Future Academy®
Offering excellence in Social and Behavioural Sciences

The European Proceedings of
Social & Behavioural Sciences
EpSBS

eISSN: 2357-1330

WLC 2016 : World LUMEN Congress. Logos Universality Mentality Education Novelty 2016 | LUMEN 15th Anniversary Edition

About Recourse within Recourse: Opinions, Solutions, Jurisprudence

Angelica Roșu[a]*

* Corresponding author: Angelica Roșu, rosuangelica@univ-danubius.ro

[a]*Danubius" University, Galați, Romania, rosuangelica@univ-danubius.ro*

Abstract

http://dx.doi.org/10.15405/epsbs.2016.09.103

The law issue under discussion aims the admissibility of appeal against the judgment ordering the suspension of trial proceedings, judgment pronounced by a court of appeal (i.e. an appeal court), when the (final) judgment to be delivered by this court, it is excluded from the judicial remedy of appeal. This approach focused on logical analysis was necessary because the old rules of Civil Procedure Code excluded from this judicial remedy the judgments pronounced by the courts of appeal (art. 244^1 Civil Procedure Code, 1865).
The new Civil Procedure Code no longer provides this exception. According to art. 414 par. (1) of Civil Procedure Code, the decision is final only in situations where the suspension was decided by the High Court of Cassation and Justice.
The issue of admissibility of the appeal has been decided differently by the doctrine, and the jurisprudence reflected the different doctrinal opinions.
Given that the course of proceedings has been stopped, we believe that the access to a judicial remedy is an issue that concerns the right of access to a court, right as established by art. 6 of the European Convention on Human Rights. The aforementioned legal text generates different solutions since the requirement of predictability and clarity established by the Convention is not satisfied.

Keywords: Admissibility of the appeal; suspension of trial; divergent doctrinal; jurisprudential opinions.

1. Introduction

This endeavour was justified by the doctrine discrepancies, reflected also in the recent judicial practice regarding the admissibility of recourse declared against Court resolution, by which it was decided to suspend the judgement of the case, resolution given by an appellate review court, therefore strictly referring to the situation when the final decision which will be given by the Court which decides to suspend the judgement of the case is a final decision.

The analysis deals with the regulating from the new Civil Procedure Code and the practice circumscribed at art. 414 Civil Procedure Code, this text providing the possibility to challenge by recourse, separately, at the hierarchically higher Court, the resolution given by the Court on the suspension of judging the trial.

2. Interpreting art. 414 Civil Procedure Code in the literature

According to art. 414 Civil Procedure Code, *the Court will decide by resolution on the suspension of judging the trial, which can be challenged by recourse, separately, at the hierarchically higher Court. When the suspension was decided by the High Court of Cassation and Justice, the decision is final.*

The recourse can be declared as long as the suspension of the trial judgement lasts, not only against the resolution by which the suspension was decided, but also against the resolution by which it was decided to reject the request to reinstate the trial.

When interpreting and applying this law text, it was retained in the literature (Boroi, 2015, pp. 505-506), on one hand, that the recourse declared against a resolution for suspending the judgement given by a Review Court is not admissible, by invoking the principle *accesorium sequitur principale.*

According to this doctrine opinion, „in what concerns the regime of the stages of recourse at which the preceding resolutions are subjected to, the principle *accesorium sequitur principale* presupposes a third aspect also, namely the preceding resolution can be subject to judicial review through the reforming stages of recourse, only in so far as the law provides a stage of recourse for the decision on the main issue. But, from this rule which is implied by the principle *accesorium sequitur principale* in the area of stages of recourse against the preceding resolutions, art. 411 para. (1) Civil Procedure Code does not institute a derogation, and since the norm mentioned is a special norm and it is thus of strict interpretation and application, such a derogation cannot be deduced by way of interpretation. It results thus that the resolution through which the judgement was suspended is subject to recourse only if the decision on the main issue would be, in its turn, subject to appeal or recourse. Accordingly, the resolution by which it is decided to suspend the judgement by the review Court is final."

On the other hand, other authors (Deleanu, 2014) spoke about recourse admissibility, showing that the text of law institutes a genuine recourse to recourse.

http://dx.doi.org/10.15405/epsbs.2016.09.103
eISSN: 2357-1330 / Corresponding Author: Angelica Roşu
Selection and peer-review under responsibility of the Organizing Committee of the conference

3. Analysis of the former Civil Procedure Code' provisions

In the context presented it is necessary to start from the analysis of the arguments which justified the contrary opinion and mandatorily, from the analysis of these arguments, as they were given by the provisions of the former Civil Procedure Code.

By reporting to the regulating from the former Civil Procedure Code, we indeed observe that the text about the recourse against the Court resolution of suspending the judgement of the case and which generated contradictory debates, had the following content:

According to art. 244^1 Civil Procedure Code from 1865 (text which was introduced by art. 1 point 77 from Emergency Ordinance no. 138/2000), *on the suspension of judging the trial, the Court, in all cases, will give a resolution which can be challenged by recourse separately. The recourse can be declared as long as the suspension of the trial being judged lasts, both against the decision by which the suspension was decided, as well as against the resolution through which the request to put the case again on trial was rejected*.

Under this text, it was shaped the doctrine opinion according to which the resolutions by which the course of judgement was either interrupted or suspended can be challenged separately by recourse, but with the condition that the decision which will be given in the respective case to be susceptible of recourse, opinion truly assimilated by the subsequent judicial practice.

The argument of the Supreme Court was that, since the request to suspend the judgement is accessory to the recourse request, also the decision to suspend the judgement of recourse cannot be the object of control on the stage of recourse.

We notice, with preliminary title, that the same argument is the one which justifies the doctrine opinion showing the inadmissible character of the recourse.

However, we mention that art. 244^1 Civil Procedure Code from 1865, as it was introduced through art. 1 point 77 from Government Emergency Ordinance no. 138/2000, was differently interpreted, existing doctrine opinions in the sense of the admissibility of recourse (Deleanu, 2007, p. 97).

In this context, of contradictory debates, the legislator has intervened, which, by Law no. 219/2005 has expressly shown that the Court resolutions given in recourse are excepted from the stages of recourse.

Accordingly, art. 244^1 Civil Procedure Code was modified by art. I, point 34 from Law no. 219/2005, after being changed, this law text having the following content: *On suspending the judgement of the trial, the Court will give a resolution which can be challenged by recourse separately,* ***except for those given in the recourse.***

The recourse can be declared as long as the suspension of the judgement of the trial lasts, against the Court resolution through which the suspension was decided, as well as against the Court resolution through which it was rejected the request to put it on trial again.

Thus, there was a period when art. 244^1 Civil Procedure Code from 1865 was submitted to interpretation by analogy, the reference being made to the principle *accesorium sequitur principale*, interpretation by analogy which was done up to the moment the legislator has expressly excepted these decisions from the possibility to challenge them in recourse.

4. Regarding the actual Civil Procedure Code, is it possible its interpretation by analogy?

We consider that the first question to be answered is the one if, at this moment, against the legislator's option, the interpretation by analogy is justified or it is mandatory to perform the interpretation according to the teleological method.

In order to answer to this question, we must start from the analysis of the actual content of the law text and we observe that it was modified substantially. The following question comes naturally: Why has the legislator chosen such a content of the law text, if he wanted to limit hereinafter the access of the litigant in this stage of recourse, when it was simpler to keep the previous restrictions?

The answer cannot be but that obviously, the restrictions (which must be of strict interpretation) were eliminated, not being able to state at the same time that the legislator, by eliminating the restrictions, had in view to keep them (based on the principle *accesorium sequitur principale)*.

Indeed, regarding the application of analogy, in the doctrine (Chis & Zidaru, 2015, p. 268) it was shown that "sometimes, it is difficult to say if the legislator *omitted to observe similar situations* and to regulate them identically under the aspect of some exception decisions or *it did not want to apply the exception decisions to situations quite similar*."

In this case, it cannot be for certain about an omission of the legislator, but about the clear intention to give a new content to the text of law, which is not distinguished but in what concerns the suspension given by the High Court of Cassation and Justice.

More so, in agreement to those retained in the doctrine, we appreciate that the judge cannot apply the analogy when it is about limiting a right.

Accordingly, art. 634, point 5, Civil Procedure Code, shows that *there are final decisions the decisions given in recourse, even if through them it was solved the main issue,* this regulation representing the general norm.

In what concerns the decision of suspension (the resolution), it benefits from a distinct regulation, being about a procedural incident which obstructs the access to justice, even temporarily.

However, having in view that besides the suspension cases provided by art. 413 para (1) point 1 and 2 Civil Procedure Code, the Court of justice can decide to suspend the judgement of the case in other cases provided by law also (art. 413 point 3 Civil Procedure Code), it can be stated that sometimes, the access to justice is not temporarily, but definitely blocked.

We can thus notice that, in case the review court puts in view to the appellant to fulfil certain obligations, deciding to suspend the judgement of the recourse, not fulfilling the obligations imposed by the court making impossible to resume the judgement, the party being exposed to the superannuation sanction, being known the fact that, according to art. 418 para (1) Civil Procedure Code, the course of superannuation is not suspended in other cases established by the law, if the suspension is caused by the lack of insistence of the parties in the trial.

Not fulfilling the obligations imposed by the Court can be assessed as proving a lack of insistence of the parties under trial, this attitude supposing by itself the existence of a fault.

It results that, going on the hypothesis of the impossibility to declare the recourse against the decision of suspending the judgement of the recourse, illegally and groundlessly instituting some obligations in appellant's responsibility or even instituting some obligations impossible to be executed,

http://dx.doi.org/10.15405/epsbs.2016.09.103
eISSN: 2357-1330 / Corresponding Author: Angelica Roşu
Selection and peer-review under responsibility of the Organizing Committee of the conference

can lead to the definite obstructing of the access to Court, having in view that art. 416 para (1) Civil Procedure Code shows that: *any petition form, contestation, appeal, recourse, review and any other request to reform or to retract is obsolete by law, even against those incapable, if it remains unprocessed due to reasons imputable to the parties, for a period of 6 months.*

4.1. The admissibility of the recourse declared against a Court resolution of suspending the judgement of the case

In case we should report to the actual doctrine (Leş, 2013, p. 535; Tăbârcă, 2013, pp. 574, 575, 578, 582, 496; Deleanu, 2014), we find that it is majority, in the sense of the admissibility of the recourse declared against a Court resolution of suspending the judgement of the case, no matter this resolution was given by a Court of Appeal (the appeal being the only stage of recourse) or by a Review Court and that even the jurisprudence of the High Court of Cassation and Justice is in agreement with this last opinion.

However, the contrary point of view was also adopted in the practice of the highest court in the State.

5. Conclusions

In our opinion, we conclude that the issue of the admissibility of such a recourse cannot be put to doubt.

Starting from the content of the given text, we observe that the only decisions expressly excepted from the possibility to be controlled through this stage of recourse are those given by the High Court of Cassation and Justice, for the purposes of the decision of suspension, the text of law showing that this decision is final.

Accordingly, we observe that, within this text, it is established the possibility to challenge by recourse (*Court resolution, which can be challenged by recourse, separately)*, as well as the impossibility to challenge other Court resolutions, being instituted the final character of the Court resolution of suspension, when the suspension was decided by the High Court of Cassation and Justice.

This text was interpreted in practice to regulate only the possibility of separately challenging the Court resolution by which the course of the judgement was interrupted, without being able to retain that all Court resolutions through which the course of judgement was interrupted are subject to recourse, no matter the final/non-final character of the decision to be given in the case.

We appreciate that in such a case – where the divergent doctrine opinions have generated jurisprudential contradictory solutions even at the level of the highest degree Court – it is not in conformity with the exigencies of the provisions of art. 6 from CEDO which compels, on one hand, the legislator to adopt norms with predictable character, and on the other hand, compels the Supreme Court to unitarily interpret the same text of law.

Accordingly, in the case Beian against Romania, it was established that the uneven practice of the Supreme Court from our country is „*contrary to the principle of public safety (...) which constitutes one of the fundamental elements of the state of law...*".

We consider that in actual context, as it was highlighted, there has to be a legislative intervention.

At the same time, apprising the Constitutional Court with giving an interpretative decision would end the jurisprudential differences which, at this moment, put under question the compliance of the requirements imposed by art. 6 from CEDO, as well as of art. 47 from the Charter of Fundamental Rights of the European Union (Deleanu, 2013, p. 1059).

References

Boroi, G. (2015). Civil Procedure Law. Bucharest: Hamangiu Publishing House.

Chiș, A.A., Zidaru, G.L. (2015). The role of the Judge in the Civil trial. Bucharest: „Legal Universe" Publishing House.

Deleanu, I. (2007). Civil Procedure Treaty, vol. II, Second Edition. Bucharest: C. H. Beck Publishing House.

Deleanu, I. (2 013). Civil Procedure Treaty, vol. I. Bucharest: "Legal Universe" Publishing House.

Deleanu, I. (2014). The appeal during the judgement of an appeal and the recourse during the judgement of recourse, new regulations in the present Civil Procedure Code. Law magazine, 5(2014), 33-53.

Leș, I. (2013). The new Civil Procedure Code. Comments article wise, art. 1 – 1133. Bucharest: C. H. Beck Publishing House.

Tăbârcă, M. (2013). Civil Procedure Law, vol. II, according to the new Civil Procedure Code. Bucharest: "Legal Universe" Publishing House.