appeals made, the statement of defense, the answer to the statement and evidence of the communication of these acts, according to al. (5) and (6).

(8) If both appeal as well as requests according to article 429-431, the file will not be sent to the court of appeal but after the termination of the reclaim days regarding the decisions issued by the latter.

to ensure the solving of the appeal in due time by the fact that it establishes, in the task of the president of the court whose decision is attacked, a series of obligations related to the admission of the appeal. Thus, the president of this judicial instance that receives the request for appeal will establish the missing information will ask the appellant to complete or modify the request immediately, if present and possible or in writing if the appeal was sent by mail, fax or courier. It results then that the request for appeal can be faxed also. Regarding the manner in which the appeal can be forwarded by the interested ones to the competent judicial instance by fax, there are still debates regarding the manner in which this could be put in practice, who supports the expenses for the paper and how could those be recovered, without being alleged the violating of the principle of justice.

The next sentence of the same al. 3 namely the “Completion of amendment of the request will be made inside the reclaim days” seems difficult to accomplish in case the appeal is formulated in the last day or over the due time. Accordingly, this disposition very difficult to put into practice can be eliminated. We afford to make such a proposal encouraged by the following: *“If the president appreciates that the remaining time interval until the expiration of the term of appeal is not sufficient, it will grant a short period of time, of 5 days at most, from the expiration of the term of appeal in which to present the completion of the modification of the request”* taken from article 303, al. 5 from the present Civil procedure code that in the practice of the courts of recourse is extremely rarely or never applied.

The same procedure will be applied in case the grounds for the appeal are presented separately from the request (alin. 4) which leads to the conclusion of the unjustifiable prolonging of the term to solve the appeal.

The role of the president of the instance issuing the decision that is being attacked and receives the appeal increases considerably in article 5 and consist in the conditions established in the project in the communication of the request of appeal or the ground of appeal to the intimate, together with the copies of the certificates of the documents presented that haven't been presented at the first hearing, with the obligation of including the statement of defense in the file in 15 days from the communication.

Then the instance to which the statement of defense was included communicates it to the appellant who has the obligation to present the response to the statement within 10 days at most from the date of the communication. The intimate will be aware of the answer to the statement of defense from the file of the cause (al. 6). This time the intimate no longer receives the communication of the answer to the statement but is obliged to take notice of its content from the content of the file.

Only after the fulfillment of the reclaim days as well as the terms provisioned in al. 5 and 6, presented in detail above, the president will present the file to the instance of appeal together with the appeals, statement of defense, answer to the statement

and the proof of communication of these acts according to the al. 5, 6 and 7. We can notice the unjustified character and without precedence of the president of the court whose decision was appealed. We assert that the present regulation regarding the admission of the appeal.

The situation complicates even more in al.8 that provisions that in case both appeal and requests have been formulated according to the dispositions of article 429-431 regarding the correction, clarification and completion of the decision in the case will not be sent to the instance of appeal until the completion of the term of appeal regarding the decisions on the latter request. And in solving this request the dispositions of al. 5-7 analyzed above will be applied. We observe the way in which, through procedure norms, the unjustified prolonging of the appeal trial is ensured, which violates the right to a fair trial provisioned by article 6 in the European Convention of Human Rights that has to be respected during all the procedural stages (Frédéric, 2006, p. 263).

We assert that the procedure of admission of the request of appeal, inspired by the EC regulation is slow and doesn't ensure the solving of the appeal in reasonable time. We have to take into account that frequently the intimates do not introduce a statement of defense and the answer to this statement is formulated more and more rarely, that at the instances of judicial control the file formulated as such will be distributed randomly and that during the process of making a decision, a series of procedural incidents can appear regarding the full court (abstention, challenge, incompatibility) and regarding the judicial instance (displacement) as well as requests regarding the judicial public aid, requests for reexamination of the judicial stamp tax etc. Also, during the solving of the appeal, the appellant can abandon the judgment of the appeal or the civil subjective right of the judgment or the parties can invoke exceptions of unconstitutionality that necessitates time to be solved or the European Court of Justice can be referred to with preliminary questions (preliminary appeal) situation in which the delay of the trial is prolonged. This is the reason we opt for maintaining the present form of presenting the request of appeal to the instance whose decision is attacked, after which the file would be sent to the instance of judicial control.

4. Conclusions

In the present study, we tried to make some appreciations and proposals regarding the completion of the draft Civil procedure code in what concerns the content and the measures that can be taken from registering the request of appeal to the judicial instance whose decision is attacked and regarding the reclaim days.

We hope that the new Civil procedure code contain, in the matter of the ordinary means of appeal, norms that won't lead to bizarre interpretations with the

consequence of creating a non unitary practice that becomes a source of recourses in the interest of the law. The judicial practice has demonstrated that a request for appeal formulated according to the law, in legal due time as well as exerting the procedural rights in good faith and according to the purpose for which they have been recognized by law ensure a good judgment.

In the present stage, there is an acute need for a Civil procedure code that corresponds to the present stage, with clear dispositions that ensures the judgment of the cases in due time and lead to reducing the conviction at ECHR.

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