Jurnalul de Studii Juridice
ISSN: 1841-6195 | e-ISSN: 2067-8509
Covered in: CEEOL, CrossRef, CrossCheck, ICI Master Journal List - Index Copernicus, Ideas RePeC, EconPapers, Socionet, HeinOnline, EBSCO.

2022, Volume 17, Issue 3-4, pages: 36-47 | https://doi.org/10.18662/jls/17.3-4/109

About Limits in Exercising the Active Role of the Judge* in Romanian Procedural Law

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Abstract: *The active role of the judge, a fundamental principle of procedural law, is applied as varied as the personalities of the judges who administer justice are different.*
In relatively simple lawsuits, with a well-defined object and placed in a single demand end, the active role is limited to following a natural, predictable path. However, there are also situations in which the lawsuits have a complex object, with several claims, an object that does not, in fact, resolve the dispute, but will probably lead to another lawsuit.
The tendency to emphasize formalism raises the issue of the ever-increasing limitation of the judge's role.
In this paper I propose to outline some of these boundaries and possible situations in which the judge, exercising his active role by possibly expanding the procedural framework, resolves the dispute and prevents a new trial.

Keywords: *litigation, judge, active role, limits.*

How to cite: Lupu, M. (2022). About limits in exercising the active role of the judge in Romanian procedural law. *Jurnalul de Studii Juridice, 17*(3-4), 36-47. https://doi.org/10.18662/jls/17.3-4/109

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The active role of the judge is institutionalized in art. 22 of the Civil Procedure Code of 2010 (Parliament of Romania, 2015), in a much more developed regulation than in the previous code (Parliament of Romania, 1993). Moreover, the geography of coding has been radically changed. If the previous regulation (1865), with all subsequent amendments, until the entry into force of the new code, established that the principles were only deduced by way of interpretation and inserted throughout the law, the new code clearly defined it from the beginning[1].

In both regulations, the principle of the active role of the judge is closely related to the principle of finding the truth, in an objective sense, meaning the similarity between reality and the factual situation considered for the settlement of the dispute. The active role of the judge in finding out the truth is all the more relevant as the parties involved in the process often have interest in presenting their own version. Romanian law does not drastically sanction the evasion of the truth by litigating parties, but only by witnesses or experts (Parliament of Romania, 2009)[2].

The old regulation established, first of all, a general obligation of judges to *insist, by all legal means, to prevent any mistake regarding the discovery of the truth in the case, based on the establishment of the facts and by the correct application of the law, in order to pronounce a sound and legal decisions.*

The legal duty has generated a dilemma among the servants of justice: should not the purpose of the activity of justice be to find out the truth and settle the dispute, and the legal and sound decision only the means? However, a discussion regarding the purpose of the civil lawsuit is not the subject of this research.

Along with the general obligation, a special prerogative is established in the matter of evidence administration. When the judge is not clear about the lawsuit, he can order the completion of evidence or even the administration of new evidence, even if the parties object.[3] The most likely to be administered is the test with specialized technical expertise. If the party, usually the plaintiff, does not agree with the administration of the evidence and, implicitly, with the payment of the expenses related to the administration of the evidence, quite high in some cases, the judge had two

[1] Preliminary Title, Chapter II: Fundamental principles of the civil lawsuit.

[2] Perjury crime, regulated by art. 273 Penal Code – Legea nr. 286/2009, Publicat în M. Of. al României, Partea I, nr. 510 din 24.07.2009 [Law no. 286/2009, Published in Official Gazette of Romania, Part I, no. 510 from 24.07.2009].

[3] *If the proposed evidence is not sufficient to fully clarify the process, the court will order that the parties complete the evidence. Also, the judge can, ex officio, discuss with the parties the necessity of administering other evidence, which he can order even if the parties object.*

options at hand: pronounce the decision based on the other evidence or administer the evidence, the payment of expenses in advance by the state and then the obligation to pay the court expenses of the party who lost the claims. The second option was obviously desirable.

The constitutional court, setting an unconstitutionality injoction (Constitutional Court of Romania, 2021), considered that an inadmissible evidence, provided as such by a legal norm, cannot be approved by the court, however, considering the provisions of art. 22 para. (2) from the Code of Civil Procedure which enshrines the active role of the judge in probation, as well as the fact that the criticized legal norm establishes a relative prohibition, which, according to art. 315 para. (2) of the Code of Civil Procedure, can be removed by agreement of the parties, the judge cannot *ex officio* reject the request for evidence, but only if the interested party opposes it.

However, the legal provision does not excessively limit the intervention of the judge in the lawsuit. In addition to the administration of evidence, he also had the possibility to requalify the legal basis (*causa debendi*), referring to the factual situation invoked in the summons request.

The current regulation expressly enshrines the role of the judge in the civil lawsuit, defining him as a participant (Constitutional Court of Romania, 2021, Title II, Chapter I).

Then, in addition to the express establishment of the principle of the active role of the judge, it widens the scope of the prerogatives to intervene in the lawsuit, in a comprehensive regulation that signifies, in our opinion, a true synthesis of the requirements of the administration of justice.

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Thus, the judge is no longer bound by *the legal framework given by the parties, being obliged to resolve the dispute according to the legal rules applicable to him.* The provision exempts him from stopping at the *screen of the law* (Muraru et al., 2002, pp. 78-79). By using the methods of legal interpretation[4], he can choose one or more norms that serve to find the truth and resolve the dispute.

[4] The mention should be made because, many times, jurists limit themselves to the logical-grammatical method, ignoring other important methods in identifying the most suitable norm applicable to the resolution of a dispute, such as the systemic method or the teleological method..

Finding the truth, in addition to its own obligation, is complemented by the elimination/prevention of any potential error. The norm details the obligation, through a series of rights conferred on the judge: to ask the parties to present explanations, orally or in writing; to put into their debate any factual or legal circumstances, even if they are not mentioned in the petition or in the response; to order the administration of the evidence it deems necessary, as well as other measures provided for by law, even if the parties object. The list is not exhaustive.

In the context, it is worth noting an emphasis on the formalism of the civil lawsuit, which results from the whole code, with much better established stages and with the limitation of the duration of each stage. The judge is given increased power in the stage of regularization of the summons request, having the possibility to cancel it in the situation where the party that is considered to cover the deficiencies does not comply (Constitutional Court of Romania, 2021, Art 200).

The goal is maintained, although, from our point of view, it should have been slightly nuanced. The substantive and legal judgment considers two distinct major situations: when the merits of the dispute are settled and can be executed, or when the merits are not investigated, but the action is rejected following the admission of an exception. In the latter case, it is no longer possible to find out the truth, because the conditions for the pronouncement of a judgment that resolves the merits are not met.

When he deems it necessary, the judge can introduce new parties to the process, even if the original parties do not agree. In addition, compared to the previous regulation, *ex officio* forced intervention of other parties is introduced (Constitutional Court of Romania, 2021, Art. 78), which also exists in the administrative litigation law (Parliament of Romania, 2004, Art. 16^1). Based on the principle of availability, the applicant may not agree to the forced introduction of other persons into the lawsuit, at the risk of rejection of the application.

Jurisprudence (Court of Appeal of Iasi, 2020) has been established that when the party does not agree the forced introduction of other persons, the action must be dismissed for lack of passive procedural quality. The court, in a request aimed at canceling an ordinance issued by the Minister of Internal Affairs, considered that the Ministry of Internal Affairs should also be included in the case. The passive procedural quality presupposes the existence of an identity between the person of the defendant and the obligee in the legal report deduced from the judgment. The plaintiff requested the annulment of an administrative act and understood to sue only the head of the issuing public institution. However, the act whose annulment is

requested was issued by the Ministry of Internal Affairs and signed by the head of the authority - the minister. The requirements of art. 16[1] of Law no. 554/2004 were respected under the conditions in which, for the first court term, the plaintiff was asked to indicate whether he is suing the Ministry of Internal Affairs. Although he should and could, the plaintiff did not expressly indicate the fact that he is suing the Ministry of Internal Affairs, expressly mentioning the fact that he is suing only the issuer of the act, the issuer who, according to his claims in the summons, is the Minister of Internal Affairs. The Court respected both the requirements of the previously mentioned text, but also of art. 22 C. proc. civil regarding the active role, but also the principle of availability, the procedural framework established by the plaintiff cannot be modified, but such a necessity can only be questioned. Also, in the absence of an express specification of the individualization of a certain defendant, the court does not have the possibility to choose an entity not named by the plaintiff, in order to resolve the dispute on the merits, and not by way of the exception of the lack of passive procedural quality. The Minister is not a central public authority, but only ensures the management and representation of the authority of the central public administration (ministry) - The Minister exercises the management of the ministry and represents it in relations with other public authorities, with legal and natural persons from the country and abroad, as well as in court (art. 55 of the Administrative Code). The minister is a dignitary (a person who exercises functions of public dignity on the basis of a mandate, according to the Constitution, this code and other normative acts), and not a public authority.

According to the same principle of the active role, *the judge gives or restores the legal qualification of the acts and facts brought to the judgment, even if the parties have given them a different name. In this case, the judge is obliged to discuss the exact legal qualification of the parties. However, the judge cannot change the name or the legal basis if the parties, by virtue of an express agreement regarding the rights they can dispose of, according to the law, have established the legal qualification and legal grounds on which they have agreed to limit the debates, if doing so does not infringe the rights or legitimate interests of others.*

Even if the judge cannot change the legal basis, relying on the methods of interpretation and the normative system, to find out the truth and resolve the dispute, he has the possibility to invoke other legal provisions to justify a solution.

Paragraph 6 of art. 22, provides that *the judge must rule on everything that was requested, without exceeding the limits of the investment, except in cases where the law would order otherwise.*

In practice, a clear distinction is made between principle and exception.

It was held, in an oblique action (Court of Appeal of Timisoara, 2016), that the effect of admitting the action in claims that the creditor promotes in place of his debtor is the reunification of the debtor's patrimony with the amount of money that he has to recover from his own debtor and not that of satisfying the debt the plaintiff creditor, not being able to ask through the indirect action that the amount of money that his debtor should receive be paid directly to him. Through the civil action, the plaintiff requested the obligation of the defendant association to pay a sum of money. He also requested that the direct debtors be also cited in the case, so that the pronounced decision would be enforceable against them. In the motivation, he stated that he has the capacity of creditor of the direct debtors. The action was rejected on the merits, with the reasoning that by formulating this indirect action, the plaintiff expressly indicated the provisions governing this type of action (art. 1560, 1561 Civil Code), detailed the admissibility conditions of the action and proceeded to describe the legal mechanism under the aspect of the effects of admitting the present action, but this mechanism has a different purpose than the one requested by the plaintiff. The plaintiff requested that, following the admission of the action, the defendant association be obliged to pay her a sum of money, although there were no legal relations between these parties to justify such a claim. However, according to art. 1561 Civil Code, the court decision admitting the oblique action benefits all creditors, without any preference in favor of the creditor who exercised the action, the effect of the admission of this action being the protection of the debtor's patrimony, a circumstance that benefits all creditors based on their right of general lien, so that the plaintiff should have requested that its direct debtors be obliged to pay the amounts in question to the defendant association, and not to itself. The court also held that the plaintiff cannot claim that the court ex officio changes the object of the action (the claim brought to the judgment being clearly expressed in terms of the obligation to pay the plaintiff) or to violate the provisions of art. 22 para. (6) C. proc. civ., pronouncing a partial admission solution, as long as this situation refers to the situation where only part of the claims brought to the judgment are founded, and in this case the plaintiff's claim is unique (payment of a sum of money). The decision was upheld on appeal.

The exception is when the judge must rule on matters other than those that form the subject of the judgment, even if the parties do not express their agreement in this regard. This is the case of the exercise of parental authority over minor children in an lawsuit for dissolution of marriage.

Although the Civil Procedure Code stipulates that the court rules on the exercise of parental authority upon request (Leş, 2022, Art. 919 para. (1) lit. a), the Civil Code (Leş, 2022, Art. 396 para. 1) imposes on it the obligation to rule, even if it was not requested by the parties: the guardianship court decides, once the divorce is pronounced, on the relations between the parents divorcees and their minor children, taking into account the best interests of the children, the conclusions of the psychosocial investigation report, as well as, if necessary, the consent of the parents, whom they listen to.

Finding the truth and settling the dispute return as the purpose of the civil lawsuit in paragraph 7 of art. 22 of the Code of Civil Procedure: *whenever the law reserves the judge's discretion or requires him to take into account all the circumstances of the case, the judge will take into account, among others, the general principles of law, the requirements of equity and the good- faith.*

Practice demonstrates, in the application of this legal provision, that the judge has a great power of appreciation in relation to the three legal criteria: general principles of law, equity and good faith.

A debate at the National Institute of Magistracy (2019) had as its object the possibility of the court to invoke, *ex officio*, the exception of lateness and to order the forfeiture of the defendant from the right to invoke the exception of the extinguishing prescription of the material right to action, a substantive procedural exception invoked with non-compliance with the deadline legally, the opinion being affirmative.

In advance, it was established that the legal text provides two limits for invoking the prescription injonction, but without indicating the situation in which each limit is applicable, the choice being thus left to the discretion of the defendant (Burţea-Cioroianu & Nicole, 2012). The only limit imposed by law is the first court term to which the parties are legally summoned.

What is of interest in the context of the problem under analysis is not the legal regime of the statute of limitations, but that of the defendant's forfeiture of the right to invoke it, procedural exception, which falls under art. 185, art. 186, art. 245 -248 of the Code of Civil Procedure and not one of substantive law whose legal regime is established by art. 2545 and the following of the Civil Code, since its effects extend to one of the ways in which the defendant exercises the civil action. In other words, although contained in the Civil Code, the text of art. 2513 Civil Code constitutes a rule of procedure and not one of substantive law (Boroi & Stancu, 2020).

In order to determine the legal regime of the lateness exception, which once admitted would result in the defendant losing the right to invoke the prescription exception, it is necessary to establish the legal nature of the rule contained in art. 2513 Civil Code. It was considered that the exception

of lateness is an absolute one, art. 2513 Civil Code, text establishing the term for invoking the prescription exception, containing a provision of public order. The reason for the temporal limitation of the right to invoke the limitation exception is to ensure the court the possibility to know from the beginning the limits of its vesting, namely whether it will judge the case on the merits or in consideration of an irregularity regarding the exercise of the right to action, thus avoiding the risk of capitalization in bad faith of the defendant's procedural rights and compromising the entire judicial activity carried out (invoking the limitation exception at the last court term or even in appeals). Even if it cannot be denied that the norm in question also protects the private interest, the public interest prevails.

According to art. 2513 of the Civil Code, the prescription can be opposed only in the first instance, by counterclaim or, in the absence of a summons, at the latest at the first term of court at which the parties are legally summoned.

Art. 84 of the old Code of Civil Procedure only establishes the right and, at the same time, the obligation of the court to give a correct qualification to the request, regardless of the name chosen by the one who formulated it, but does not give it the possibility to change the circumstances in fact and in law on which the plaintiff bases his claim. The *iura novit curia* rule is not likely to lead to the conclusion that the judge could ex officio change the cause of the summons, because by this rule it is understood that the judge is not bound by the legal text invoked by the party, but he must apply that legal text that corresponds to the legally qualified factual situation. As a conclusion, the judge establishes the factual situation of the case, without being able to give another legal qualification, and then he will apply the law corresponding to this situation, regardless of the possible legal provisions invoked by the parties.

By virtue of the active role, the judge has the duty to explain to the plaintiff the consequence of not fulfilling an obligation, as ruled by the European Court of Human Rights (2009), which, observing the very important stake of the action brought by the plaintiff, which had as its object the right to visit his son, recalled that the judge seised with such a request has the obligation, according to the consistent jurisprudence of the Court, to always defend the best interests of the child (see, among others, Sylvester v. Austria, nos. 36.812/97 and 40.104/98, § 59, April 24, 2003, and Monory v. Romania and Hungary, no. 71,099/01, § 83, April 5, 2005). Or, without denying that it is primarily the duty of domestic courts to analyze the facts, interpret and apply domestic law and thus establish the limits of the active role that Romanian law entrusts to the national judge [(Brualla Gomez de la

Torre v. Spain, December 19, 1997, § 31, Collection of Judgments and Decisions 1997-VIII, and Garcia Ruiz v. Spain (MC), No. 30,544/96, § 28, ECHR 1999-I)], the Court established that, in this case, the Government could not prove that the tribunal or the court of appeal had explained to the claimant the consequences of non-payment of stamp duty or that he could have requested to be exempted from paying them, given that such a request, however uncertain it might have been its resolution on that date, was for the plaintiff the only means to see his appeals judged on merits.

Excessive formality can greatly prolong the duration of the lawsuit and generate significant court costs for the parties involved. The judge can, by limiting the application of the law more to its letter and invoking the fundamental principles of the law, shorten the duration of the proceedings.

As a principle, the summons request can be modified until the first court hearing. But what happens when, from the administration of the evidence, a different situation results from the one the plaintiff had in mind when he promoted the action?

An example is an action for the establishment of the boundary line in which, from the administration of the expert evidence, it follows that parts of the plaintiff's land are also occupied by both the defendants in the file and other neighbors, in which case the plaintiff will have to, for a settlement of the dispute, to amend his summons.

According to art. 204 of the Code of Civil Procedure, *the plaintiff can amend his request and propose new evidence, under penalty of forfeiture, only up to the first term to which he is legally cited. In this case, the court orders the postponement of the case and the communication of the amended request to the defendant, in order to formulate the response, which, under the penalty of forfeiture, will be submitted at least 10 days before the set deadline, to be investigated by the plaintiff in the case file.*

(2) However, no deadline will be given, but the verbal statements made in court will be included in the conclusion of the session when:

1. correct the material errors in the content of the request;

2. the claimant increases or decreases the amount of the object of the request;

3. the counter value of the object of the request, lost or destroyed during the process, is requested;

4. a request for confirmation is replaced by a request for realization of the right or vice versa, when the request for confirmation is admissible.

Theoretically, the modification of the action can only be done with the consent of the defendants. Typically, defendants tend to prolong the trial, so they won't settle. In this case, the Judge has several possibilities: reject the application as late or admit the modification of the action, using a reasoning that involves the methods of teleological and systemic interpretation.

In the first case, obviously, a new file will be generated because the action to establish the boundary line cannot be resolved until after the resolution of the action to claim the occupied parts of land. A new file means extending the duration of the trial. In addition, in order to extinguish the contentious report, it would be advisable for the two requests to be settled together. In order for the two requests to be resolved together, the plaintiff has at his disposal the invocation of the connection exception, regulated in art. 139 of the Code of Civil Procedure, according to which *(1) In order to ensure a good judgment, in the first instance it is possible to join several processes in which the same parties or even together with other parties and whose object and cause are closely related . (2) The exception of contiguity can be invoked by the parties or ex officio at the latest at the first court term before the subsequently referred court, which, by conclusion, will rule on the exception. The termination can only be challenged on the merits. (3) The file will be sent to the first court, unless the plaintiff and the defendant request that it be sent to one of the other courts. If the courts are of different degrees, the files will be connected to the higher court in the degree. (4) When one of the requests is under the exclusive jurisdiction of a court, the connection is made to that court. The provisions of art. 99 para. (2) are applicable. (5) In any state of the judgment, the related processes can be disjointed and judged separately, if only one of them is in a state of judgment.*

Admitting the change of action would be much more appropriate. The judge has the following arguments at his disposal: the forced intervention of other people in the process, mentioned above, which can be done at any time; the advanced stage of probation administration; the need to pronounce a decision by which the dispute can be solved unitarily and to prevent any other new disputes; the interpretation of the change in the sense of paragraph (2) point 3, as an increase of the object, even if the two objects are apparently different, considering the close connection between them.

As a conclusion, by exercising the active role, the judge must aim not so much at complying with the law in its letter, but at achieving the goals of the civil process, namely finding out the truth and settling the dispute. The two desiderates will make the decision legal and sound, that is, they will lead to the achievement of the purpose of the process, as formally defined.

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