

**CRITICAL CONSIDERATIONS ON DECISION NO. 7/2016  
OF THE HIGH COURT OF CASSATION AND JUSTICE,  
REGARDING THE INTERPRETATION AND APPLICATION  
OF ART. 127 PAR. 1 AND 3 CODE OF CIVIL PROCEDURE**

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**ABSTRACT:** *The article critically analyzes the solutions taken into consideration by the High Court of Cassation and Justice in the Decision no. 7/2016, which admitted the appeal on points of the law concerning the interpretation and application of art. 127 par. (1) and (3) Code of Civil Procedure and determined that the phrase "the court of operation" should be interpreted restrictively, in the sense that it refers to the situation where the judge actually operates in the court that is competent to adjudicate on the request of the proceedings at first instance.*

*In our opinion, the correct interpretation is the extensive one, which refers to judges of all procedural cycles of judgment, whatever the court is in which they operate, as long as they belong to the district court of appeal in whose jurisdiction the court belongs, which would have usually had the resolving power.*

*Also, the Supreme Court has established that art. 127 par. (1) and (3) Code of Civil Procedure is to be interpreted in terms of the concept of "registrar" in the sense that it is also applicable in the case of claimants belonging to the auxiliary personnel (registrar) in the prosecutors' offices courts.*

*On the contrary, we believe that the restrictive view is correct, which refers only to those registrars who actually operate in the court that settles the case.*

**KEYWORDS:** *optional jurisdiction; judge at first instance; registrar of courts at the prosecutors' offices*

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**PRELIMINARIES**

The optional competence is regulated by art. 127 Code of Civil Procedure, chapter III: *Special Provisions* in Title II *The Participants in the Civil Process*.

The legislator has taken into account two possibilities. The first one refers to a judge acting as plaintiff in an application for which the Court where he works, has due standing. In this case, he will have to seize one of the Courts of the same grade, placed under the jurisdiction of any Court of Appeal neighboring the one he is working for.

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*Per a contrario*, if the judge has a different position in the process, for instance an intervener, these provisions do not apply. Moreover, this will be the case even for a request of main intervention, whereby the holder seeks the same rights as the plaintiff, since the situations referred by the legislation are of strict interpretation and application, and thus, they can't be extended, through analogical interpretation, to other cases than the ones explicitly regulated. (Boroi, 2016).

It will suffice for the judge to have the above mentioned position – as a person working at the competent Court - by the time that Court is seized, any change taking place during the trial being completely irrelevant. We may have in mind any possible termination of the quality of judge (through retirement or resignation) or removal of the named judge from that Court (through secondment, delegation, transfer or disciplinary move). (Boroi, 2016).

But for his first instance application, the judge will have to seize another Court than the one he works at, act that will determine the legal extension of the territorial standing. His only available option will be the one to choose one Court of the same grade to his working place, but situated in the jurisdiction of a neighboring Court of Appeal.

This case of mandatory referral to another court, determined by the plaintiff's position as judge may be considered a means of legal resettlement, as expressly provided by art. 127 par. (1) C. civ. proc., determining the resolution of the case by another Court of the same grade. (Rosu, 2014).

The second possibility provided in the legislation is the one in which a judge is sued and the competent the Court to hear the case is the one he works at. In this situation, the plaintiff may seize any of the same grade Courts located in the jurisdiction of the neighboring Courts of Appeal.

In contrast to the first case where the judge acts as plaintiff, and thus he is obliged to seize another Court, now the complainant has the option between the Court where the named judge works and any other competent tribunal.

The legislator provided the existence of optional jurisdiction, allowing the plaintiff to make use or not of these derogatory provisions in order to ensure impartiality and avoid any subsequent requests of transfer. It is because the special standing of the defendant – that of being a judge – that suspicions may be raised with respect to the impartiality of the judgment. (Rosu, 2014).

The optional jurisdiction is derogatory from the normal law, and this is why such a procedural norm is listed in the chapter related to "Special Provisions" on competence. As it follows, the text is incident regardless of the object of dispute, since the law makes no distinction in this respect. (Les, 2015).

The provisions related to a judge's standing as plaintiff or defendant in a trial apply correspondingly, to prosecutors, judicial assistants and to registrars.

Others equal, one prosecutor's role in civil proceedings is regulated by art. 92 C. civ. proc. and envisaged mainly for protecting the legit rights and interests of children, of interdicted persons or of disappeared ones. Thus, even if his role was reduced, he may still draw conclusions in any civil proceedings, in any of its phases, if it deems necessary to safeguard the rule of law, the rights and interests of citizens.

Due to the possibility for prosecutors to take part in civil proceedings, the special provisions related to competence are justifiably extended to their case.

The judicial assistants take part in solving labor and social insurance disputes. In this case, the full court will consist of a judge and two judicial assistants. Therefore, will be justified to have the special provisions of competence extended for these assistants, as well.

The registrars play an active role during the judgment activities and therefore, the extension of the provisions related to special competence is justified in their case, too.

Despite the fact that the C. civ. proc. does not provide, there are cases in which both the plaintiff and the defendant may be judges, prosecutors, judicial assistants or registrars. We consider that, in these situations, the competence should also be determined in accordance to art. 127 C.civ. proc., namely to require a mandatory choosing for a different Court, due to the special standing of the plaintiff, and an optional choosing due to the defendant standing. (Rosu, 2014).

#### **THE SUPREME COURT DECISION NO. 7/2016 ISSUED AS APPEAL IN THE INTEREST OF LAW, WITH RESPECT TO THE PROVISIONS OF ART. 127 PAR. 1 AND 3 C. CIV. PROC.**

In the Decision 7/2016<sup>1</sup>, The Supreme Court has admitted the appeal in the interest of law, as brought up by the College Board of the High Court of Cassation and Justice on the interpretation and application of art 127 par. (1) and (3) C. civ. proc. by establishing that the expression “Court where the judge works” as used in art. 127 par. (1) C. civ. proc. must be restrictively interpreted to point to the case in which the judge in question works effectively at the Court having standing to adjudicate on first instance.

In the same time, the Supreme Court has established that the word “registrar” in art 127 par (1) and (3) C. civ. proc. must be interpreted so as to include the auxiliary specialized clerks from the prosecutors’ offices, as well.

#### **1. LEGAL ASPECTS THAT HAVE GENERATED UNEVEN PRACTICE. DIVERGENT JURISPRUDENTIAL ISSUES**

The question raised by the College Board of the High Court of Cassation and Justice showed that there did not exist a unitary perspective in the judiciary practice of interpreting and applying the provisions of art 127 par (1) and (3) C. civ. proc., with respect to the following two issues:

1.1. *The first legal issue* that had created divergencies in the judiciary practice refers to the meaning of the phrase “the competence of the Court he works at”, as included in the first paragraph 8of art. 127 C.civ. proc., in the cases in which the judge (prosecutor/ legal assistant/ registrar) acts as a plaintiff.

*One first opinion* held that the provisions of art. 127 par.(1) C. civ. proc. are of strict interpretation, meaning that they are incident only in the case in which the dispute is brought before the Court where the judge – here plaintiff - effectively works. In support of this view, it was held that the rule laid down by the legal text regulates a situation of optional jurisdiction for the situation in which the judge, legal assistant or registrar act as

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<sup>1</sup>The Decision no. 7/2016 has been published in the Official Journal of Romania, Part I, no. 461 of June 22nd 2016.

plaintiffs. Particularly this rule interdicts seizing the competent Court if this is the one where the plaintiff actually works or, in the case of a prosecutor, if he operates for the office attached to the competent Court to hear the case.

It was noted that the expression used by the legislator in art. 127 par (1) C. civ. proc. “standing of the Court he works at” can not be broadly interpreted as a Court of Appeal in which jurisdiction the plaintiff – judge/ prosecutor/ legal assistant/ registrar – operates, but it precisely means the Court where he works.

As such, it has been argued that art. 127 par (1) C. civ. proc. is not applicable in the case in which the applicant (judge, prosecutor, legal assistant, registrar) is not effectively working at the Court competent to adjudicate the case, while the competence is established according to the procedural norms of civil law or to those applicable to each type of action (labor dispute, successoral partition a.s.o.).

It was only for the case in which the complainant, judge or registrar, is effectively working at the Court competent to solve the summon, when the competence had been decided in favor of a Court of similar grade situated in the jurisdiction of a Court of Appeal nearby.

We consider this opinion debatable, since the suspicion of impartiality is not removed, but rather maintained, coming across a Court from the jurisdiction of the Court of Appeal where the complainant - judge / prosecutor / legal assistant / registrar – effectively works. The establishment of the optional competence was meant to be an alternative to the institution of resettlement that is to avoid in such cases, the need to apply for one.

*The second opinion* stated that the expression “the Court he is working at” must be broadly interpreted, including all the procedural cycles of jurisdiction, with the plaintiff’s position as judge/ prosecutor/ legal assistant/ registrar determining the application of art. 127 par. (1) C. civ. proc., irrespective of the Court/ prosecutor’s office where he works, inasmuch as these belong to the jurisdiction of the same Court of Appeal as the Court having due standing to adjudicate the case.

It was argued that the aim of this text of law was to avoid the situations of legitim doubt which, under the previous regulation, required an application for transfer.

The rationale for which this issue was legislated was to remove any suspicion of biased settlement, due to the position of the parts.

That being so it was considered that the provisions of art. 127 par. (1) C. civ. proc. have to be interpreted in the sense that the absolute lack of territorial competence refers to all the Courts in the jurisdiction of the named Court of Appeal, while the fact that the plaintiff does not effectively work for the Court having territorial and material standing to hear the dispute ought not be likely to prevent the application of art. 127 par. (1) C. civ. proc.

We support with no reservations the second opinion, because we believe that the extensive interpretation avoids the suspicion of impartiality from the very beginning of a trial until its end and creates the framework to conduct the proceedings in fair conditions for any defendant which might be a person with no special position in the Courts.

Rejecting this interpretation leads to the maintainance of the cases of legitimate doubt and therefore to the formulation of an application for transfer. But the legislator, through instituting a new special provision has envisaged the possibility to opt for a different Court from the very beginning, if the plaintiff is a judge/prosecutor/legal assistant/

registrar. This is how the celerity of the civil procedure can be met and the adjudication of the incident related to competence and transfer, avoided during the proceedings.

Solving a request for removal, even if decided under emergency demand, determines the extension of the process. As a consequence the establishment, through art. 127 par. (1) C. civ. proc., of an optional competence contributes to the adjudication of the case within an optimal and predictable term, thus avoiding its useless prolongation.

1.2. *The second legal issue* that lead to divergence related to the enforcement of art. 127 alin (1) and (3) C. civ. proc. referred to the interpretation of the word “registrar”, namely if the above rules are or not incident to the applicants working as specialized auxiliary personnel (the registrars) in the prosecutors’ offices.

*One first opinion* consisted of the consideration that in such cases, the hypothesis of the rule in art. 127 par. (1) C. civ. proc. is not incident, since the aim of this regulation is to provide the objective impartiality of the Court and can not be broken by the auxiliary personnel not working in the Court competent to judge the case.

In arguing this view it was underlined that such a solution comes out of the literal interpretation of art. 127 par. (3) C. civ. proc., since this being a special rule, it falls under strict interpretation and can’t be subject to a broader one.

We consider this opinion to be a correct one, since the legislator, in art. 127 par. 3 C. civ. proc. meant the registrars who actively take part in the judgment activity, because they are the ones who, due to their status, might influence the court’s decision.

On the contrary, the registrars working at the prosecutor’s office can not be targeted, because they do not participate in the decision making process.

*The second opinion* considered that in the given situation, the rule laid down in art. 127 par. (1) C. civ. proc. is incident.

In arguing this opinion, the teleologic interpretation was taken into consideration, namely that in the provisions of art. 127 par (3) C. civ. proc., the notion of “registrar” can’t be limited to the strict sense of registrars working in the Courts. It is obvious that, according to the provisions of Law 304/2004 related to the judicial organization<sup>2</sup> and of Law 567/2004 with respect to the statute of the specialized auxiliary personnel in the Courts and prosecutors’ offices attached to them as well as of the personnel working at the National Institute of Forensic Expertise<sup>3</sup>, the law also applies to the registrars working in the prosecutors’ offices attached to the Courts, in a similar way to the prosecutors’ expressly mentioned by the same legal rule.

We cannot agree with this opinion, because the legislator refers to the proper application of the provisions related to judges and registrars. The optional competence is related to the Court where the registrar effectively works and disregards the auxiliary personnel not working in the Court competent to judge the case.

## 2. THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT

The Constitutional Court has issued Decision no. 558 of October 16<sup>th</sup>, 2014<sup>4</sup> with reference to the exception of unconstitutionality of art. 142 par. (1) first Thesis, of art. 143

<sup>2</sup> Republished in the Official Journal of Romania, Part I, no. 827 of September, 13th, 2005, with subsequent amendments.

<sup>3</sup> Republished in the Official Journal of Romania, Part I, no. 47 of January, 14th 2005, with subsequent amendments.

<sup>4</sup>The Official Journal of Romania, Part I, no. 897 of December 10th, 2014.

par. (1) with respect to the expression “giving a bail in amount of 1000 lei” and of art. 145 par. (1) first Thesis, all from C. civ. proc. In this Decision, the Court has stated that:

“In the hypothesis that a judge is part of a lawsuit, the Code of civil procedure regulates the particular situation of these cases and offers the judge an alternative procedural path with the possibility to choose Courts similarly competent. This way, the norm in art. 127 par. (1) C. civ. proc. (...) is a procedural means seeking to remove any suspicion related to a biased settlement of the case due to the position of one of the parts. In addition, the legal provision mentioned in par. (2) regulates the case of the judge acting as defendant. Therefore art. 127 C. civ. proc. appears as an *alternative to the institution of resettlement* (our emphasize), because in the case of its application, there will be no need to seize the Court of Appeal or the Supreme Court, when appropriate, to rule on the application for transfer of the civil trial on grounds of legitimate doubt about the lack of impartiality of judges owed to the quality of the parties.

The Court has noted that in the analysed case, the applicant judge could not have benefited from the provisions of art. 127 par. (1) C. civ. proc., nor could the competent Court invoke any form of breaking them, as long as these procedural provisions describe the duty of the applicant judge to claim to a Court of the same grade in the jurisdiction of the neighboring Court of appeal, not to a superior one.

Thus, there was no alternative procedural mechanism to allow the rectification of the criticized legal rules. In this case, the Court remarked that, given the circumstances, there were justified fears of the applicant for unconstitutionality exception with respect to the objective impartiality of the Court to judge the substance of the case, as a consequence of having been accepted the resettlement request. In this respect, the European Court of Human Rights held that appearances play a special role in assessing the objective impartiality, because in a democratic society, the Courts must inspire full confidence to the litigants. (See in this respect, Decision of October 1<sup>st</sup>, 1982, Case Piersack vs Belgium, par. 28-32, Decision of October 26<sup>th</sup> 1984 Case De Cubber vs Belgium, par. 25-30 or Decision of May 24<sup>th</sup>, 1989, Case Hauschildt vs Denmark, par. 46-52).

The Constitutional Court has thus established a duty for the legislator to modify the rules of standing, with respect to resettlement. For instance, it was proposed a reconfiguration of art. 127 C. civ. proc. expected to state the mandatory competence of another Court, if the plaintiff is a judge.

With respect to art. 142 par. 1, first Thesis, C. civ. proc. (regulating on the Court competent to judge the resettlement application on grounds of legitimate suspicion), the Constitutional Court has found – Decision 558/2014 – that the above provisions are constitutional to the extent to which the ground of suspicion does not refer to the quality of judge working at the Court of Appeal, in the case of one of the parts.

We consider that the above solution is well grounded, because the seised Court must always meet the basic requirement of being impartial, much more the competent court to solve the request of resettlement. While there are still subsisting reasons of legitimate doubt with respect to the initial Court, the Court of Appeal is expected to insure the restoration of the situation and send the case to a higher Court. (Rosu, 2015).

These aspects had been reiterated in Decision 49 of February 17<sup>th</sup>, 2015 with respect to the exception of unconstitutionality of the provisions in art 127 C. civ. proc.<sup>5</sup>. In this Decision, the Constitutional Court has rejected the exception as ungrounded.

In its reasoning the Court argued that:

“Analyzing the provisions of art. 127 C. civ. proc., the Court held that by instituting a legal presumption of lack of appearance of judge’s impartiality, they correspond to the demands of art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms with respect to the right to “an independent and impartial tribunal”,.

These legal provisions introduce the concept of optional competence, with reference to special categories of applications.

Thus, for a request in which a judge, a prosecutor, a legal assistant or a registrar acts as complainant, and the competent Court is the one he is working at, he is obliged to seize another Court of the same grade, operating under the jurisdiction of any neighboring Court of Appeal, with the choice between either of the Courts of the same grade previously nominated. (...).

Since the provisions of par. (1) art 127 C. civ. proc. use the imperative “will have to notify”, while par. (2) of the same article states that one “may refer”, it is considered that the legislator envisaged an obligation of the applicant under the conditions of par. (1) and an option for him, in the events of par. (2).

It is also obvious that the rationale of these provisions is to give the opposing part the necessary instruments to remove any suspicion that might exist with respect to the impartiality of the Court where the judge, prosecutor, legal assistant or registrar, works.

We believe that the Constitutional Court has correctly rejected the raised objection, because of the need to ensure all the conditions for the seized court to hear the case impartially, while the quality of judge, prosecutor, legal assistant or registrar to the same Court is likely to annul the presumption of impartiality.

The reliance on other processual institutions through recusal and abstention or resettlement takes place after the referral to the Court and determines the interruption of a trial. Thus, in the case of abstention, art. 49 C. civ. proc. states that no processual step should be taken until a decision is made on the abstention declaration. In the case of resettlement, the request does not have any suspensive effect, but on the request of the interested part, the Court may order the suspension of the procedure. In order to avoid such resettlement requests having retarding effect and being formulated with bad-will, the legislator has imposed that the suspension request be accompanied by the payment of a guarantee in amount of 1000 lei, in accordance to art. 143 alin 1, C. civ. proc. (Rosu, 2015).

### **3. THE OPINION OF THE COLEGE BOARD OF THE HIGH COURT OF CASSATION AND JUSTICE.**

The College Board of the High Court of Cassation and Justice, the one who had noticed the existence of an uneven judicial practice among all levels of Courts across the country and who has decided through Resolution no. 3 of February 5<sup>th</sup> 2016, to seize the

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<sup>5</sup>The Official Journal of Romania, Part I, no. 189 of March 20th, 2015.

High Court of Cassation and Justice on these legal issues, has not nominated in its application, the jurisprudential orientation which it considers to be lawful.

It is, at least, weird that precisely the College Board of the Supreme Court has not expressed any view on the orientation it shares, among the many uneven alternatives it had noticed.

#### 4. THE OPINION OF THE PROSECUTOR GENERAL.

The General Prosecutor of the Office attached to the High Court of Cassation and Justice has considered the first opinion on the first legal issue along with the second opinion on the second legal issue as being in the letter and the spirit of the law, for the following reasons:

4.1. In the decision on the first legal issue, related to establishing the meaning of the expression “the Court he is working at”, it is stated that the imperative provisions included in art. 127 par. (1) C, proc. civ. had been issued by the legislator in order to provide some guarantees of objective impartiality and they represent special norms, derogating both from the ordinary law of resettlement and from the norms of territorial competence, irrespective if these belong to the public or private legal order or they have been listed in the Code of civil procedure or among the special laws.

Due to this character of the rules enshrined in the text under discussion, as well as to the legal semnification given to them from the perspective of the right to access to justice, these provisions can only be subject to a restrictive interpretation, since *exceptio est strictissimae interpretationis*.

The same conclusion can be reached using the grammatical interpretation of the rule. We may note that the legislator has used in art. 127 par. (1) C. civ. proc. (In original, *The Court at which he is working*, n. trd), the relative pronoun “which” substituting the noun “Court” in the above phrase.

From here we may draw the conclusion that the legislator had envisaged only the Court where the judge is actually working.

Moreover, the mandatory attributes to have this rule applicable, namely to be a complainant and a judge must be met cumulatively.

Taking into consideration the description of absolute incompetence as well as the significations of the summons, it comes out that the reference processual moment chosen by the legislator to state the application of art. 127 is the one of investing the Court, since the text leads logically and legally to an exclusive application in the first instance and not in the stage of appeal.

The same conclusion can be drawn from the jurisprudence of the Constitutional Court, for instance in Decision No. 558/2014.

General Prosecutor's Office attached to the High Court of Cassation and Justice, held that the phrase “the Court he is working at”, meaning *per se* the place where the complainant judge actually works and where he now, fills a lawsuit, the above phrase refers to the competence of first instance of that Court, thus the mentioned derogation operates only for territorial issues, not for substantive ones.

The other way around, if the legislator would have intended to have the rule taking into account the Court of Appeal including the place where the plaintiff works, thus considering also the possibility of appeals, he would have regulated as such.

The reference to the Court of Appeal in whose jurisdiction is located the competent Court to solve the dispute, may be explained exclusively through the aim of creating a territorial demarcation, on the ground of which to be established the referreable Court in the nearby.

In addition to this argument, the Prosecutor General has referred to the field to which the norm may be applied, from the perspective of the addressable subjects.

The reference to the jurisdiction of the Court of Appeal must be also understood in the light of the substantive competence of the Courts of Appeal, in first instance, as it is regulated by art. 96 point 1 C. civ. proc. and by the special laws.

Taking into consideration all these aspects, the Prosecutor General has considered that in the given situation there are no premises for an extensive interpretation through any of its methods (analogy, extension of concepts or induction).

The declarative interpretation is largely at work here, since the law expresses exactly what it was intended to say (*lex tam dixit quam ut voluit*), grace of the special and derogatory character of the rule in art. 127 par. (1) C. civ. proc. as well as of the meaning the text has, in the sense of a free access to justice.

Any possible legitimate suspicions that might hover over the impartiality of the Court seized either with a summon, the Court being not the place where the complainant judge is working or, seized with an appeal, while the plaintiff effectively for the Court competent to solve it, all these may be removed using the alternative means to guarantee the subjective impartiality, namely abstention or recusal, respectively resettlement, in accordance to art. 42 point 13, art. 43 and art. 140 par. (2) C. civ. proc.

We consider improper the above opinion, since through the establishment of optional competence in art. 127 par. (1) C. civ. proc., the legislator has sought exactly the opposite of General Prosecutor's conclusion, namely to avoid using the alternative institutions of abstention, recusal or resettlement.

There would have had no sense to create a new institution, while abstention, recusal or resettlement had already been defined even in the previous Code of Civil Procedure.

The mere rationale of the optional competence was to create an alternative to already consecrated institutions and thus to avoid the cases of suspicion, mainly against the judges.

The fact that means of appeal were not explicitly provided in the text of law can not be an argument to further consider the restrictive interpretation. This is because we should take into consideration that one's position as judge working at whatever Court in the jurisdiction of a Court of Appeal, turns him susceptible to influence the outcome of the case, since his colleagues will be the ones to make the decision. Even if it is about different Courts, the suspicion could only be removed through extensive interpretation which considers the judge/ prosecutor/ legal assistant/ registrar acting as complainant, irrespective of his working place inasmuch as that Court/ prosecutor's office belong to the jurisdiction of the same Court of Appeal as the Court competent to hear the case.

4.2. In analyzing the concept of "Registrar" in relation to the phrase "the Court he is working at" used in art. 127 par (1) and (3) C. civ. proc., the General Prosecutor has underlined that, in accordance to art. 2 par (1) of Law 567/2004, the work of the specialized auxiliary personnel, in particular of the registrars, in the administration of justice, represent a real support for judges and prosecutors. Therefore, their expertise as

well as the proper performance of their duties play an important part in the effective exercise of the Courts and Prosecutor's offices own jobs.

From the entire Statute of the specialized auxiliary personnel comes out plainly that the legislator has instituted a unitary legal regime for the registrars working at the Courts as well as at the Prosecutor's offices, with respect to both their professional careers and the rights and duties attached to this position.

Therefore, in accordance to the principle *ubi lex non distinguit nec nos distinguere debemus*, the General Prosecutor has considered that art 127 par. (1) C. civ. proc. is equally applicable to the registrars from the Courts and to those from the Prosecutor's offices.

Considering the unitary legal status of the two categories of registrars as well as their common duty to refrain from any action which would jeopardize the prestige of the judiciary, it is estimated that the aim of the legislator in issuing art. 127 par. (1) C. civ. proc. – that of ensuring a preventive mechanism to guarantee the objective impartiality of the Court seized with a request of summons in which a registrar may act as plaintiff – this aim is met both in the case of Courts' registrars and of those from the prosecutor's offices.

The effectiveness of working for the named Court as required in art. 127 par. (1) C. civ. proc. ought to be understood in the context of par. (3) of this article, referring to the entire activity pursued in a prosecutor's office, irrespective if it is about a prosecutor or a registrar.

The argument given by the rationale of regulation works with full valences, both in terms of the registrars from the competent Court judging the case in first instance and of those from the prosecutor's office attached to it. (*ubi eadem est ratio, eadem solutio esse debet*).

The analogy that this argument would question is only apparent, and therefore can not be disavowed, even if it intervenes on a rule of special and derogatory procedure, since the use of references to the norm's identity of rationale is allowed by the very normative content of the norm, stating that the rules issued for the complainant - judge properly apply to the prosecutors and registrars.

On the contrary, a restrictive interpretation of the norm, excluding the registrars in prosecutors' offices from its scope, would lead to an excessive fragmentation of the enforcement of this piece of law, in contrast to the legislator's aim of not distinguishing among the registrars from the Courts and those from the prosecutor's offices.

We are surprised by the opinion of General Prosecutor related to registrars. It is precisely in their case where he proposes an extensive interpretation, but the registrars in prosecutor's offices do not play any part in the work of justice and therefore they bear no suspicion of impartiality.

A restrictive interpretation would be proper in their situation, because only those from the Court where the case is settled might really influence the decision to be made.

The provisions of art. 127 par. 3 C. civ. proc. show that the rules edicted for the judges should be applied *accordingly*, (own emphasize) to the registrars. Since art. 127 par. (1) C. civ. proc. refers to the *Court* (own emphasize), one can not interpret extensively the notion of registrar. In this case, it should be rather applied the rule *ubi lex non distinguit nec nos distinguere debemus*.

There is also an inconsistency of legal logic between these two points of view. While in the case of judges, the restrictive interpretation is proposed, although they are the ones

to formulate a decision and settle a dispute, in the case of registrars, exactly the other way around, it is proposed an extensive interpretation on the ground of the same legal article.

But, since the provisions for judges have to be applied accordingly, that means that the legislator has taken into account only the registrars from the Courts, and not those from the prosecutor's offices. In this case, if the legislative intention would have been different, it would have been explicitly provided in a different way.

One cannot apply multiple criteria of interpretation for a single article to lead towards complete different solutions unless the legislator has made the distinctions at stake.

##### **5. THE OPINION EXPRESSED BY THE CONSULTED EXPERTS FROM THE CENTER FOR CIVIL PROCEDURE AT THE SCHOOL OF LAW, UNIVERSITY OF BUCHAREST**

With respect to the first issue under scrutiny, namely the interpretation of the phrase "the Court he is working at", the experts have considered the first jurisprudential position to be the correct one, making the quoted expression to be restrictively interpreted so as to refer to the case in which the judge, legal assistant or registrar effectively works in the Court competent to solve the dispute in first instance (respectively, in the case of a prosecutor, it is meant the office attached to the mentioned Court).

Apparently, the purpose of the law to ensure the impartiality of the Court would be better served by promoting the opposite interpretation, according to which art. 127 C. civ. proc. should be also applied when the complainant acts as judge, registrar a.s.o. at a Court superior to the one competent to hear the case in first instance, while the superior instance would have standing to adjudicate the appeal in reformation provided by the law in the concrete dispute. (In such a situation, a concret exam of the admissible means of appeal in reformation should be conducted. For instance, in a labor dispute, the rule would be applicable if the judge would work at the Court of Appeal competent to judge the appeal, while the decision in appeal is final).

We believe that this interpretation ensures not only appearant, but in a fair and legal way the impartiality of the Court, because it covers all the stages of the procedure and thus, avoids the use of other alternative institutions like abstention, recusal or relocation.

The experts have opinated that such an interpretation contradicts the restrictive formulation of the text, which differs from its French pattern, since it circumstantiates both the persons subject to the norm and a certain Court – which can only be of first instance; on the other hand, there is impossible to invoke the procedural incident directly in appeal (*a fortiori*, nor in the recourse), in contrast to the French regulation.

In our opinion, however, regardless of the adopted pattern, the aim of the legislator is to ensure impartiality throughout the entire process. There is no room for invoking this incident during the stages of appeal, once the extensive interpretation is accepted.

Still, the experts have established that the extensive interpretation can not be accepted because the review proceedings can not be anticipated, being possible for the parts to accept the first decision or, simply for this decision to remain final, not being appealed nor recurred. In this case, there would make no sense to anticipate that the dispute will get in its phase of appeal to the Court where the judge is working, such a hypothesis remaining a simple possibility. Even if this will come true, there will be still the mechanism of resettlement that can be used.

This argument is contradicted by the judicial practice, because most of the decisions are appealed, only few cases ending through a settlement or acceptance. As a consequence, the rule is that judicial decisions are attacked, while acceptance makes for the exception.

Thus, we can not accept as arguments, the exceptional situations, but rather, the cases defining the rule.

The experts' opinion can not ignore the realities in judicial practice, it has, instead, to take them into account.

Even the specialized literature underlines that the rationale of having legislated art. 127 C. civ. proc. lies in the removal of any suspicion of biased settling the case due to the quality of one part. (Constanda, 2016).

Despite of these, it is stressed that the premise to apply art. 127 C. civ. proc. is that the judge should work at the competent Court to hear the case in first instance. Thus, the condition is not met if the part is working as judge at another Court, even of the same grade, from the jurisdiction of the same Court of Appeal. The intention of the legislator in issuing the law comes out unequivocal from the strict reference to that very instance where the part works as a judge and who has the competence to solve the dispute. (Constanda, 2016).

The same token, the condition to apply the law does not apply when the part is working as judge at a superior Court which would have to adjudicate the possible appeal against the decision in first instance. (Constanda, 2016).

Although it is underlined that, while the application of art. 127 C. civ. proc., there is no need to seize the competent Court to judge a request for transfer of the case this effect does not justify the extensive interpretation and application of the provisions in art. 127 C. civ. proc. There are situations not envisaged by the legislator, like the possibility that the part works as judge at the superior Court where the appeal is heard. (Constanda, 2016).

On the contrary, we consider that the legislator's aim was particularly that of avoiding any further request of resettlement, and therefore, we ought to take into consideration, the extensive interpretation. The restrictive interpretation voids the norm in art. 127 C. civ. proc. of its content.

Not least, the specialists have warned that if it would be accepted that art. 127 C. civ. proc. be invoked only when the case would effectively reach the stage of appeal at the Court where one of the parts is working, the timing limit absolutely imposed in art. 130 par. (2) C. civ. proc. , would be exceeded. This is the time measured from the first day of judicial hearing in front of the Court of first instance. There is no legal ground to have this extension, since the present Code of civil procedure does not include any similar regulation to that in art. 47 par. (2) in the French Code of Civil Procedure, encompassing the possibility to invoke the incident directly in the appeal, as well.

According to the specialists, the most important argument against an extensive interpretation is its impossibility, when the appeal is of the competence of the High Court of Cassation and Justice. Obviously, art. 127 C. civ. proc. was not issued in such a hypothesis, while the adjudication of the dispute (in first instance or in appeal) within the jurisdiction of / or by another Court of Appeal would not offer any remedy, since the jurisdiction of the Supreme Court is represented by the entire country.

As such, a contradictory solution may not be accepted. It would state that art. 127 C. civ. proc. to be applied only if the appeal or recourse would be on the competence of the

Tribunal or of the Court of Appeal, but not if the recourse would go to the Supreme Court. Such a solution contains a logical fracture and would be inconsistent.

There could, however, exist a remedy even if the recourse would be on the competence of the Supreme Court, with a different group of judges adjudicating in the case the complainant would work at that Court. We must underline here, that in the field of civil procedure, there are very few situations in which the Supreme Court is competent to judge the recourses – according to art. 97 par. (1) point 1 C. civ. proc. Here there are the recourses against the decisions of the Courts of Appeal as well as other decisions, defined by the law.

We emphasize here that the majority of recourses are settled by the Tribunals and the Courts of Appeal. As it follows, there are here, again, a rule and an exception. Or, one may not use as argument the rare situation in which the Supreme Court resolves the appeals in civil matters. Furthermore, we mention that according to art. 497 C. civ. proc., the Supreme Court does not retain the case to trial, but in the eventuality of cassation, it refers the case to a new adjudication to the Court of Appeal or to that of first instance.

Unlike the resolution of the recourse by the Supreme Court, where the rule is the cassation with reference, in the case in which the Tribunal or the Court of Appeal have the standing, the rule is cassation with retain. (Rosu, 2016).

Last argument of the experts says that art. 127 C. civ. proc. represents a special and derogatory norm from the normal law of territorial competence and therefore, it can not be interpreted extensively, by means of analogy. (see art. 10 Civil Code).

It would follow that, if the case reaches in the appeal stage at the Tribunal or Court of Appeal where one of the parts works as a judge, the interested side should require – definitely, only if it deems necessary – the transfer for legitimate doubt. But this solution was available in the past, as well, and it represents the advantage of a case by case assessment of the concrete circumstances which may not justify the prorogation of the competence, especially if the part is a legal assistant or a registrar, or even if he is a judge but, for instance, works in a different section than the one competent to hear the case.

Just for the sake of information it was mentioned that the same solution had been retained in preparing the Decision of the Constitutional Court no. 558 of October 16<sup>th</sup>, 2014.

With respect to the second issue submitted the High Court of Cassation and Justice, namely the interpretation of the notion of “registrar” used in art. 127 par. (1) and (3) C. civ. proc., to include or not the specialized auxiliary personnel from the prosecutor’s offices attached to the Courts, the experts have also formulated their position. According to it, they have argued that since art. 127 C. civ. proc. is, in its essence, a rule of exception, requiring a strict and not an extensive interpretation, thus the first jurisprudential view being correct. In this case, there is no way to consider even the appearance of impartiality of the Court, when a registrar from the prosecutor’s office attached to the first instance Court, is part of the dispute. Therefore, the rule should be applied only to the clerks who are effectively working at the Court first seized, not in the office attached to it.

We appreciate this opinion as correct, since, indeed, the registrars from the prosecutor’s office are not in the position to influence the solution issued, and thus, there can’t hang any suspicion of their intrusion in the decision making process.

However, it was stated that, similarly, the rule in art. 127 par. 3 C. civ. proc. is incident only with respect to the registrars from the competent Court and its attached prosecutor's office and not from any other Court/ prosecutor's office in the jurisdiction of that Court of Appeal. (Constanda, 2016).

Or, this is what we consider a wrong position, because the registrar from the prosecutor's office does not take part in the judgment activity, and thus, he doesn't have a similar situation with the registrar from the Court hearing the case.

## **6. THE REPORT ON THE RECOURSE IN THE INTEREST OF LAW**

The Judge - rapporteurs have had different opinions on the legal issues, and thus two different reports had been drafted.

The first proposed solution was that of admitting the recourse in the interest of law and issuing a decision in which the phrase "the Court he is working at" from art. 127 par. (1) C. civ. proc. be interpreted in the sense of including all the procesual cycles of the judgement. In such a case, if the complainant is a judge, art. 127 par. (1) C. civ. proc. should be applied insofar as the Court he is working at and the competent Court belong to the jurisdiction of a same Court of Appeal. With respect to the second legal question, it was argued that the notion "registrar" in art. 127 par. (1) and (3) C. civ. proc. must be interpreted as applicable also in the case of the complainants who work as specialized auxiliary personnel at the prosecutor's offices attached to the Courts.

We consider correct the position in first report related to the first question, because this way both the defendant and the other participants may have due conditions for the ensurance of an impartial judgment, from the beginning of the process. The defendant will no longer have to use the institutions of recusal or resettlement later, during the other procesual cycles. Instead, we disagree with the report's opinion on the second question, since it extends the notion of "registrar" to the specialised auxiliary personnel from the prosecutor's offices attached to the Courts. As we have already noted, these registrars do not take part in the judgment activities and thus will not be in the position to influence the outcome of the case.

The other report prepared in this discussion, it was proposed that the phrase "the Court he is working at" to be interpreted restrictively, with reference to the situation in which the judge is effectively working at the competent Court to adjudicate the summons in first instance. With respect to the second question aimed at interpreting the notion of "registrar" as related to the phrase "the Court he is working at", it was concluded that it must be interpreted in the sense that the text of law – art. 127 par. (3) C. civ. proc. must be applied only to the registrar effectively working at the first seised Court.

Here we reject the restrictive interpretation with respect to the judge, but agree with a restrictive approach regarding the registrars.

## **7. THE HIGH COURT OF CASSATION AND JUSTICE**

Art. 127 C. civ. proc., having the marginal title "Optional Competence" is located in the IIIrd Chapter entitled "Special Provisions" within the Title III, "The Competence of the Courts". This legal norm regulates distinctively the particular situation of the

competence to solve summons in which the judges, prosecutors, registrars or legal assistants act either as complainants or as defendants.

The first legal issue which has constituted the object of the recourse in the interest of law was the meaning of the phrase “the Court he is working at”, respectively if this is to be interpreted in a restrictive or rather, broad manner.

The premise for the application of the provisions in art. 127 par. (1) C. civ. proc. is that the judge must work at the Court having standing to hear the case in first instance. This condition is not met if the judge is working at a different Court than the competent one, even of the same grade and located in the jurisdiction of the same Court of Appeal.

The legislator’s intention in drafting this norm was unambiguous, emerging from the strict reference to that particular Court who has the competence to adjudicate the case and where the part is working as a judge.

Thus, we must underline that the provisions of art. 127 par. (1) C. civ. proc. are applicable only when the summon to be formulated by or against a judge would be, by law, of the competence of the Court where he works.

The provisions of art. 127 C. civ. proc. are considering referral to the court of first instance, and not to those competent for appeals.

Any extensive interpretation of provisions in art. 127 C. Civ. proc. contradicts the restrictive wording of the text of law, since it circumstantiates both the persons covered by the norm (the complainants having the quality of judge, prosecutor, legal assistant, registrar) and the Court seised (which can not be but for the first instance).

The extensive interpretation can not be accepted also because one can not anticipate the review proceedings being used, while there is possible for the parts to accept the decision issued or for this decision to remain final through not being exercised any means of attack.

Thus, in full disagreement to the decisions of the Supreme Court, we believe that, the legislator’s intention was that of having the extensive interpretation, which ensures the conditions of an impartial settlement. The argument that one can not anticipate the promotion of the means of attack can not subsist, since in the judicial practice, most of the judicial decisions are attacked. Or, while making a decision as important as a recourse in the interest of law, the aspects occurring with high frequency are to be taken into consideration and not the exceptions.

The Supreme Court has underlined that the mechanism designed by art. 127 C. Civ. proc. is not the only one provided by the legislation to guarantee the objective impartiality of the Court, in the event that a judge from the competent Tribunal is part in the litigation, since the institution of resettlement may be used.

Once the case would reach, through the means of attack to a Tribunal of a Court of Appeal where one of the parts works as a judge, the interested part would be the one to appreciate the necessity of asking for the resettlement on the grounds of legitim doubt. Thus, if the complainant works at a superior Court and the appeal is to be resolved by the Court where he works, the personal remedy is the resettlement regulated by art. 140 par. (1) and (2) C. Civ. proc.

We believe that, on the contrary, the intention of the legislator for the case of a complainant judge was to avoid the recourse to the alternative institutions like resettlement, in order to guarantee the impartiality. Along with the judges – rapporteurs of the first report, we consider that the application of extensive interpretation avoids further

troubles related to doubts on impartiality. Procedural incidents like recusal, abstention or resettlement have a retarding effect, and thus there is no celerity in solving the dispute.

Instead, the extensive interpretation provides the referral to an impartial Court, from the very beginning, avoiding any possible incident on this ground and also ensuring the settlement of the case in an optimal and predictable term.

The Supreme Court has mentioned that, in this context is worth underlining that by Decision 558 of October 16<sup>th</sup>, 2014 of the Constitutional Court, it was decided that provisions of art. 142 par. (1) first thesis and of art. 145 par. (1) first thesis C. Civ. proc. are constitutional insofar as the ground of legitim doubt do not relate to the quality of judge to the Court of Appel on the side of any of the parts.

Paragraph 24 in the argumentation of the Constitutional Court is relevant for a restrictive interpretation of art. 127 par. (1) C. Civ. proc., because it holds that “the complainant judge could not have used the provisions of art. 127 par. (1) C. Civ. proc. not could the competent Court invoke the breaking of these, as long as these procedural provisions circumscribe the obligation of the complainant judge to seize a Court of the same grade with the competent one, located in the jurisdiction of a neighboring Court of Appeal, and not to a higher Court.”

Among the arguments of the Court of Constitutional Disputes, the Supreme Court has retained those that fit to a restrictive interpretation. Thus, in terms of objective impartiality, the Constitutional Court has found that the relocation to another Court situated in the jurisdiction of the same Court of Appeal is not enough to remove the reasons of legitim doubt, in all the situations, meaning that these *will exist for any Court in the jurisdiction of the same Court of appeal* (our emphasize).

In the same time, the Constitutional Tribunal held that the rule in art. 127 par. (1) C. Civ. proc. is a procedural means to *remove any suspicion of biased settlement of a case due to the quality of one part.* (our emphasize).

Moreover, the Court has established the duty of the legislator to change the rules of competence with respect to resettlement. It was, thus, proposed the reconfiguration of art. 127 C. Civ. proc. which establishes the mandatory competence of a different Court if the complainant is a judge and the optional competence if the summon is introduced against a judge. (Rosu, 2015)

In these circumstance, we consider that the extensive opinion related to judges from the first report on the recourse in the interest of law, should be validated.

The Supreme Court has concluded that the provisions of art. 127 par. (1) C. Civ. proc. can not be applied but strictly and limitatively, taking into consideration the special character of the norm, expressly referring to the Court where the complainant works.

The second legal question having created divergences in the application of art. 127 par (1) and (3) C. Civ. proc. on the interpretation of the notion of “registrar” was that of establishing if these norms are incident or not to the complainants working as specialized auxiliary personnel (registrar) at the prosecutor’s offices attached to the Courts.

The purpose of art. 127 par. (1) C. Civ. proc. is to ensure the impartiality of the Court, while par. (3) of the same article indicates expressly and eshaustively the subjects targeted by the sphere of application of the first paragraph, nominating with no distinction the registrars, a category circumscribed to the general notion of specialised auxiliary personnel, as defined by art. 3 of Law 567/2004.

According to art. 3 par. (1) in conjunction with arts. 4 and 76 of Law 567/2004<sup>6</sup>, registrars belong to the specialised auxiliary personnel of the Courts and the prosecutor's offices attached to them. Registrars have the duty that, through all their work, to respect the rights and freedoms of persons, as well as their equality before the law, to ensure a legal undiscriminatory treatment to all the participants in the judiciary proceedings, to respect the deontologic norms of the profession, to fulfill their tasks with professionalism, fairness and celerity, in accordance to the law, and to refrain from any action that might prejudice any natural or legal person or the prestige of judiciary.

Therefore, the legislator has placed the registrars from the Courts and the attached prosecutors' offices under a unitary legal regime, even if according to art. 62 par. (4) of Law 304/2004, the prosecutor's offices are independent in their relations to the Courts.

The literary reading of the text of art. 127 par. (3) C. Civ. proc. in the sense of its application to only the registrars from the Courts would not be possible, since the text does not include such a provision, and the literal reading requires full compliance between the wording of the interpreted text and the practical cases falling under the hypothesis of that norm. On the contrary, we consider that the interpretation of art. 127 par. (3) C. Civ. proc. as related to registrars refers strictly to the Court where they work, since they do not take part in the issuing of the decision.

The Supreme Court has argued that while art. 127 par. (3) C. Civ. proc. does not distinguish among the registrars from the Courts and those from the prosecutor's offices it is equally applicable to all, according to the principle *ubi lex non distinguit nec nos distinguere debemus*.

If his conclusion is added to the fact that there are both prosecutors and registrars working in prosecutor's offices, then the phrase "appropriately applies", used by the legislator in art. 127 par. (3) C. civ. proc. must be understood as referring to the entire activity in such an office, irrespective if we talk about a prosecutor or a registrar.

The argument that art. 127 par. (3) C. civ. proc. is a special norm, under strict interpretation, thus excluding any extensive interpretation does not subsist – The Supreme Court argues – as long as the text does not explicitly exclude any category of registrars, while the duty to keep the appearance of impartiality is also imposed to the registrars from the prosecutor's offices.

We notice a mismatch of legal logic on the side of the Supreme Court with respect to this last argument. There can not be different interpretations for the same piece of law, a restrictive one, particularly for the judges who adopt the decision, and an extensive approach for the registrars, who have no part in making these decisions. The interpretations of art. 127 par (1) C. civ. proc. must follow the same line of thinking and argumentation in both cases.

It is unacceptable to have two opposing interpretations within a single article, especially if taking into account the different quality and powers of the judges and registrars.

To conclude, the Supreme Court has decided that the notion of "registrar" from art. 127 par. (3) C. civ. proc. must be interpreted as including the specialized auxiliary personnel (registrars) from the prosecutor's offices attached to the Courts.

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<sup>6</sup> Official Journal of Romania, Part I, no. 119 of October 14th, 2004, with subsequent amendments.

However, the correct opinion regarding the registrars is the one expressed by the consulted experts, who have stated that art. 127 C. civ. proc. must be strictly and not extensively interpreted. In such a case, there would not be affected even the appearance of impartiality of the seized Court, when a registrar from the Prosecutor's office of the competent Court of first instance is subject in the case. Therefore, the rule would be applicable only to the registrars effectively working at the Court first seized, and not to the prosecutor's office attached to it.

## 8. CONCLUSIONS

The role of the Supreme Court is undeniable that of providing a unitary interpretation and application of the law for all the Courts, but its solutions should take into account the imperative of achieving justice under impartial and objective conditions.

Therefore, all the necessary conditions must be insured from the very beginning of any adjudication. In our opinion, a broad interpretation of art. 127 par. 3 C. civ. proc. may be the means to achieve this.

## REFERENCES

- Constanda Andreia, Commentary to art. 127, în *The New Civil Procedure Code. Comment on articles*, vol. I, art. 1-455, 2<sup>nd</sup> edition, revised and enlarged, ed. By George Boroi, Hamangiu Publishing House, Bucureşti, 2016, p. 384. p. 387
- Leş Ioan, *The New Code of Civil Procedure. Commentary on articles*, 2<sup>nd</sup> edition, C. H. Beck Publishing House, Bucharest, 2015, p. 244.
- Roşu Claudia, *Civil Procedural Law. Special Part*, 7<sup>th</sup> edition, C. H. Beck Publishing House, Bucharest, 2016, p. 79.
- Roşu Claudia, *Special Provisions Concerning the Courts' Jurisdiction as established by the Code of Civil Procedure*, in „Legal Trend”/ “Curentul Juridic” no. 2/2014, p. 116-118.
- Roşu Claudia, *Resettlement in the Civil Procedure*, in „Judiciary Courier”/ “Curierul Judiciar” no. 1/2015, p. 25, p. 26.