THE SETTLEMENT OF THE PRESIDENTIAL ORDINANCE. COMPARATIVE ELEMENTS OF ROMANIAN CIVIL PROCEDURAL LAW AND ITALIAN CIVIL PROCEDURAL LAW*

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ABSTRACT: *The legal institution of the presidential ordinance, both in Italian civil procedural law and in Romanian civil procedural cod, enjoys a wide applicability and a versatile character, covering various areas of law. If in Romanian civil procedural law, the legal situations that this institution may give birth in judicial practice, often remain without response and analysis in existing doctrinal studies, one of the reasons for this paper is to carry out a comparative study between the regulations of the two institutions, namely both in Romanian civil procedural law and in Italian civil procedural law.*

KEYWORDS: *presidential ordinance; romanian civil procedural law; italian civil procedural law; special procedure; urgency.*
JEL Code: *K4, K15.*

1. PRELIMINARIES

The presidential order is seen in the doctrine, either as a special procedure or as a request for a lawsuit initiating the special procedure, or as a court decision by which interim measures are taken in case of emergency (I. Leș, 2020).

The institution of the presidential ordinance is part of what is widely called in the literature the provisional jurisdiction, but this does not mean that the procedure itself is broken by the requirements of art. 6 para. 1 of the European Convention on Human Rights „the right to a fair trial" (C. Chainais, 2020).

"*Final decisions in the provisional procedure must be in accordance with the requirements of a fair trial"*[2], until this decision, the ECHR refused to argue the need

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[2] ECHR Decision of 15 October 2009, Micallef v. Malta.

to comply with the provisions of art. 6 para.1 of the European Convention on Human ights in the case of provisional proceedings.

The non-prejudgment of the merits of the case, the provisional nature and certain procedural flaws which arose during the judgment of the case in substance, were those which led the Court to that historical case-law.

The Court's solution originates in a conflict born in 1985 in Malta between the neighbors of a bloc, more precisely the discomfort created to the neighbor on the ground floor by the neighbor on the upper floor by the fact that the latter placed his laundry on the balcony. Basically, through an injunction , the owner of the ground floor apartment asked the competent court to give a judgment prohibiting the owner of the upstairs apartment from spreading his laundry over the courtyard of his apartment, invoking an infringement of his right to property. The dispute between the owners of the two apartments was temporarily resolved by urgent procedure, a procedure vitiated on the merits by not quoting the defendant by admitting the applicant's request, and on appeal that the judge of the case was a brother to the applicant's lawyer. These considerations were the ones that formed the basis of the Grand Chamber of the ECHR to reconsider its point of view[3].

Consequently, on 15 October 2009, ie more than 24 years after the actual conflict arose, the Grand Chamber of the ECHR offered this historical solution to the case-law, invigorating, if we can say, the applicability of the provisions of art. 6 on guaranteeing the right to a fair trial.

This solution came with some clarifications, as follows: as regards the right to be brought to justice, it must be civil in the sense of ECHR case-law, both principally, as well as in the emergency procedure, the approach requested by the presidential order should be directly decisive for the civil law that is deduced from the main judgment.

2. THE SETTLEMENT OF THE PRESIDENTIAL ORDINANCE IN THE ROMANIAN CIVIL PROCEDURAL LAW

The procedure of the presidential ordinance, as it is regulated starting with art. 997 C. proc. civ.[4], is a special procedure, that is judged urgently and especially, the legislator offering him the following definition: *"The court, stating that there is an appearance of law in favor of the applicant, will be able to order interim measures in hasty cases, in order to maintain a right which would be harmed by delay, to prevent imminent and irreparable damage, as well as to remove obstacles that would arise during an execution".*

As a preliminary question, unlike Italian civil procedural law, as regards the scope of the presidential order, it is, in principle, applicable in any matter, as long as in that field the legislator did not establish a special procedure, of an exclusive nature.

As regards the features of the presidential order, this is a special procedure, which may be introduced at the request of the person concerned prior to the opening of the proceedings or may be incidentally formulated, during a substantive trial, given that the presidential

[3]https://www.juridice.ro/88124/revirimentul-de-jurisprudenta-la-cedo-si-intinsul-rufelor-la-uscat-deasupra-curtii-vecinului-aplicabilitatea-dreptului-la-un-proces-echitabil-la-ordonanta-presedintiala.html

[4] Art. 997 Romanian civil procedural code.

ordinance does not prejudice the merits of the case, does not anticipate it, does not address it, does not resolve it. (Roșu, 2023).

A situation that has given rise to many discussions over the years among practitioners is the hypothesis that the court seised of the merits already exists, but the case for good reasons is relocated, and subsequently the person concerned understands to refer the matter to the court and to a request for a presidential order. In the past, opinions were divided, with a non-unitary practice in this regard (admissible or inadmissible request).

The clarifications were brought by the High Court of Cassation and Justice, by Decision no. 2816/2013 of May 22, 2013[5], where it has been established that „ presidential ordinance is not incidental, which may be made separately from the existence of an ongoing process, as it results from the way in which art. 997 para. (4) C. proc. civ., according to which the ordinance can be given even when the judgment on the fund is pending. However, ”*the fact that the application for the merits was relocated to another court does not justify, for that reason alone, the reference of the application for a presidential order to the same court. In order to determine the court competent to resolve the presidential order, the court which would have jurisdiction to adjudicate on the merits must be considered, and not the court which actually judges, as a result of the procedural incident which is the relocation.”* (Ghe. Piperea, 2019).

Moreover, it was mentioned by the High Court of Cassation and Justice that resettlement is a form of judicial extension of territorial jurisdiction, operating only in respect of the cause for which the relocation has been requested, any other processes to be resolved according to the general rules of territorial jurisdiction as provided in the Code of Proc. civ.

It is clearly to say, the presidential order procedure enjoys a speedy settlement. This presupposes that it can be resolved without summoning the parties when the court finds that it is a special emergency, to decide that the execution will be carried out without any summons or without a deadline. One point to be mentioned in this situation is that although in the first instance, due to the special urgency, the case is being tried without a subpoena as well as without the form of order sought by the parties, according to art.1000 par. 3 C. proc. civ., the judgment is made with their citation, thus respecting the fundamental principles of civil procedural law.

It follows that the presidential order is enforceable but covers only provisional measures, without being able to affect the solution to the merits of the case.

However, it should be noted that there are situations where a judgment given by the presidential order turns its provisional nature into a definitive nature. Most of the time, this happens in the event that the presidential order is handed down without a trial in the substance and the parties, in particular the applicant, they are no longer interested in promoting the process on common law, as long as the defendant does not appeal the solution pronounced by the presidential ordinance.

[5] Decision no. 2816/2013 Of May 23, 2013, available at: https://legeaz.net/spete-civil-iccj-2013/decizia-2816-2013.

3. THE SETTLEMENT OF THE PRESIDENTIAL ORDINANCE IN THE ITALIAN CIVIL PROCEDURAL LAW

The procedure of the presidential ordinance finds its correspondent in the Italian civil procedural law within the provisions of art.700 C. proc. civ [6].

The legal provision provides the following definition of the procedure: ”*Anyone with good reason to fear (to consider) that in the time necessary to exercise their right normally, they, is threatened with imminent and irreparable damage, may be addressed to the judge for urgent action, which depending on the circumstances are appropriate to provisionally ensure the effects of the judgment on the merits.”* [7]

The reason for the introduction of that text was intended to ensure immediate protection of the applicant's law, which otherwise could be irreparably compromised as long as the substantive process lasted. One of the purposes of this procedure was to anticipate, in whole or in part, the substantive solution or effects it would have between the parties. Unlike the provisions governing the institution of the presidential ordinance in Romanian civil procedural law, in Italian civil procedural law, the application of the regulations of art. 700 C. proc. it. however, it is limited to those cases where there are no other legal procedures to protect the law or when they are inadequate or ineffective. The procedure provided by art. 700 C. proc. civ. it. is abbreviated (L. Paolo Comoglio, 2014), and except in exceptional cases, it takes place before contradictory debates, being devoid of non-essential formalities and incompatible with urgency.

As for the form of the request, as in the Romanian civil procedural law, it takes the written form, fulfilling the conditions.

The measure is provisional and comes in order to provide legal protection in certain situations, during the period as long as it is to be definitively resolved by a common law judgment.f any request for a lawsuit.

What is interesting to mention is that by their special character, they are considered to be atypical measures, as the law does not establish their content, but, instead, it leaves the judge a wide discretion, depending on the situation he is facing. However, the judge will have to limit himself to the request made, avoiding an ultra-petită, ie to rule on issues which the applicant has not requested. This atypical character is the expression of the legislator's will to give a wider discretion to the judge, who can identify the most effective measures to protect the right that is in danger.

At the same time, they are subsidiary in nature, and can only be requested when the interest could not be satisfied by a measure ”*typical* ” provided by law.

As in the legal provisions governing the presidential ordinance in our law, the legal provisions of the Italian Code of Civil Procedure are express as to the obligation to have a common law process.

Thus, if in Romanian civil procedural law, in some situations we may have a presidential ordinance, without the obligation of the applicant to submit a joint application, the urgent measure, as regulated in Italian procedural law, it is among the only ones that allow this possibility.

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[6] Art. 700 Italian Civil procedural code.

[7] https://www.btstudiolegale.it/il-ricorso-ex-art-700-cpc/.

This is possible after the 2005 legislative change[8], by introducing par. 6, 7, 8 of art. 669/8 of C. proc. civ. it., the urgent measure was offered an effective character, in the sense that the non-introduction of the action on the merits (in the event that the urgent procedure was admitted *ante causam*), or the extinguishing of the action on the merits does not determine its ineffectiveness[9].

As a consequence, similar to the hypothesis regulated in the Romanian civil procedural provisions, the non-pronunciation of a judgment in substance after the issuance of an urgent measure pursuant to Article 700 of C.proc.civ.it

(Brandolini, 2008), does not result in the cessation of its effects.

However, this does not mean that the urgent measure cannot be revoked. For example, it is revoked if the action on the merits is resolved with a sentence declaring non-existent the right that was protected through the procedure provided by art. 700, from which we deduce, as in Romanian civil procedural law, that the urgent measure has no res judicata authority over the merits of the process, losing its effectiveness once the decision in substance remains final (Fiorucci, 2009).

4. CONCLUSIONS

For the most part, the provisions of Italian law are also found in Romanian law. Even so, some different issues are worth mentioning, maybe even adopted in our legislation. The most important of these is the one that refers to the wide possibility of the judge to appreciate the solution, depending on the situation they face. Thus, the Italian legislature allowed the judge to be seriously involved in the case by intervening on the most effective measures to protect the right which is in danger.

Finally, we conclude that both systems of law analyzed, both the Romanian and the Italian system, have distinct features, which in fact characterize the civil procedural institution, but also many similarities regarding the procedure for resolving the presidential ordinance.

The broad image of the institution of the presidential ordinance in terms of the features related to each state, is a landmark regarding the future changes of the legal provisions.

REFERENCES

I. Leș, C. Jugastru, 2020. *Tratat de drept procesual civil. Căile de atac. Dispoziții privind asigurarea unei practici judiciare unitare.Proceduri speciale. Executarea silită. Procesul civil internațional.*. Ediția a II-a, revăzută și adăugită ed. București: Universul Juridic.

C. Chainais, F. F. L. M. S. G., 2020. *Procedure civile, 35e edition.* Paris: Dalloz.

[8] Transformation into law, with modifications, of Decree-Law no. 35, which contains urgent provisions within the Action Plan for economic, social and territorial development. Government Delegation for the amendment of the Code of Civil Procedure on Cassation and Arbitration Procedures as well as for the organic reform of the discipline of insolvency proceedings, published in Gazzetta Ufficiale della Republica Italiana, First Part, No. 111 of May 14, 2005, available athttps://www.gazzettaufficiale.it/eli/gu/2005/05/14/111/so/91/sg/pdf.

[9] Ibidem.

Fiorucci, F., 2009. *I provedimenti d'urgenza ex. art 700 C.P.C. "Seconda edizione aggiornata alla legge di riforma del processo civile 18 giungo 2009.* Roma: Giuffre Editore.

C. Roșu, 2023, *Drept procesual civil, Partea Specială.* Ediția a 12 ed. București: C.H. Beck.

Gh. Piperea, C. Antonache, P. Piperea, A.Dimitriu, I. Sorescu, M. Piperea, A. Rățoi, 2019, *Codul de procedură civilă, Comentarii și explicații,* Editura C. H. Beck, București.

L. Paolo Comoglio, C. C. B. R. V., 2014. *Commentario del Codice di Procedura Civile.* Torino: Wolters Kluwer Italia.

Brandolini, E., 2008. *700 C.P.C Strategie Processuali Ed Ambiti Applicativi,* Cedam.

Legislation:

Law no. 134/2010 on the Code of Civil Procedure was published in the Official Gazette of Romania, Part I, no. 485 of July 15, 2010, republished in the Official Gazette of Romania, Part I, no. 545 of August 3, 2012 and republished in the Official Gazette of Romania, Part I no. 247 of April 10, 2015.

ECHR Decision of 15 October 2009, Micallef v. Malta

Web sources:
www.lege5.ro.
www.iusetnorma.it
www.gazzettaufficiale.it
www.btstudiolegale.it