

THE PRINCIPLE OF PARTY DISPOSITION IN CIVIL LAWSUITS

*Sidonia CULDA**

Abstract

One of the main principles of civil procedural law is the principle of party disposition, which is the subject of the present article, with the procedure and its effects. The principle is not an absolute one, there are some legal limitations.

We have to mention that in the Romanian civil procedure party disposition is not absolute given that the protection of certain persons or interests has also been recognised as active procedural legitimisation for other persons or organs besides the holder of a right.

Keywords: *party disposition, procedural framework, object, decision, limits.*

JEL Classification: [K37]

1. Introduction

Generally, principles are rules that have shaped the unity, homogeneity, balance and clarity of the law. These have allowed the overcoming of legal gaps and the total absence of rules, as judges may not refuse to solve legal disputes submitted for trial.

The constructive force of principles also stands at the basis of legal elaboration and their enforcement will be carried out through correct application when the law is not sufficient, ambiguous or unclear.

At the same time, each legal branch comprises basic rules for the entire legislation within that given branch, as well as basic rules that apply to one or several institutions within the given legal branch (Roş, 2017).

The principle of party disposition covers a theoretical and a practical segment that are functionally interdependent with all the other principles of civil procedural law.

* Assistant Professor, PhD., “Dimitrie Cantemir” Christian University Bucharest, Faculty of Law Cluj Napoca, Romania.

This principle is stipulated in Article 9 of the Civil procedure code, as well as in other legal provisions, explicitly and implicitly, such as Article 22 para. (6) of the Civil procedure code.

2. About the principle

The principle of party disposition means that the parties may not only determine the existence of a lawsuit by initiating the judicial proceedings and by having the liberty to end a lawsuit before a decision is taken on the merits of the case being tried, but also the content of lawsuits by establishing the procedural framework in relation to the parties, the object and the cause, as well as the phases and stages a lawsuit may follow.

Essentially, this principle presupposes:

- The right of the parties to initiate the proceedings;
- The right of the parties to determine the procedural framework, both from the point of view of the object (the actual claim submitted for trial), the cause and the parties and from the perspective of the defences formulated within a lawsuit;
- The right of the parties to end a lawsuit by means of certain procedural acts of disposition;
- The right to appeal or not to appeal a decision by using different means of appeal;
- The right to request the enforcement of judgements.

We should mention that the principle in question does not have an absolute character, as it is susceptible of limitations, but only in cases expressly and limitatively provided for by law.

Chronologically speaking, as for the initiation of civil procedures, they may be initiated upon the request of interested persons or, in cases specifically provided for by law, upon the request of another person, organisation, public authority or institution or institution of public interest. Except interested persons, other subjects of law do not justify a personal interest, but they act for the protection of the legitimate rights and interests of persons in special situations or in order to protect a group or general interest, as the case may be.

We have to mention that in the Romanian civil procedure party disposition is not absolute given that the protection of certain persons or interests has also been recognised as active procedural legitimisation for other persons or organs besides the holder of a right (Năsui, 2017).

According to Article 92 para. 1 of the Civil procedure code, prosecutors may initiate any type of civil lawsuit for the protection of the rights and interests of minors, persons whose legal competence has been restricted, missing persons, as well as in other cases provided for by law (Tăbârcă, 2013).

For example: Article 49 para. 1 of the Civil code stipulates that any person who has an interest may make the request for the judicial declaration of the death of a person or Article 256 of the Civil code which provides that after the death of an injured person actions for restoring a non-property right infringed upon may be continued or initiated by the surviving spouse, by any of the direct relatives of the person deceased, as well as any of his/her collateral relatives up to grade four inclusively.

As a rule, in civil law, judicial proceedings do not take place *ex officio*, but there also some exceptions.

For example, pursuant to Article 919 para. 2 of the Civil procedure code, in divorce cases in which the spouses have minor children – born before or during their marriage or adopted – the court shall also rule on the exercise of parental authority, as well as the parents' contribution to the expenses of raising and educating their children, even if this has not been requested in the application for divorce, while para. 3 of the same article provides that the court shall also rule *ex officio* on the name of the spouses after the divorce.

The object and the limits of judicial proceedings are determined in the petitions and defences of the parties, as provided for in Article 9 para. 2 of the Civil procedure code. At the same time, pursuant to Article 22 para. 6, judges have to rule on everything that has been requested, without however exceeding the limits of the authority they have been vested with, unless otherwise provided for by law.

Applications shall comprise among others the parties, the claim submitted to trial, as well as the “*de facto*” and “*de jure*” grounds of the claim. The procedural framework initially determined may be later modified by the applicant pursuant to Article 204 of the Civil procedure code and the respondent may file a counterclaim, while sometimes both the applicant and the respondent may file applications for forced intervention - Article 68, 72 and Article 75 of the Civil procedure code.

The limits of defence are determined by respondents who will formulate their position as for the applicants' claims according to their interests – they may file statements of defence, counterclaims or they may invoke certain irregularities. Third parties may file applications for voluntary or accessory intervention - Article 61 of the Civil procedure code, and thus the procedural framework is extended both from the point of view of the object and the cause, not only from that of the parties.

As for the cause of applications, if an applicant has erroneously grounded his/her claims by relating the *de facto* situation to an inapplicable legal provision, the court may not re-qualify the application by applying the appropriate legal provision.

The trial is a private law matter, which determines the prevalence of the party's private interests. There are some exceptions to this rule as well, i.e. situations when this principle is attenuated and the party may not have the right of disposal over the trial or over the subjective right submitted for trial. For example, in lawsuits concerning parentage the right may not be waived.

For the admissibility of an application for accessory intervention in lawsuits concerning the suspension of an individual administrative act, different opinions and decisions have been formulated in the legal doctrine and in jurisprudence (Dobre, 2018).

More exactly, the idea of the admissibility of such applications, taking into consideration that the application concerning the suspension of an individual administrative act is personal, has been rejected.

According to the contrary opinion, individual administrative acts also produce effects that affect other subjects of law than their addressee and therefore applications for the annulment or suspension of an individual administrative act do not have a strictly personal character.

The High Court of Cassation and Justice has ruled in favour of the second variant, of the admissibility of applications for intervention, determining that a third party may stand as accessory intervener in a lawsuit concerning the suspension of an individual administrative act if he/she justifies a legitimate interest materialised in the practical use obtained as a result of a decision that is favourable to the party in whose favour he/she intervenes.

As a rule, the court shall only rule on what the parties submitted for trial, without having the possibility to grant more than what has been claimed or to rule on something that has not been claimed (Boroi, 2015).

For example, if the victim of an illicit and prejudicial act requests the obligation of the respondent to pay a certain amount of money and the technical expertise determines a higher prejudice than requested, the court will only be able to grant that particular amount if the applicant has raised his/her claims; if a usufruct right is claimed, no property right may be granted to the applicant; if in a case concerning the establishment of the estate an heir is entitled to a share of $\frac{3}{4}$, but he/she claims a share of $\frac{1}{2}$, the court will not be able to instruct him/her that he/she would be entitled to a bigger share, but if the party does not raise the amount of the object, the court may only determine the share that has been claimed.

Another example would be that if an applicant requests the obligation of a respondent to pay an amount of money, the court may not grant the applicant interests or if the restitution of an asset has been requested, the applicant may not be granted the restitution of fruits as well.

This also results from the decision of the European Court of Human Rights in *Rotaru vs. Romania*, which determines that the omission of the

Bucharest Court of Appeal to examine the request to grant civil damages and legal expenses has infringed upon the applicant's right to a fair trial pursuant to Article 6 para. 1 of the Convention.

As other authors, we also consider that courts are also limited by the causes of applications or procedural acts with the same nature in the sense that courts could not alter the foundation of a claim. Judges could change the legal qualification of claims submitted for trial without being constrained by the legal texts indicated by the parties.

They shall apply to a particular case the legal text that corresponds to the factual situation as legally qualified by the party to the extent to which that factual situation is confirmed by the evidence submitted in the case.

By submitting claims for trial, applicants ground them on certain factual situations which they legally qualify so that the respective claims appear as justified. In their defence, respondents also build factual situations so that the claims submitted against them would appear unfounded.

Based on the evidence submitted, judges shall establish the factual situation of each case, upholding only those circumstances that have been substantiated. Judges may not provide another legal qualification than the one provided by the parties, and then they shall apply the applicable legal provisions, irrespective of the legal texts indicated by the parties.

Therefore, if a respondent has erroneously grounded his/her claim on civil delictual liability, the decision may not be pronounced on contractual grounds; if declaring the voidness of a handwritten will for not being written, signed and dated by the testator himself/herself is requested, the court would not be able to annul the will for the incapacity of the testator to dispose of his/her assets.

The practical situations presented refer to cases when a respondent has not modified the grounds during the first hearing or even after that term, with the express consent of all the parties involved.

Judges shall not in any case have the possibility to change ex officio the cause of an application and considering that such a modification would be exclusively in the benefit of the applicant, which would of course affect the respondent's right to a fair trial.

The exceptions to the right of the parties to determine the procedural framework shall be expressly stipulated by law.

The forced introduction of other persons into a case, ex officio, is such an exception - Article 78-79 of the Civil procedure code.

There are exceptions from the principle of party disposition in material law as well. In the field of unforeseeability, Article 1271 of the Civil code leaves it to courts to order the adaptation of a contract even if the applicant has only requested its termination, without formulating a count regarding the equitable distribution of risks between the contracting parties due to a

significant change in circumstances, changes that have been unpredictable and unassumed.

The possibility of judges to intervene, upon request or ex officio, for the modification of the penalty clause – in the sense of diminishing it when it is excessive or increasing it when it is derisory– is another exception (Luduşan, 2018).

The rule established by Article 1541 of the Civil code is that the court may not reduce the amount of the penalty clause established by the parties. There are two exceptions to this rule:

- a) The amount of the penalty clause may be modified – diminished by a judge if the main obligation was partially fulfilled and this fulfillment was profitable to the creditor;
- b) The court may reduce the penalties when they are manifestly excessive as compared to the prejudice that could have been foreseen at the time of concluding the contract.

It should be noticed that the new Civil code does not stipulate the mutability of the penalty clause, i.e. increasing it if there is an extremely low penalty clause as compared to the prejudice caused to the creditor. Article 1152 of the French Civil code grants to judges the right to increase the penalty clause if it is derisory. The abuse of rights, unjust enrichment could be mentioned as grounds for reducing the penalty clause.

We would also like to mention that the right to initiate or not to initiate a trial includes the right of the parties to exercise or not to exercise the means of appeal, as well as the right to initiate or not to initiate forced execution.

There are exceptions to the principle of party disposition from this point of view as well, such as for example the right of the prosecutor to exercise the means of appeal and to request the enforcement of enforceable titles determined pursuant to Article 92 para. 4 and 5 of the Civil procedure code.

Conclusion

We conclude by asserting that in our legal system no equilibrium has been found so far between the principle of the free will of the parties in determining the penalty clause and the possibility conferred by law to judges to intervene in conventions concluded between the parties and modify them.

Taking into consideration that each case is characterised by a multitude of particularities, we consider that the intervention of the lawmaker would be beneficial in order to trace some limits or to establish certain evaluation criteria.

We should mention that there are several legal norms that stipulate the possibility of reducing the amount of the penalty clause, such as: the draft European Contract Code elaborated by the Academie des Privatistes Europeens in 2001; the Benelux Convention – The Hague 1975 and the Council of Europe

Resolution on penalty clauses in civil law, adopted in 1976 by the Council of Europe; the UNIDROIT principles approved by the International Institute for the Unification of Private Law in April 2004; Article 9509 para. 2 of the Principles of European Contract Law.

As for the right of the parties to perform procedural acts of disposition, applicants may renounce to the trial or to the right claimed, they may recognise the applicant's claims, the party who has lost the lawsuit may acquiesce to the decision by which he/she has been obliged to perform a service to the other party.

This aspect of party disposition which concerns the right of the parties to perform procedural acts of disposition is limited by the fact that courts, based on their active role, shall verify the acts of disposition of the parties and they shall not be bound by them, continuing the proceedings if they appreciate that they aim the infringement of certain binding rules, defrauding the interests of the parties or third persons.

The right to appeal or not to appeal a decision by using the means of appeal, as a facet of the principle of party disposition, involves the possibility of the party that has lost a lawsuit to request the revision or withdrawal of the decision by exercising the legal means of appeal. Evidently, if a party has exercised a means of appeal, in the application of the principle of party disposition that party may also withdraw from the proceedings.

Also as an expression of the principle of party disposition, parties may criticise the entire decision in relation to the solution to all counts or they may limit themselves to certain aspects only.

This component of the principle of party disposition is also subject to certain limitations. Thus, under the conditions set in Article 92 para. 4, district attorneys may exercise the means of appeal against decisions provided for in para. 1 even if a civil lawsuit has not been initiated or when they have participated in the proceedings, according to law.

As for the enforcement of enforceable titles, if a debtor does not willingly fulfill an obligation, creditors have the right to request the enforcement of a decision, but equally, as an expression of the principle of party disposition, creditors may renounce to the enforcement of this decision.

Other situations which are expressions of the principle of party disposition are for example: the parties may approve that the judge play the role of the translator when a person to be heard does not speak Romanian - Article 225 para. 1 of the Civil procedure code; applicants may file applications against judges performing their activity at the courts competent to trial their cases, at those particular courts - Article 127 para. 2 of the Civil procedure code.

There are also instances in which applicants may not invoke party disposition: the obsolence of an application may not be invoked for the first

time in a court of appeal - Article 420 para. 1 of the Civil procedure code; they may not accept judicial testimonies that have been made to produce effects even if this would lead to losing a right they may not dispose of - Article 349 para. 4 of the Civil procedure code.

At the same time, there are also limitations affecting respondents: they may not agree to applicants modifying their applications after the first hearing to which they have been legally cited - Article 204 para. 1 of the Civil procedure code.

At the opposite end, the right of courts to correctly clarify an application or an appeal which has been named incorrectly is not considered a derogation from the principle of party disposition. We shall also add that, based on their active role, judges establish or re-establish the legal qualification of acts and facts submitted for trial, even if the parties have named them differently, and they shall call into question the correct legal qualification.

Qualification is providing the right name to an application correctly grounded on a de facto situation even if the legal texts indicated are not correct. As opposed to qualification, the modification of an application means a re-grounding of something that has been initially incorrectly established, which may only be done by the party.

In conclusion, the principle of party disposition is an extremely important principle in civil procedural law, yet it is not an absolute one.

It is functionally interdependent with other principles and together they provide the legal framework for solving legal relationships under dispute.

Bibliography:

1. Boroî G., Stanciu M., (2015), *Drept procesual civil*, Bucureşti: Hamangiu.
2. Dobre A-F., Dreptul nr. 4/2018. *Admisibilitatea formulării unei cereri de intervenție accesorie în litigiile având ca obiect suspendarea unui act administrativ individual*, p. 98.
3. F. Ludușan F., Dreptul nr. 2/2018, *Aspecte teoretice și jurisprudențiale referitoare la reductibilitatea clauzei penale în Codul Civil*, p. 51.
4. Năsui G., (2017), *Drept procesual civil. Partea generală*, București: Universul Juridic.
5. Roș N., (2017), *Dreptul muncii: curs universitar*, București: Pro Universitaria.
6. Tăbărcă M., (2013), *Drept procesual civil. Vol. I – Teoria generală*, București: Universul Juridic.