ANALYSIS OF ART. 396 PAR. (2) CIVIL PROCEDURE CODE, IN THE LIGHT OF THE ROMANIAN CONSTITUTIONAL COURT'S DECISION NO. 454/2018

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Abstract

The present article proposes a brief analysis of the provisions of art. 396 par. (2) of the Civil procedure code, more precisely to conclude whether or not in the future it could be necessary to change the way the courts communicate certain documents of interest to the parties of the trial, thus eradicating the phrase 'through the court's record office'. This provision is analyzed in the light of the Romanian Constitutional Court's Decision no. 454/2018, with a view on the reasonable exercise of possible remedies.

Keywords: *record office, communication, trial, remedies, civil procedure code, art. 396 par. (2)*

1. Introduction

Considering that, recently, the Decision of the Constitutional Court of Romania no. 454/2018 was published, we consider that a closer look is requested regarding the subject of the complaint, the motivations that have been considered and especially the solution reached by the Constitutional Court.

Consequently, this article proposes not only a critical analysis of the way in which the text of art. 396 par. (2) Civil Procedure Code was considered to have been constitutional, but rather we would like to draw attention to the fact that, in certain situations, this particular approach has the real potential to lead to the violation of the fundamental rights of the parties to a dispute. We are particularly concerned with the right to a fair trial, the right to defense, and the principle of publicity of court hearings.

Therefore, in the present article we will continue to discuss the reasoning why, in the future, it might be beneficial to consider modifying art. 396 par. (2) Civil Procedure Code.

2. Summary of Decision no. 454/2018, regarding the constitutionality of art. 396 par. (2) Civil Procedure Code.

By Decision no. 454/2018[1], pronounced by the Constitutional Court of Romania, there have been analyzed complaints regarding several legal provisions, both from the Civil Procedure Code and from other normative acts. In this article, we are expressly interested in the motivations regarding the way art. 396 par. (2) Civil Procedure Code has been interpreted.

The holder of the objection of unconstitutionality is the High Court of Cassation and Justice, through the United Sections, as it is an adopted and unissued law[2].

The reasoning for the objection of unconstitutionality is that "*by establishing that the ruling is made available to the parties through the court's record office, it does not allow the precise determination of the moment when the ruling has been given, creating uncertainties regarding this particular moment, considering that the law attributes to this moment of the ruling, in some cases, the function of the initial moment of beginning the timeframe limits for certain remedies. The legislator's option of introducing an alternative way of a ruling made available for the parties implies the adoption of a rule that has the capacity to determine precisely the moment when the ruling has been given and to offer the level of precision ensured by the delivery of the ruling in a public hearing. However, the reference to making the solution available to the parties through the court's record office is insufficient to allow accurate determination of the moment when the ruling has been given, with negative effects on the rights which can be exercised in relation to that precise moment, according to the law*".

The Constitutional Court motivated its rejection of the objection of unconstitutionality by means of some main arguments, which bring to light the vision that the Court had in view in this particular situation, namely:

In paragraph 27 of Decision no. 454/2018, the Court argues that "*making the solution available to the parties through the court's record office as a means of*

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[1] Referring to the objection of unconstitutionality of the provisions of art. I point 37 (referring to art. 402 of the Civil Procedure Code] and point 58 (with reference to art. 497 of the Civil Procedure Code], as well as Art. III point 3 [referring to art. XVIII par. (2) of Law no. 2/2013] and point 4 (with reference to art. XVIII1 of Law no. 2/2013] of the Law for amending and completing the Law no. 134/2010 regarding the Civil Procedure Code, as well as for amending and supplementing other normative acts, published in the Official Journal of Romania no. 836 of November 1st, 2018, as further amended and supplemented. The Decision is available on the website https://ccr.ro/, accessed on March 18th, 2019.

[2] At the time when the Court was notified, it was about a legislative proposal, which was initiated by 182 deputies and senators, registered at the Senate on April 18th, 2018. Subsequently, as the Court itself states, the certified form of the law was filed, which did not differ in any way from the original proposal As such, the Court considered that it has been legally notified.

achieving the alternative publicity of the ruling, as opposed to a public hearing was a major novelty, imposed for unquestionable practical reasons. By normalizing this particular possibility of pronouncing the ruling, it has been ensured that the solution was effectively acknowledged. However, the very doctrine of civil procedural law has been surprised by the limitation of the hypotheses in which this means of achieving the publicity of the judgment was exceptionally regulated only in the case of postponement of the pronouncement regulated by art. 396 par. (2) of the Code of Civil Procedure".

In paragraph 28 of the Decision no. 454/2018, the Court considers that, in fact, this innovation is an effective way to respect the principle of publicity, in line with the jurisprudence of the European Court of Human Rights.

Next, at paragraph 29, it is expressly stated that it is not possible to reach the conclusion of the breach of the public character of the ruling pronouncement, since any interested person has the possibility to obtain a copy of the solution.

Also, at paragraph 34, the Court stated that the justice system should be properly administered in a democratic society, making reference again to the human rights provided for in the ECHR.

In paragraph 40 we find another argument in support of the constitutionality of this way of communication with the parties to a litigation, namely that, in the Court's opinion, in the last 5 years since the entry into force of the Civil Procedure Code, it has been already applied by the courts.

Finally, it is concluded at paragraph 41 that "*in the event that the court postpone the ruling, the date of the ruling is the day for which the postponement was settled. At this date a record is made, which is made available to the parties through the court's record office*".

Therefore, the Constitutional Court considers that this way of "*communication*" is entirely constitutional and therefore does not violate the procedural rights of the parties, namely the principle of publicity of court hearings.

3. The necessary conditions for art. 396 par. (2) Civil Procedure Code to be applied accordingly.

The doctrine has already stated the view that the postponement of the ruling pronouncement established by art. 396 par. (2) Civil Procedure Code should not be made anyhow, a matter of which even the provisions of the new Civil Procedure Code are drawing the attention to.

Thus, the conditions that should be fulfilled at the moment when the postponement of the pronouncement is decided are: *"(i) 1 premise condition: the ruling of the decision to be postponed (therefore the solution provided by article 396 paragraph (2) can not be put into practice when the pronouncement of the luring was not postponed); and (ii) two sub-conditions, namely: (a) there was a justified case for postponing the ruling; and (b) the presiding judge has expressly indicated in the content of the ruling that the postponed hearing will be made available to the parties the court's record office*[3]".

We appreciate, however, that this mechanism of postponement of the ruling should not be embraced and used by the courts every single time. The reason is to avoid making rulings that are no longer in line with the complete information in the files, precisely because, as it is well known, the burden of files for each judge is higher than average.

Consequently, the freshest information on the files a judge has to rule can be found at the moment when the debates were closed. By postponing the ruling pronouncement, it is possible that errors appear that may prejudice the parties to the dispute. Obviously, in truly delicate and complex situations, it is desirable for the judge to carefully measure the solution he has to pronounce. Nevertheless, it has been noticed an unjustified increase in ruling postponements, although the legal situations in question did not present a particular difficulty.

4. The effects of art. 396 par. (2) Civil Procedure Code regarding voluntary intervention, before and after the amendments brought by Law no. 310/2018.

Considering the brief aspects previously outlined, which summarise the main arguments of the Romanian Constitutional Court, corroboration with a recent regulation, namely Law no. 310/2018[4], is required.

This normative act brings a variety of changes in the civil procedural matter, but for the present article, it would be beneficial to address the changes mentioned in Art. I point 3.

Consequently, we note that, unlike the previous regulation, art. 64 Civil Procedure Code was adapted to the stringent needs of society in terms of remedies against the rejection / admission of a court resolution.

Thus, please note that there is no longer a distinction between resolutions that can be attacked with the ruling itself. Previously, the law stated that the

[3] See in this respect Daniel Moreanu, extract from the article entitled "Şedinţa publică de pronunţare a hotărârii judecătoreşti în materie civilă. Analiză cu privire la natura juridică procesuală de şedinţă de judecată şi obligaţia legală de înregistrare prin mijloace tehnice audio sau video", which was published in "Dreptul" Magazine no. 4/2018, available online at the following website: https://www.juridice.ro/560481/este-sau-nu-sedinta-de-judecata-sedinta-publica-de-pronuntare-a-hotararii-judecatoresti-in-materie-civila-se-impune-a-fi-inregistrata-prin-mijloace-tehnice-audio-sau-video.html. The website was accessed on March 18th, 2019.

[4] for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and completing other normative acts, published in the Official Journal of Romania no. 1074 of December 18th, 2018.

admission of a resolution could be remedied only with the ruling. The court's resolution of rejecting the intervention as inadmissible was granted a different regime of remedy, meaning that it could be challenged only with appeal / second appeal[5] within 5 days. Here it becomes interesting because the previously regulated 5 days term was flowing differently depending on the presence or absence of the parties, as follows: 5 days from the ruling pronouncement for the present parties, respectively from the communication of the ruling for the missing parties.

The question is what would happen in the following situation: on the day of the trial, with all the parties present, the court closes the debates and is about to rule regarding the admissibility of a voluntary intervention. Since more time to deliberate on the ruling is required, the court decides to postpone the pronouncement. However, the judge decides that in this particular case, the solution should be made available to the parties through the court's record office. At the time of the postponement, none of the parties decides to appear, and the judge rules to reject the voluntary intervention as inadmissible.

Consequently, in this particular situation there are two contradictory regulations, both of them having the same legal power. Thus, in the interpretation of art. 396 par. (2) Civil Procedure Code, the Constitutional Court considered that "*the date of the ruling is the day for which the solution was postponed*", so we would be tempted to consider that the appeal in the above-mentioned situation should be filed within 5 days starting from the date on which the court postponed the pronouncement.

On the other hand, taking into account the provisions from art. 64 Civil Procedure Code, in the initial version, it is clearly specified that the parties, if they wish to appeal the conclusion of the resolution that rejected the intervention as inadmissible, have at their disposal the entire term of 5 days, but specifying two alternatives: from the pronouncement of the ruling for the present parties, respectively from the communication of the ruling for the missing parties.

Considering that none of the parties was present in this particular case, we appreciate, however, that a remedy brought within 5 days of the communication of the resolution should not be considered late. Nevertheless, the act of justice has rarely been applied in a unitary manner, which is why it was necessary to have specially created panels at the level of the High Court of Cassation and Justice to decide, for instance, preliminary rulings for the solving of law matters[6].

Considering that the Romanian society is part of the Roman-Germanic civilization, so not founded on the precedent judicial system, we can only appreciate the new modification of art. 64 Civil procedure code as being beneficial in the particular situation described above. This is because the previous regulation would have breached, in our opinion, the right to a fair trial, the right to defense, and it would have violated the principle of court hearings' publicity.

Thus, there were two regulations, both of which had the same legal force in the event they were simultaneously applied, meaning that they should have been somehow separated. It would have been possible to prioritize the initial regulation on the request for intervention and to consider that, being absent at the time of the pronouncement, the parties were granted a 5-day time limit from the communication of the ruling, in order to be able to challenge the resolution. However, it would have been possible, on the other hand, that the regulation of art. 396 par. (2) The Civil Procedure Code could have been applied first, since the parties were present at the time of the debates and the cpurt decided to postpone the pronouncement, and all the parties were thus informed.

Unfortunately, the situation described above is far from being unique. Thus, in all the cases where there is a certain legal remedy possible either from the ruling pronouncement or from the ruling communication, as the case may be, there is a real possibility that the parties may be prejudiced, despite the fact that the Constitutional Court specified "*the date of the pronouncement is the day for which the pronouncement was postponed*".

For instance, certains situations may be considered, without limiting the analysis to them, as follows:

1. Regarding the regime of straightening, clarifying and completing the court's decision, art. 444 par. (1) provides that "completing the decision [...] may be requested in the case of decisions given in extraordinary appeals [...] within 15 days of pronouncement. In the case of final decisions given on appeal or second appeal, their completion may be requested within 15 days starting from de decision's comunication[7]";
2. With regard to the appeal, art. 468 par. (4) states that "for a prosecutor, the time limit for appeal shall start from the date on which the decision was pronounced, unless the prosecutor participated in the hearing of the case, in this case the time-limit starting from the communication of the decision[8]". Thus, it can also be imagined a situation where law professionals could introduce a late appeal;
3. Also, the litigation regarding the delaying the dispute can not be overlooked. Thus, art. 524 par.

[5] In accordance with art. 64 par. (4) of the already old regulation of the Civil Procedure Code, the remedy that should have been followed by the party unhappy with the court's resolution regarding the rejection as inadmissible of the intervention was either the appeal or the second appeal, depending on the moment in front of which the enforced resolution was pronounced. Thus, if we speak of the first instance, the remedy was the appeal, and if we consider a superior hierarchical court, the party had to file a second appeal.

[6] Art. 519 – 521 Civil procedure code.

[7] Art. 444 par. (1) Civil procedure code.

[8] Art. 468 par. (4) Civil procedure code.

(6) point 1 states that this litigation can be made "when the law sets a deadline for the completion of a procedure, either by pronouncement or by motivating a decision, but this term has been fulfilled without result[9]";

4. The non-contentious judicial procedure is also affected, which is why we are drawing the attention to the content of art. 534 par. (3): "The term of appeal shall run from the pronouncement, for those present at the last hearing, and from the communication, for those who have been absent[10]";
5. Concerning the precautionary and provisional measures, especially the distraint upon property and the court receivership, art. 957 par. (1) and art. 975 par. (4), in conjunction with the postponement of the pronouncement, may create difficulties as well.
6. Regarding the property sale in the proceedings of the judicial division, we must also draw the attention to the provisions of art. 991 par. (4): "The Regulations provided for in this article may be challenged separately only with appeal, within 15 days starting from the pronouncement[11]".

As one can easily notice, these articles are just a few examples of legal provisions that have the potential to generate frustration and even create discriminatory situations when they will be applied in corroboration with the postponement of pronouncement.

Consequently, it is absolutely necessary to note that the major issue is the formula "*by making the solution available at the disposal of the parties through the court's record office*". Thus, we consider that it would be beneficial that the the Romanian legislator analize the situation, in order to determine whether this formula actually meets the needs of the society in the field of justice or creates useless difficulties when applied, that could be easily avoided.

5. Conclusions

The normative acts, therefore the legislation as a whole, must be predictable and be drafted in such a way that they can be considered clear. However, we consider that these two requirements are not fully or even partially achieved in terms of art. 396 par. (2) Civil Procedure Code. The article is not clear even for law professionals, not to mention for the parties of a litigation that don't have an attorney, since a decision by the Constitutional Court of Romania was needed to set and try to clarify a specific term.

However, the present article does not question in any way the applicability of the Romanian Constitutional Court' Decision no. 454/2018, since we are not able to begin such an approach. It is believed, nonetheless, that in the future, it can not be ruled out the idea of completing the article in question even with what the Constitutional Court explicitly mentioned in the decision. Thus, we appreciate that it would be welcome to fill in the clarification that the terms that flow from the pronouncement will be considered from the date when the dispute is postponed and the court actually pronounces the solution. In this way, there would be no confusion, as the article would be much clearer than in its present form.

S-ar putea sa se considere pe viitor ca nu este necesara o asemenea adaugire, motiv pentru care articolul ar urma sa fie scurtat in mod corespunzator.

Thn again, a modification of the article should not be totally excluded from the future analysis, in the sense of excluding the phrase referring to making the solution available to the parties through the court`s record office. In fact, this is the concept that has generated the most concerns and even an objection of unconstitutionality, which is why the regulation may need to be further analyzed by the Romanian legislator. Therefore, the legislatior may reach to the conclusion that such an addition is not necessary, which is why it is perfectly possible that the article be shortened accordingly.

References

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- Decision no. 454 of July 4th, 2018 of the Constitutional Court of Romania;
- Law no. 310/2018 for amending and completing the Law no. 134/2010 on the Civil Procedure Code, as well as for amending and completing other normative acts;
- Law no. 134/2010 on the Civil Procedure Code;
- https://ccr.ro/;
- https://www.juridice.ro/.

[9] Art. 524 par. (6) point 1 Civil procedure code.
[10] Art. 534 par. (3) Civil procedure code.
[11] Art. 991 par. (4) Civil procedure code.