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- PhD FINAL THESIS -

THE PARTIES OF THE CIVIL LAWSUIT

(Abstract)

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We have selected this subject for the fact that parties are "characters" unleashing and maintaining the trial, their definition and explanations instigating a series of controversy in the judicial literature. So far we were forced to express an opinion, both by adhering at one of the analyzed thesis and expressing a personal point of view, hoping that it gave personality/ distinction to this final thesis and also legitimates the work we put into it.

We have been forced to take into account the fact that we are in a turning point of judicial regulation, having a Code of Civil Procedure (who suffered various transformations) in force and a New Code of Civil Procedure waiting for the law in order to take effect and, close to the procedural legislation, a New Civil Code, in force from the 1st of October 2011. This legislative feature existing at the moment of elaborating the present final thesis is reflected in various comparisons between the judicial regulations in force and those of the New Code of Civil Procedure, also when emphasizing the stipulations taken over from the New Code of Civil Procedure and also when criticizing some regulations stipulated in the new procedural legislation which we have considered proper.

All the above mentioned features are to be followed in the present abstract.

We have organized to aproach the subject into six chapters, divided into sections and these sections in paragraphs.

Therefore, in the first section of the first Chapter of our thesis, dedicated to the concept of parties in the lawsuit and to the conditions requested in order to be a party, we have pursued that, starting from the structure of the lawsuit, to specify parties and third parties position reported to it. Starting from this first title, even before approaching the controversy of the party notion, we had to stand by the relation between the civil material rights plan and the one of the procedural rights, and also by the question whether the Court is or is not a party of the lawsuit.

Upon the first question we have disowned the support of some authors, whom did not prevail in the juridical literature, in the sense that the field of the procedural civil law reports represents the sanctioning field of the substantial reports, showing that inside the playful space of relations/relationships of civil material rights where the playful holders assert themselves as owners of rights and obligations, sometimes appear conflicting attitudes, claims, are reported violations of the subjective rights, and so, in order to defend the violated subjective rights and promote the claims, the holders address to the specialized institutes of the State, able and called out to apply the provisions of material laws, if it is the case, by force of the State authority. Thus, together with the plan of civil reports of material right, takes shape the plan of procedural rights reports; between those two plans

sometimes there are some estates of interference and of reciprocal influence, but not of dependence.

We have shown that we must take into account the fact that not always the civil lawsuit is caused by a conflict inside the material/ substantial right area, as well, the amicable divorce or the apportionment by agreement. As regarding the right to call on justice, we have emphasized that this is part of the civil capacity of each human being and that this right may be activated whenever this may be justified by an interest referred to the obligations in the area of the rapports of civil material/substantial rights.

We have mentioned that everything is being "build" upon the foundation of the conflict aroused in the area of the material right, whom by "displacement" in the area of procedural law transforms into disputed issue, the leaders being nominated litigants, also said those participants at the trial who claim judicial aspirations to the contrary of contentious proceedings.

As reported to the issue of the judge's status in the civil lawsuit, we have joined to the opinion that he cannot be a party of the lawsuit, but, as a main character in the structure of the civil trial, between the subjective elements of its content, he has the procedural rights, obligations and duties, on the foreground being the right of ruling the judment of the trial. The judge is the main feature in the civil trial, alongside being the prosecutor and, in some specific phase of the trial, the bailiff. Thus, we concluded that the plaintiff and defendant are the main parties of the process, and the court is "essential element" of achieving the judicial activity.

Tackling the issue of the content and of the definition of the parties concept, the first finding was that inside the legislation there is no definition of the party, only inside the Article 41, called "The Parties" contained in Title I of the Second Book of the Civil Procedure Code, the same reference being part of article 55 of The New Code of Civil Procedure, although we have appreciated as being useful and appropriate the insertion of a definition of the civil law party in the new procedural law. Toward this lack also maintained in the new regulation, we have analyzed the definitions offered by the juridical literature, all being different from one author to another, older or newer. The "border" dividing the definitions offered by the judicial doctrine is that when defining the notion of "party" is being taken into account the position regarding the rapport with the material/substantial right or the pretended infringed interests or if the trial aspect must be seen into, seeing that the situation of the judicial litigious rapport between parts is being established by judicial proceedings. As far as we are concerned we agree with the thesis that obtaining the status of a civil lawsuit party cannot be conditioned by checking whether that person is the holder of a right or of an obligation in the judicial rapport of material/substantial right committed to judgment.

Using opinions expressed both in French and Italian juridical literature we have enriched the opinion that we agreed with, in the purpose of the procedural character of the notion of a "party". We have also insisted on the interest upon determining the notion of a "party", which is not only pure theoretical, but it

presents a great practical importance that, for example, by the fact that the decision is to be applied only in front of the participating parties but also when interfere authority exceptions regarding “res judicata” or “litis pendens”. We wished to emphasize that the whole unfolding of the civil trial is settled by norms and rules that ensure the protection and exploitation of the legitimate rights and interests of litigant parts, always having a contradictory position, in the context of which the applicant sustains its claims against the defendant who acts by defending himself against them, an exception being the situation when the defendant leaves behind the defensive attitude, claiming new rights against the plaintiff on the counterclaim and the both sides acquire the status of defendant and plaintiff („judicium duplex”). To outline the distinction between parties and third parties we have said that the parties are usually holding the relations of material on which "wraps" the report of procedural law, and third parties (penitus extranei) are persons who are not related to procedural report and will not refer the decision to be given, unless they will intervene in the process and thus will acquire the quality of parties.

We have withhold from the juridical literature the idea that, sometimes at first sight some persons are considered third parties, even though they are parties o the civil lawsuit as they are represented in the trial and take advantage of the presumption of tacit mandate of representation, such as spouses or joined co-debtors.

We have also aimed to note the fact that the initial demarcation between parties and the third parties is being modified during the civil trial and we have kept as an example the decease of the party when its position is taken by the heirs or the conveyance of litigious rights when the assignee acquires the quality of part in the trial.

One of the problems we considered it would be better to insist is that of the conditions requested in order to be part of the civil trial; regarding this aspect, in the juridical literature there have been expressed several opinions, maybe determined by the fact that the legislation emphasizes only one feature, that of procedural capacity, the other ones being the creation of jurisprudence and of juridical literature. We have also noted the fact that the analysis of the conditions to be followed in order to be part in a civil trial must be reported to the conditions requested in order to exercise the civil action because, for bringing in the civil action, the individual or the legal entity must be able to become a party of the lawsuit.

We wished to emphasize the fact that, by the time the fist Romanian Code of Civil Procedure (1866) has been issued, the first conception regarding the conditions of bringing in the civil action and of acquiring the status of the party in the lawsuit has been drawn up, the request must be analyzed as a matter of fact, must be consolidated upon a right and the person whom enunciates it must have the legal capacity.

We have pointed out that now, even though the expressed opinions from the juridical literature are multivarious, they all point out the same conditions in

order to be a civil part, or to exercise the civil action, the procedural capacity of usage, the procedural status and the justified alleged right. Developing this subject we have insisted upon the question whether asserting a right in the lawsuit represents only a condition to promote the civil action and a request of participation of third parties or also in order to acquire the status of a party. As the subject would return in one of our further chapters, at this moment we have summed up to affirm that the thesis of the asserted right was based upon the legal situation from the mentioned period, stating that the cumulative accomplishment of the conditions imposed in order to be part of the trial represents the *sine qua non* condition in order to analyze the civil disputed issues' foundation and the evidence for accomplishing one or some of these conditions is to be administrated by the instance during the lawsuit, following that, eventually, to ascertain the lack of the procedural status of one of the litigant parties.

Returning to our theme, we have further reported that as far as we are concerned, we appreciate the juridical procedural capacity as a part of the civil judicial capacity which represents the ability of the individual or legal entity to assume rights and procedural duties, exercising these rights and accomplishing the duties, in other words it is all about the ability of some persons to become parties in the trial. At the same time we have emphasized that this stipulation necessary for being a party of the trial is regulated by Article 41 of the Civil Procedure Code and repeated at article 55 of the New Civil Procedure Code; it can't be estranged from its holder, cannot be abnegated, cannot be part of transactions, cannot be restricted, excepting purposefully cases and limited provisioned by law, having castigation or protection character of some specific categories of persons.

It became obvious also to remember that persons without the exercise of their rights cannot be part of a trial without being represented, assisted or authorized, this stipulation being part of the New Civil Procedure Code, precisely at Article 42. Seeing that the law did not define the capacity of usage of the legal entities we noticed that the juridical literature did that in respect to the procedural capacity of the individuals and at their judicial features: legality, inalienability, intangibility and specialty, which I have explained. We appreciate that, from our thesis' subject point of view the feature of specialty is the most important, seen that this is the one making the difference between the capacity of usage of the individual and the same capacity of the legal entity, in relation to the acts that they may accomplish. At the same time we have emphasized that legal entities have a capacity of application different from one another, the similitude being only exceptional. In the juridical literature it often has been tried to compare the period with restricted capacity of the legal entity with the period from the individuals' existence when it is applied the adagio „infans conceptus"; the comparison is tempting and may lead to the identification of some resembling points, but we did not accept it because the nature of acquired rights of this period is different. The legal entity stops having self being by merging, dividing and dissolution, at the precise moment when it stops its capacity of usage. The fact that in some paper works it is being mentioned the "residual capacity", we

have emphasized that we can talk about this, for example, from the moment the dissolution of a legal entity is being resolute and until the completion of liquidation, when its capacity of usage is limited to the necessary documents for the liquidation process and when, we agree, may be called "residual" thanks to its content.

Approaching the theme of exercise capacity of the legal entity we had to take into account the several opinions expressed in the juridical literature and choose one of them. For a clear assimilation of the terms, we have shown that in the comparative law for the capacity of usage it is expressed by the synonym "the capacity of being a party of the trial" and for the capacity of the exercise "the capacity of standing in the trial".

Although the Civil Procedure Code provides no civil penalty for the lack of procedural capacity of usage, we found out that its absence leads to the dismissal of the action for having no legal grounds as the person/legal entity does not have the right to use a specific civil right. We have shown that the lack of procedural capacity of usage can be invoked at any stage of civil proceedings by any party, by the prosecutor and the court on its own, thus being sanctioned by absolute nullity, with the consequence of the procedural act which are void under these conditions. It should be noted that the New Code of Civil Procedure expressly establishes the nullity of procedural solution achieved by the one without the capacity of usage.

As compared, the procedural actions and pleadings accomplished by a person which misses the procedural capacity of exercise are subject to cancellation and can be ratified. According to article 161 of the Civil Procedure Code in force, if not ratified, the resolvable documents will be canceled, this procedure being taken over art 56, paragraph (5) of the New Civil Procedure Code. We dared to ask ourselves whether is permitted the cancellation of the non ratified documents in case of a legal entity where they must have been ratified by the authority of the legal entity who has the capacity of application but not the procedural capacity of exercise. As well as the lack of the exercise capacity hits by nullity any civil action in the same manner the lack of the procedural exercise hits by nullity any procedural action. It may be noted that the lack of procedural capacity to exercise of the parties is checked by default, by the presiding judge prior to its registration receipt before the court.

As regarding the procedural capacity, we have joined the definition offered by the specific juridical literature and according to it, this would be the legitimacy for a person to attend the trial, thanks to his feature, or, otherwise, the legitimacy of being the titleholder of the right or obligation decided under the provisions of the law. Examining the definitions given to the procedural status and the opinions resulted from their synthesis, some of them have to be reminded. In this regard, at first, opinions according to which this procedural status must correspond to the quality of rights' representative and we have emphasized that this thesis is to be found in the French juridical literature. At the same time, we have also quoted from the Italian juridical literature authors not sustaining this thesis but who sustain that the status of a party is achieved by leaving aside any mention of the

substantial right, through the simple fact that we face an exclusively procedural situation.

In the our juridical Romanian literature, dominating through the force of reasons, leads the opinion that through the procedural legitimation, both active and passive, comes into the applicant's responsibility whom during his request of call on justice must expose the facts and the grounds of the reasons substantiating the right to bring in justice the defendant, with the mention that justifying the active procedural quality does not enforce the existence of a subjective right, a result of a juridical rapport of substantial/material right establishment, because such a condition not provisioned by the law would lead to the restraint of the procedural legitimation concept's content. Analogue, the procedural passive legitimation does not enforce the existence of any material civil law. Finally, we have underlined the opinion we have agreed with, that conditioning the parts of a trial by identifying them with the subjects of the judged report, would contradict the constitutional right of the free access in justice. Recalling the extraordinary procedural legitimation we refereed to the prosecutor, creditor and guarantor, but also to some authorities, and to those receiving the tacit assumption of representation.

When we took care of transmitting the procedural staatus we took into consideration that the ways of this transmission may be legal or conventional, whetever the passive or active status, as an aspect underlined by some authors, we have also developed the matter of procedural status reversion as an effect of the counterclaim, underlining that, in fact, it is not a reversion but a doubling effect, the plaintiff from the original request becomes defendant in the counterclaim, and the defendant from the original request becomes plaintiff in the counterclaim.

We have appreciated the fact that the New Civil Procedure Code finished a theoretical debate by adopting inside this matter the solution we have adhered to, that the "plaintiff is not permitted to fill in a counterclaim at the defendant's original counterclaim." As regarding the matter of the lack of procedural quality we permitted to plead for a lex ferenda proposal, for which we have developed grounds to the meaning of procedural solution in order to permit the replacement of the person missed by the procedural stauts with a person owning this status. But, our proposal has not been withheld by the New Code of Civil Procedure, being only applicable in the context of showing the titleholder's right. Writing about procedural status' justification, we have emphasized a formula from the juridical literature that in case of an action brought by a person with no quality, the right may exist, while in case of a groundless action, the right becomes inexistent.

Inside Section II of the first Chapter we have developed the theme about co participation of parties in the lawsuit and, in order to avoid some confusions still continue existing nowadays, we have outlined the separation criterions of procedural co-participation and of simple situation when there are more plaintiffs or defendants, explaining the condition of being inside the alternative appearance of litis consortium. We wanted to present the regulation of this institution also from the perspectives of the New Code of Civil Procedure, similar to the regulation

of the code in force remarking that art. 58 added, toward its correspondent (art. 47) the fact that between the parties of the consortium must be in a close relationship, by this bringing nearer the conditions of co-participation and those of different disputed issues.

About forms of co-participation we have tried to realize an image by presenting the situation most met in our practice. If we take into account the position of the participant parties, we have accepted the opinion from the juridical literature, according to which we have an "active" litis consortium when more plaintiffs sue a single defendant or "passive" when more defendants sue one single plaintiff and "mixed" when more defendants sue more plaintiffs, form of litis consortium that we have named "reciprocal" because it creates the image of some personal reciprocal offensive which interfere with the litis consortium named "counterclaim" when more defendants compose together a "counterclaim"

In connection to the procedural phase where the litis consortium is constituted and regarding the differences between eventual and alternative litis consortium, we have permitted to argue our own opinion, contradictory with the juridical literature, that it does not exist an estate of contingency but one of suspensive condition against the multitude of requests, having only alternative litis consortium.

We have reminded the fact that regarding the procedure documents exercised only by a part of the co participants but who are serving to all defendants or plaintiffs, in the judicial practice was adopted the solution, sustained by some authors, that once with the civil procedure documents we can also understand the requests for exercising some appeals, idea that we agree with, adding that the absolute exceptions appealed by a co-participant may be useful also for the others, as well as for the passive solidarity or challenging the judge, if the challenge request has been admitted it is useful for everyone, as we have shown it is possible that a judge may be challenged against a participant but "good" for others.

We have pointed out the situation of accessorial intervening party to be attached to one of the participants or all participants having the same status. Related to this aspect we have left aside the opinion of the foreign juridical literature embraced by some imposing Romanian authors, in the meaning that the accessorial intervenient may abandon the one who has sustained and join his enemy, for the reason invoked by us that although juridical speaking this may be possible, morally speaking this means "betrayal" of explicit shown attitudes towards one of the participants and sustaining exactly his enemy, maybe with the same talent and passion used to sustain the first one. We have said, using a rough tone, that there are enough examples of immorality in the Romanian judicial practice in order to make place for this example of accepted betrayal. The motivation that, in this case, it is about a new request of accessorial intervening party towards the one the first request was made; it is precise under technical and juridical rapport and has the same precision as covering an immorality. We held a rule underlined in the literature that an instance cannot pass to the other step of the trial until the exhaustion of all the other steps for all co-participants

We also wanted to refer to some issues not having such a clear and precise opinion in the juridical literature or are having solution whom we are reserved. A first matter refers to the question whether one of the participants may ask to another participant having the same status in the lawsuit, to witness. In this issue, the opinion prevailing in the literature from abroad, supported by some Romanian authors, is that a witness can be co-litigant, but only on the personal actions of another related part and not on common facts or on his own. We do not assimilate this view, since it is based on an extensive interpretation of Article 189 of the Code of Civil Procedure in effect, taken over the art. 309 of the New Civil Procedure Code, that distinguished professor Ion Deleanu states that this law does not prohibit a co-participant to be a witness. But, we agree, this text of the law as it is formulated must be interpreted ad literam and, for this reason, the mentioned thesis has no support.

Another similar issue involving the same discussion from above is whether one participant can request the judge to examine his partner. Among authors whom have analyzed the institution of co-participation, Professor Ion Deleanu has a negative opinion on this matter, but his arguments did not convince us. It is true that if the recognition of the "interrogated" one will be obtained, the situation could be compared with the deposition of the one who proved the interrogatory, but we must see that reason of the interrogatory proof is not only the one leading to recognition but, in general, to obtain some useful information for the absolution of the case, even though it sometimes leads to obtain confessions. In that question that we discuss we must take into account the fact that testimony, being a personal act may emanate from any of the co-participants, but its effects will not be extended to the others even if they refer to something in common, because between co-participants the representation is not presumed.

As regarded the possibility of one co participant to reveal a document which only concerns himself, we have affirmatively pointed out under the procedural independence of co-participants and on the fact that the request he makes does not involve the others, but we added that it may be rejected by the Court unless the person who made it does not prove that it is the common interest of co-participants.

As far as concerns the ceasing of the necessary litis consortium, besides the hypothesis of ceasing it by court order, irrevocable and enforceable, where there are included all the co-participants, the literature has advanced the hypothesis of willingly giving up one or more of the co-participants' right to trial, if the right is divisible, but we have not accepted this hypothesis because it is not possible as it leads to the impossibility of the other co-participants to complete the cause in an unitary way.

In the third Section of the First Chapter we have developed the theme of rights and obligations of the parties. In the introduction to this chapter, we noted that participants in the trial must meet the requirements of procedural capacity, interest and legal standing and can be parties by ownership, or by civil action or promoting voluntary intervention, or by designation, as a defendant or forced intervening party, thus becoming subjects of the civil trial, to which will cover the

judgment given at the end of the process; from this will take advantage of all rights and obligations enforced and recognized by law.

Regardless the person is entitled to be "original", that means that has acquired this status of a party of a lawsuit by introducing the civil action, or designated by the request of some other person, or became a party by intervening in a process attended by other original persons, this person will benefit, equally, of the rights and the duties provided by law.

Among these rights and obligations, there are some that we can call "general" and refers to all persons having the quality of part in the trial and others that refer only to some of the parties, depending on their procedural status, and therefore, we referred firstly to the general rights and obligations, and then to the plaintiffs' and to the defendant's rights and obligations.

We wanted to emphasize that always we have referred to rights and obligations, for the fact that they are included in the civil capacity of individuals and also because they are complementarily facing, their separation being able to be legitimately done only in theory. If it would have been the case to lay down all the rights and obligations of the parties this would have meant, as a distinguished author expresses, "involving all magisterial proceedings."

Thus, from the possible ways of organizing the exposure of this subject we have chosen to present, first, the rights of a general nature, which we allowed to call "fundamental rights" that refers to all parts of the process and reverberates on all obligations and only then we would refer to the specific rights of certain categories of parties (plaintiffs, defendants).

Still before that, we referred to two principles of maximum generality dominating "the presence of" civil parties in the whole trial, namely: principle of correct proportionality and good faith. We insisted on emphasizing that proportionality is co substantial with equity and we say, equity is used to correct the oscillations. If we look at this principle of the legislative activity, the correct proportion, as we call it, this aims to achieve a fair balance between centrifugal tendencies of domestic regulations and centripetal tendencies of the regulations of the supra-states structures, in our case inside the European Community. Still, if we look for the correct principle of judicial activity, we will notice that its aim is to enforce the balance between the responsibilities or rights of the judge in leading and solving the trial and the imposed limits to those rights by establishing a scheme of exercising them. Whenever the principle of the proportionality is not respected, this would lead to abusively exercising some rights, at their diversion from the reason they were created by law. The principle of the proportionality is interfering, or using other words, "is met" in all phases of the trial with the principle of good faith, another principle of great generality, which refers to all parties and has echo over all their rights and obligations.

We permit ourselves to note that the legislator does not allow to formulate a definition of good faith, but only reports it to the requirements to exercise the rights recognized by law and also that the legislator refers only to rights while it was natural to take also into account obligations. Related to this appears the abuse,

which in our opinion, is an unlawful act, which has a subjective component, consisting of the mental attitude of the part that commits (duplicity, deceit, disloyalty) and an objective component, which expresses the right diversion from the purpose for which the law recognized as the shaping of some requests in order to cause delay in the trial.

Related to fundamental rights regarding free access to justice and to an effective remedy, we felt compelled to also refer to preserving the right to promote an appeal against the decisions promoted in instance, especially since in the field of legal procedural rules appeared the words "first and last resort" by Law no. 202/2010, this could suggest the elimination of all appeals, at least of the reforming ones, which seems that would contravene the above exposed principle. We appreciated that the right to free access to justice has the same legal nature of a subjective right, or, in other words, a right-claim versus the State, who signed joining to the European Convention.

We have emphasized that it is difficult to determine the fairness of a trial, and, in this respect, we referred to rules established of the case-law of the European Court, that, first of all, the assessment of the procedure developed in the whole process, and secondly, appreciation of the case depending on the specific circumstances. In our opinion, the right to a fair trial is a synthesis right, resulting from the sum of procedural rights recognized and guaranteed to individuals.

We have mentioned that in our domestic legislation cannot be found a specific regulation of the right of equal arms but we adhere to the views of some authors arguing that equality of parties in the procedural means is one of the forms of manifestation of the equal rights of citizens dedicated in art. 16 of the Constitution.

Concerning the right of defense we found that the juridical literature has often equated with the right of contradiction in the trial, but we have not adhered to this assimilation because contradiction is only one component of the right to defense can reduce not only contradictory. We wanted to mention that, as noted in the Court of Justice of the European Community, the right to defense is considered a prerequisite to a fair trial; respecting the rights of defense must be ensured in all proceedings initiated against a person who may cause injury.

In connection with our subject is the adversarial principle which is one of the forms of achieving the right to defense and also the principle of equality, which is known as a right to know, to discuss and to debate in the civil process and also is a symbol of bilateral character of contentious proceedings. At Community level, the Court of Justice of the European Community noted that the court must rely on its own violation of substantial forms, including the parties' right to showing comments.

Author Ihering stated that the slowness of justice is itself an injustice which is why we are showing that the European shaped concept, according to which restoration of law in its entirely must be realized within a reasonable time, as a condition of effectiveness and credibility of the judiciary system. Therefore, we

have supported that the court must preserve a balance between the quality and the speed of the judicial process.

The European Convention devoted the right to a reasonable period of time in article 6 and Art. 13, being integrated into what we call "jus communis"; in relation to the phrase "reasonable time" it has been proposed its explication by the formula "optimal and predictable term" but which we say, is as misty, having at her turn, need for interpretation. Also, rightly it has been pointed out that the distance between those who do justice and those for whom justice is done has been erroneously interpreted as being an appearance of impartiality. Yes, we agree, it is better to just say "apparently" and not a guarantee of impartiality.

As far as concerns the right of the publicity of the debates, we concluded that the publicity of the debates and the delivery of the judgment constitute the essential democratic form of justice transparency.

In terms of the general right to use the mother tongue in justice, we mentioned that the reporting provisions of art. 13 of the Romanian Constitution in Article 142 of the Code of Procedure in force, could lead to the view that there is a collision between these regulations, but this would be a conflicting opinion, because in reality it is about a relationship between general and particular, the general meaning that justice in Romania is conducted in Romanian language and the particular that, under the prescribed circumstances and manners, parties can use for communication their mother tongue.

Besides the common rights of the parties above mentioned, prestigious authors also add the right of addressing requests to the court or to conduct criminal proceedings, through a representative, but a common obligation of the parties, that we have also treated, is the obligation to pursue development and complete the process, obligation differently present in the Romanian legal literature. We have expressed the opinion that this obligation to "pursue" the part can be understood as an obligation of perseverance, for the presence of parties in civil proceedings is justified by the existence of their interest. This interest is related to the claims of the part, and they will or will not be recognized by final judicial decision and, in this light, is also the interest and obligation to pursue and persist the development of the process to reach final decision. In the specialized juridical Romanian literature we found professor Ion Deleanu's statement, that we agree with, in the extent that the parties of the trial do not have a "sovereign freedom" as the Romanian procedural system brings some limitations to the freedom of provision of the parties, by the active role of the court who may object to some disposition documents available; French doctrine is even talking about a kind of "trusteeship", which exercised in a reasonable way does not bother the liberalism of the parties, but even protects it, putting it away from any specific consequences. We conclude that the obligations of the parties are designed in order to ensure discipline to the civil trial.

Inside Chapter II we have shown the matter of conditions to be fulfilled by a person in order to be a party of the trial, the matter of having capacity is recognized by all authors and underlined in the legislation and also having the

procedural status; we have chosen the thesis that it is not necessary the existence of a right or pretend legitimate interest infringed, arriving to discuss about the matter of interest, generally not regulated by law, but fixed as a condition in order to promote some actions, an intervention or some remedy. As the central axis of the reasoning we stopped at the statement of Professor Ioan Les affirming that the procedural activity cannot be initiated and maintained without the justification of an interest and, at the same time, we have appreciated the opinion of some authors regarding the fact that interest interferes with the procedural status. In the same connection we have also pointed out the fact that, reported to the provisions of article 109 of the Code of Civil procedure, the provisions of art. 30, paragraph (1) of the New Code of Civil procedure are more comprehensive, because they are not appointing only a person claiming for a right, but also the situation when that person is looking for taking some conservative measures, keeping a state of fact or ensuring some evidences.

As regarding conditions to be accomplished by the interest asserted in justice, we have stated that it must "be", namely to be "born and actual" this utterance found out at most of the authors we have appreciated as not being too much inspired, because the interest could not be actual and unborn at the same time. Finally, we have also approached an aspect slightly approached by the authors, that of the temporality of the interest.

Along Chapter III regarding Representation, authorization and assistance of the parties, taking a wording of authors Emil Poenaru and Cristinel Murzea from their monography on the representation in the private law, we have accepted an "image" of maximum synthesis of the institution in the extent that representation suggests the idea of an absent though considered as being present, underlining that everything that happens by representation is the dissociation between the (represented) person who stands the consequences of the finished action and (attorney) the person who finishes the action. At the same time, we have emphasized that the technical-juridical procedure of representation keeps its identity, no matter it takes place related to representative' execution of some civil, procedural or commercial actions. The moment the representation takes place in the lawsuit, it achieves specific features which individualize it and offers a specific aspect, but even by its essential features shows the affiliation to the big family of civil representation. In front of the issued thesis by the juridical literature of representation, we remembered the thesis of substitution of the representative and that of limitation of the effects towards the parts of the representation contract or of the representation theory as fiction. As far as we are concerned, we have supported that the mechanism of representation supposes that the representative even though issues the document in his own name, it wields thanks to which interferes in another ones area. He expresses his will on the grounds of a mandatory power, that's just why he must correspond to the exercise of a subjective right of the represented one.

Also we have pointed out on some features of ceasing a judicial mandate, because it continues until it retirement by his heirs or by the official of the one who

became not capable. To the image's completion we have broached the theme of the legal representation of subjects in the lawsuit frequently met at individuals without capacity of exercise and at legal entities, with the mention that in the former chapters we have presented the procedural capacity of usage and exercise.

Up in the followings, we have presented the conventional representation of the parts in the lawsuit, stating that the institution is both regulated by Civil Code Procedure (art. 67, paragraph 1) and by The New Code of Civil Procedure (art. 79, paragraph 1) who allow parts to defend themselves but also to ask for the services of a defender. We have also brought elements of comparative law in this matter, showing the regulation of this institution in the law of some European countries.

At the same time we have appreciated that we must endorse the proposal for lex ferenda expressed by Professor Ioan Les in the extent of introducing in the Romanian law of representations' compulsoriness by lawyer in the trials taking place in front of superior courts, that is The High Court of Cassation and Justice and The court of Appeal, in that manner being protected both defending right and the principles' quickness of solving cases. We have mentioned that, even though the representation is permitted, generally, in all the cases, however this it not permitted in the case of calling in front of the judge in divorce trials but even though in those cases has been found an escape of interrogating by proxy, according to article 233 of the Code of Civil procedure in force, correspondent for article 375 of the New Code of Civil procedure. We have underlined the fact that even though the law does not enforce special conditions to the representative, according to article 68 of the Code of Civil procedure in force, correspondent for article 82 of the New Code of Civil procedure, if this one is not a lawyer, he will not be permitted to set conclusions otherwise than by a lawyer and we have been tempted to look to this legal provision as a devoting way of the lawyers to exclusively set conclusions on a trial for the benefit of their earnings and increasing the expenses with a lawsuit for parties. In order to clarify the terms of this field, we have shown that being present does not imply also the representation of the part in Court, on the other hand, the representation implies being present.

Relating to the distinction expressed by juridical literature between representing in practicing and representing in court or „ad litem" we have maintained that the ad litem mandate could only have as source the convention.

In order to clarify the institution of judicial representation we insisted on separating it from other close institutions such as the mandate without participation, subrogation, and business administration.

The fact that article 69, paragraph 2 of the Civil Procedure Code in force, correspondent for article 82 of the New Code of Civil procedure, shows that the lawyer who assisted one of the parties in the judgment of the case, with no mandate, is able to take any actions subject to a term and which would be lost by non exercising them on time, in the juridical literature has been explained by several authors through the theory of the apparently or tacit mandate, but as far as we are concerned we did not accept this explanation due to the fact that the apparently or tacit mandate exists under this shape, apparently or tacit, but in our

assumption the law clearly foresees that the lawyer may act with no mandate, and more, it cant be a tacit mandate because there must exist at least the accordance of will between the attorney and the one who gives that right, as well as there is impossible to exist an apparently mandate without the same accord of will. So, leaving behind the theory of the apparently or tacit mandate, we have emphasized that it is extremely difficult to apply the juridical ground of lawyer's right to perform procedural actions for the party he assists without having a mandate and we permitted ourselves to appreciate as unnatural this „bonus" consented by the legislator for the ones who exercise the profession of lawyer.

Another matter arising disputes in the juridical literature was that of the juridical nature of the judicial representation contract. About this subject, by reporting it to the provisions of article 72 of the Civil Procedure Code in force, correspondent for article 84 of the New Code of Civil procedure, as far as we are concerned, we have also wondered, as many authors did, whether the convention for representation between client and lawyer is or is not a version of the conventional mandate, as it contains both elements of the contract mandate and of agreement and it also has been sustained that in fact this is all about a private enterprise contract or as previously been reminded opinions from the French literature in the extent that is all about a contract of public services, accomplished by an auxiliary of the law. As far as we are concerned, we have emphasized that the attempt of various authors to "press" this contract inside the structure of one of the named contracts is not efficient, because it cannot take the shape of a named contract, continuing to remain in the area of the contracts called "not named". On the other hand, we think, there are no reasons to dispute the texts of the laws who name it mandate, but, we want to emphasize that this is about a judicial mandate. About this special mandate we cannot suppose that was given under the provisions of article 67 of the Civil Procedure Code in force, correspondent for article 85 of the New Code of Civil procedure or that is part of a general mandate. About the signature from the mandate given to the lawyer, which must be legalized by the public notary, we permitted to appreciate that, as a matter of fact, it is not about a signatures' legalization, but about an authentic document, only that the mandate of representation may also be orally given in front of the court and will be recorded by the end of the session.

The civil penalty for the missing or probating the mandate represent the cancellation of the request and the exception by whom it is discharged is not a dilatory exception, as sustained by some of the authors; we say that it is a matter exception affecting the matter activity of the Court, being sanctioned with nullity, under the provisions of art. 106 Code of Civil Procedure in force, also said, the request cancellation of the calling in justice also attracts inefficiency of the following procedural documents.

In Chapter IV we approached the legal institution of third parties in the trial, born under the sign of prestige and olden times offered by Roman law and how it was recovered in the French law and other European countries, referring to the usefulness of this institution and to its regulation method in our legislation,

with specifications related both to the existing code and the New Code of Civil Procedure. In this context we have found it "difficult to understand" some so-called developments or judged as "modifications" as, for example, the provision of art. 49 paragraph 1 of Civil Procedure Code in force in the sense *that "anyone interested may intervene in a cause that is following between other people"* was replaced by the provisions of art. 60 paragraph 1 *"Whoever is interested may intervene in a process judging between the original parties."* So, it was substituted "reason" with "process" and "other persons" with "original parties" coming to have a change only in "the way of saying the same thing", which allows us to say that there is neither evolution nor "reform" but a way to just mime them.

In the context of presenting forms of participation of third parties in the trial, we noted that in our literature was expressed an opinion, left isolated, about two special forms of intervention within the process, respectively, calling in justice the person guaranteed by guarantor defendant and calling in the trial by the debtor defendant some indivisible obligations of the other co-debtors. As for us, we felt that this specific regulation in the Code of Civil Procedure would not be possible because the invented models do not embrace the demand of the interventions' structure request.

The covering regulation available to all forms of intervention is based in article 60 of the New Code of Civil Procedure which took over the article 49 of the Code in force. We appreciated that the way the first paragraph of Article 49 is formulated, which deletes the border between litigants and foreign individuals process is flawed because it suggests wide opening of the door for third parties to enter the process, but in this manner is made an abstraction of the conditions of intrusion inside the trial. More objectionable, we say, are paragraphs (2) and (3) of Article 60 and 49, which define the two forms of intervention, which are not separated by the interest but by the right claimed that in the first situation (self-interest intervention) belongs to third parties and in the second situation (intervention in the interests of another) belongs to the party in whose favor the intervention was made. We have criticized these two paragraphs also for the fact that they contain too general regulations though it would have to be remembered voluntary and optional character for both forms and also the delimitation of the field that makes possible the main intervention.

In front of the lack of one definition for the term of legislator for the notion of original parties, we felt that its meaning is "parties between procedures arose" or "parts between the procedure started and that this is pending". This specification / requirement applies to both forms of intervention and we have also appreciated that when the action is brought within a process having as object a disjoint request, we felt that this will be applied the regime of "original" demand so that the parties will be parts of the disjoint demand.

In this regard, the New Code of Civil Procedure replaces the terms used as it follows: "the intervention of its own" with "primary intervention" and "intervention in the interest of a party" with "incidental interference". As regarded the first situation, in the juridical literature has been stated the expression of intervention

used in their own interest, but we used that one of main intervention, that, we defend, can take place also when the third party intervenes in the trial to protect the rights of individuals which by law is entitled to defend from these relationships resulting his own interest, the second form of intervention, the one that Code calls "accessory", also preferred by us. We would also want to add that it should be avoided the opinion that by accessory intervention the intervening party becomes a simple side, as he has a proper interest in participating in the trial, because thanks to his intervention he can avoid further action against him. I appreciated that voluntary action can intervene in the presidential ordinance which shall take into account of the specificity, which brings out the discussion about how to achieve interest. I wanted to point out as an aspect ignored by the juridical literature that the difference between the two forms of intervention clearly aroused in evidence if we look forward on the effects they produce in terms of processes that occurs on them, where the main intervention process changes the structure both in terms of object and process and in the case of accessory subjects and for accessories, the impact is reduced only to the coverage resuming a new topic with the role of adjacent part.

Regarding the possibility of formulating a request for the main intervention also in the court of appeal conditioned by "the agreement of the parties", we argued that there can be no parties of the appeal way because it is not about an incident appeal reason, for which we have proposed the removal of this confusion by specifying that it was originally party of the process reached the stage of appeal. For the accessorial intervention, The New Code opens up wide the door in order to be formulated any time, even in the review procedures, such as those mentioned in Art. 450 (appeal, the appeal for annulment and revision). Also as a purpose of clarification I appreciated that the formula "until the closing of the debate" refers to ground debates, before the closure of the trial.

Regarding the possibility of changing the main intervention request into the accessorial intervention and vice versa we understand to set a limit from the opinion of one distinguished author who has appreciated them as being "interchangeable". We reasoned that the reserve in relation to the characteristics that separates them and, especially, those related to special procedural rules applicable to them, whom we have analyzed in detail.

Analyzing changes inside article 52 paragraph 2 of the Code of Civil Procedure in force by Article 63, paragraph 3 of the New Codes' provisions relating to a review against the decision to reject as inadmissible the intervention, the appeal to be exercised within 5 days of the pronouncement, that communication, we appreciated it as being questionable. Thus, we have noticed that in essence it is allowed the use of interlocutory appeals against non-admission basically of intervention, but not of any appeal, being excluded the review, the appeal for annulment. We have also noticed that the legislature failed to regulate the situation that bears the dispute between the parties during settlement against the rejection of the demand intervention as inadmissible. Our proposal for lex ferenda law is the modification of the criticized law text respectively from article 63 of the

New Code of Civil Procedure, with the purpose that the judge may have the possibility to appreciate and dispose either to suspend the trials' proceedings until solving the appeal, or delaying it. In our opinion, the consequence for the resolution of the previous settlement fund, anterior to solving the petition declared by the voluntary intervening party against the rejection as being inadmissible consists in preventing third parties to become part to the proceedings and, therefore, it will have no standing to appeal the decision settled down between the originally parties. Or, in other words, although the original judge would issue an unlawful decision, it is not expressly provided a way to fix it. As we are concerned, we propose the introduction of a new paragraph to Art. 452, as some authors have opined that would devote active standing appeal, and for the responders injured in the manner shown above.

We approached the limitations on the request of the main intervention and how to handle the main intervention taking place in two procedural moments: basically permission of the application and its prosecution. We joined the thesis that the main action is a civil one, and we truly believe that the parties can accept and even welcome the counterclaim against the claims raised by intervention.

Regarding the appropriate moment to formulate the request for an accessorial intervention, we have noted that the legislator is permissive, because in accordance with Article 62 paragraph (2) of the New Code of Civil Procedure this may be done "even" and "extraordinary counterclaims", which is an amendment to art. 51 of the Code in force which provided the formulating of an intervention in the interest of a party even before the Court of Appeal. Also we could see that when analyzing article 62 paragraph text. (2) of the new Code and by reference to the new regulation of the appeal, must be determined the time that after the appeal, an application for accessory intervention may take action. The same determination, we say, is required also by the determination that it exists or it may exist, both at the appeal for annulment and the review, a time of analyzing the admissibility basically, prior to settlement fund.

Analyzing the text of art. 56 of the Code of Civil Procedure in effect, a correspondent for the art. 66 paragraph. (4) of the New Code of Civil Procedure, we asked what reason allows one party to be defended by the intervening party, but forbids the declaration of an appeal if the original way of appeal is not accomplished also by the original party. Next, we will mention that the question came from the formulation of Article 56 ("even on petition"), was clarified by the text of the New Code which states that accessorial voluntary action occurs and shall be heard and reviewed in processes or appeals for cancellation.

Approaching the institution of forced intervention we have shown that in the matter of the proceedings request of others we are vexed by the powerful force of character to enter the process of the individual who could claim the same rights as the plaintiff, not being allowed to exercise his rights when and how he wants, but still, we accepted the justification of the institution by that together with the current trial is put into "action" also a virtual trial, thus avoiding the delivery of conflicting judgments. Being forced to enter the trial, the third part receives the status of

intervening party on his own name according to art. 58 of the Code in force, or more properly, the status of the applicant, according to art. 69 of the New Code, thus ending the existing controversy in this respect inside the doctrine. We agree however to the opinion of authors Ioan Les and Ion Deleanu, in the extent that the giving up of a part to the notification of the proceedings at the request of another person becomes ineffective if the one introduced in the trial does not show his wish to do so.

Analyzing the guarantee calling as form of the required forced intervention, we want to recall that in the literature, there were views in the extent that New Civil Procedure Code should have expressly regulated the applicability of all legal provisions concerning the form, content and communication demand notification of the proceedings and defense, however, these provisions are not in the new regulations and we say, they were not necessary. Instead, the new regulation has new provisions concerning the settlement of the appeal in two procedural moments: basically permission of the application and its prosecution. It has been unanimously appreciated that the third party called as guarantee, obviously, has all the procedural rights and obligations that also has the guaranteed party. On our part, we support the view according to which although the law does not provide, the third party called to guarantee, has the right to replace all the procedural rights of the party who called him in guarantee. We believe that this substitution may be realized via the indirect action of the one who replaces. Finally, we also have noted that the status of the application of calling the warranty is that of dependency proceedings, against the main claim, so that the judgment pronounced in the main claim has force as “res judicata” also to the guarantor. Although some European legislation provides the unlimited possibility of introducing third parties, we believe it is useful to avoid calling in the guarantee chain, in order to avoid the delay in solving the case. Therefore we consider that the warranty called a second time will have to assert his right to guarantee or indemnification only by means of a separate main action and not by another warranty call. But this would not have sparked discussion in the juridical literature if it had been resolved through legislation in the New Code of Civil Procedure.

Approaching the institution of showing the titleholders’ right, we referred to the article 64 of the Code of Civil Procedure in force, correspondent of Article 74 of the New Code of Civil Procedure, and we noticed that because of the legal regulations’ clarity, fortunately taken without being damaged also by the new Code, the literature gave definitions who overlapped the legislative model. From the procedural point of view, this action belonging to the defendant is being realized by answer at the calling in justice or by separated request, under the provisions of Art. 65, correspondent of art. 75 of the New Code of Civil Procedure, the regulation of The New Code of Civil Procedure introducing the judgment of the request into two procedural phases, the principle admission and the solving of the ground request. In connection with the fundamental phase of solving the request, although the law does not provide, we believe that the demand for showing the holders’ right is required to be communicated to the

applicant, motivated by the fact that one of the possible effects of introducing the third party may be the removal of the defendant, which can be achieved only with the consent of the applicant, without its consent the substitution cannot be realized. The person pointed out as the holder of the right, would take his place becoming defendant; with the consequence of the defendant being excluded from the cause, the same defendant who formulated the request of showing the rights. If the plaintiff agrees and the condition that the "pointed" one recognizes the sustaining of the original defendant is accomplished that means that the party remained in the process as a defendant is the owner of the goods and the owner of the rights exercised over it. So, we would permit to say that if the plaintiff has no reason to refuse giving his consent to reconstitution, on the contrary, he is motivated to do so. Likewise, the third part is able to defend by greeting, showing that he is not the holder of the right judged before the Court, in which situation he will acquire the quality of main intervening.

A new procedural institution is the one of the forced introduction into the cause, by default, of some other persons. It is a creation of the New Code of Civil Procedure regulated by articles 77 and 78, creating two new forms/ways of introducing by the court, third parties into the trial, one compulsory and the other one optional. We noticed the fact that in the juridical literature has been sustained the aptitude of instance to introduce third parties in the trial, of course with the discussion of parties, so article 77 paragraph (2) does not come as a novelty, except the fact when it shows that this is done when the judicial rapport enforces it, the previous proposals referring to situations when the judicial rapport requires it. We sustain that the phrase "when the judicial rapport requires it" is a new and unfortunate formula; it is difficult to imagine when the judicial rapport (we suppose the procedural one) would enforce that. We permit to say that is quite surprising the provision of Art. 77 paragraph (1) of the New Code of Civil Procedure which requires the court to introduce relevant third parties, "even if the parties are against", for example in court procedures, in which case we wonder where has been "lost" the principle of parts' availability in the trial, courts' right to judge and rule decisions about process and the principle of the instances' active part in its limits.

In Chapter V we approached the judicial function of the prosecutor as part of the process and, after a brief historical overview of its evolution and reaching the question of the legal nature of the Public Ministry, we joined the thesis that it is inconceivable the affiliation of the prosecutor's office to the executive power, for the prosecutor's office fulfills an activity complementary to the distribution of justice, that performs a special type of magistracy. In closing this debate we have presented a decision of the Constitutional Court where is underlined that The Public Ministry is part of "the judging authority" and that represents a "special magistracy". Nowadays, Article 90 of the New Code of Civil Procedure, a correspondent for the article 45 of the Code of Civil Procedure in force, regulates the possibility of the prosecutor to participate and draw conclusions in any civil proceedings and in any phase of

these, but has been diminished the right to sue (only for the use of minor child, persons under interdiction and missing persons); it does not persist anymore the interdiction of bringing an action with strictly personal character. At the same time, the prosecutor acquires the complete freedom to exercise his ways of appeal, which is allowing him to carry out the judicial supervision.

Regarding the terms of “main party” and "joined party" that define the prosecutor in the trial, we have shown that they are not the happiest terms, as they can lead to confusions; although they can be also found in other European codes (Belgian), but we have also used them in our work both for a certain ineptness of the language and for the fact that in the juridical literature, there was no judicious proposal for their replacement. We consider that the “royal method” of prosecutors’ activity in the trial is that of bringing in a civil action, on the ground of art. 45 paragraph (1), who allows him “to start” the civil action as it was about an engine, but, beside the hapless term used like description as “civil action” must be wide and fully understood, covering not only the main claim of the proceedings but also demands exerted indirectly, such action or counterclaim. We felt obliged to dwell on the question that if the prosecutor has started proceedings, the holder of the right referred to in the action will be introduced in the trial. We argued that if the holder of the right is a minor child or a prohibited individual, the court will have to call for them a curator. And, if appropriate, the individual introduced in the trial, may waive his right to trial and may enter into transactions. We were surprised that these provisions are not found in the New Code of Civil Procedure.

In the juridical literature dominated the opinion that if the prosecutor withdraws the action, the one who entered the process and for whom the prosecutor started the action, will be in debt to require the trial to be continued. We raised the question about the legal basis which would justify this continuity as long as the action was started having all legal powers conferred to the prosecutor and that the one called has none of these powers. We concluded that the withdrawal of the action by the prosecutor has "cancellation" effect, equivalent to its failure. At the same time we have sustained that, seen the situation when the prosecutor reaches the conclusion that he introduced the actions in a wrong way, it is honorable to withdraw the action than to assist at its rejection. In our analysis we noted that it is difficult to imagine the hypothesis when the motivation of the dismissal of the action brought by the prosecutor is due to some formal mistakes, making it easier to imagine the hypothesis of the wrong appreciation of the legally "starting condition": "when necessary", condition difficult to be followed by the prosecutor and, equally difficult to be proved by the Court, our opinion being that the way the law is formulated leaves the prosecutor to decide whether to intervene or not in promoting the civil action. We think that it is useful to eliminate from the New Code of Civil Procedure the limitation of the prosecutors’ right to bring in the action when referring to a substantially purely personal right, but we appreciate that it is the prosecutor to decide whether is

acceptable or not that, by action, to intrude in exercising some rights which exclude another appreciation than the one of the titleholder.

Tackling the issue of actions promoted by the prosecutor in order to defend the rights of minor child and legal incapable individuals, we are facing a controversy matter, such as prosecutor introducing the action of establishing the parental filiations, in this matter moving away from the majority of the authors and accepting the argumentation of professor Emil Poenaru in the extent that together with the minor's representatives, the prosecutor may appreciate bringing in the procedure of establishing the parental filiations in the name of the minor, even if, or especially if the minor is represented by his mother, also a minor. In agreement with the literature, we found that the prosecutor may dispense the action started by the mother of the child, renunciation who needs the consent of the guardianship authority. We noted that according to the new Code of Civil Procedure - Art. 425, paragraph (3), actions to establish paternity can be brought against the heirs of the so-called father. We found this provision a subject of discussion on several issues that we have supported in extenso. We exposed our point of view in the action of paternity denial, around which faced prestigious authors, we embraced the thesis pleading for the priority of truth, which the prosecutor can defend and introducing the action for the benefit of mothers' husband, of mother or of the biological father or their survivors.

We have mentioned that neither the current law nor the newly adopted does contain a direct and complete provision regarding the position of the prosecutor in the trail when the civil action begins. We pointed out the main view of the legal literature which concluded that the prosecutor, as main party becomes the titleholder of the rights and obligations specific for his procedural role and in the process where he has a specific position that does not affect the equality of the other parties, this specific resulting from the fact that he is not subject to common law relationship which bears significantly on the process. It is useful, we said, that the prosecutor should contact the titleholder of the pretended subjective violated right/interest, for whose benefit he introduces the action, so this, by a renunciation act does not lead that the prosecutors' action become void. We have noted between specific elements, that the prosecutor may submit claims in order to take exception of the judge only for reasons concerning the relationship between judges and other parties. There are not applicable to the prosecutor the provisions related to the lack of defense, or those related to interrogation. He may waive the action, even if the holder of subjective rights insists to continue the trial.

Under an imperative provision of the new procedural law, it will be introduced in the trial, by default, the holder of the subjective right and we have emphasized that this procedural institution cannot be equated with any of the forms of intervention covered by the Code of Civil Procedure because the individual into question is the only titleholder of the right and the introduction allege has its basis in the imperative legislation. Likewise, this matter cannot be compared with the situation of procedural co-participation under the form of active litis consortium, because the prosecutor does not hold subjective civil rights. Paragraph (2) of

Article 45 of the Code of Procedure in force, a correspondent of Article 90 of the New Code of Civil Procedure, expressly enumerates the procedural right that the titleholder of subjective rights could use, that is giving up his right to trial and concluding a transaction. Renunciation at the trial is an irrevocable action and requires the court to close the case, procedural acts made up to that point being considered void. We think we should mention the fact that the prosecutor also may waive the trial, but in order for the waiver to be effective, it requires the consent of the defendant, because the prosecutor can reach to this conclusion only after entering the debates. When the subjective right holder wishes to continue the action even if the prosecutor withdraws his request, according to article 91 of the New Code of Civil Procedure, the titleholder of the subjective right may request the court further subjective judgment. Compared to some opinions, we point out that the subject titleholder of the right may ask the court to order continuing the trial, and his request can be accepted or not by the court. We believe that this claim is founded on the fact that starting action is realized by the prosecutor, compulsory introducing in the trial the titleholder of the rights and will result the starting of the right to action of the substantial right's titleholder. The law does not address to the "reverse" situation when the titleholder of the substantial right gives up trial, but the doctrine appreciated that once the prosecutor's position was upheld as part of the process he will be free to exercise his procedural rights as he sees fit without being limited by the acts of the subjective rights titleholder. Prosecutors' action remains pointless if the holder of the subjective right gives up even the judged right.

We could not miss the point of view expressed at a certain moment that in the doctrine referring to the insertion in the trial of the subjective right titleholder, determines the ceasing of prosecutors' quality of titular of the civil action. We have repudiated this point of view because admitting it, would mean that the prosecutor is not invested by law with a personal right to bring in actions and that he only serves to replace the titleholder within the strict limits of understanding the justice.

In order to complete the picture of the discussed subject we have shown that the prosecutor can bring in the action also by being a civil part. Of course, it is about an action which arises from a criminal act and excluding the fact that it is optional for the victim, this having to choose between the path of civilian trial and criminal law, sometimes compensation is granted by default even if it does not exist a setting up of a civil part, motivated by the fact that exercising the civil action inside the trial impresses official features.

We considered it useful to be aware that, if the prosecutor proceeds to becoming a part on behalf of someone who was defrauded and that is minor or legal incapable, this is equal with bringing in a civil action and, of course, the rule of irreversibility of chosen path will be also applied to the prosecutor. The question whether the injured party introduced in the trial, should comply the prosecutor's option, our response was negative and we said that he may proceed to transactions or waiving entitlement and implicitly to damages.

Given the lack of legal regulation of prosecutors' participation as intervening party in the trial we have developed this topic in our thesis. So we have shown that if a subject of law would have the right and interest to intervene in an ongoing process, but cannot do that for objective reasons, the prosecutor may issue an application to intervene as a part hereto. Thus, he could draw conclusions about the lawsuit and its legal framework, being quoted in the process also the subjective right titleholder. We remembered that the prosecutor may also start main intervention application, in the well known conditions. We have pointed out that the prosecutor cannot draw a request of voluntary accessorial intervention, seen the fact that this cannot be assimilated to a civil action.

In order to "close" the subject of prosecutors' civil action, faced to many different opinions on the subject, we have approached the legal nature of the civil action and of the prosecutors' right of action, so being forced to generally look at these concepts and then the specific of prosecutors' ownership competence. This approach led us to theories which deny the existence of the right to action, towards opinions that the subjective right does not absorb the content of guaranteed procedural institutions; the thesis that the right of action is a subjective right, ability of each individual; the thesis of the right of action understood in two extents: material and procedural, not to be repeated here, noting only the fact that the prosecutors' right to action, essentially, has nothing different from the right of action admitted to any matter of common law.

Following the logic that the legislator puts in order the prosecutors' ways of action inside the civil action, we looked for the appearance of the prosecutor's exercising his remedies. Unlike the prosecutors' severely limited right to start a civil action, the right to pursue paths is "wide" offered to the prosecutor, the explanation being that, as a body of monitoring the legality, the prosecutor must have had ways to remedy eventually mistakes in the work of distributing the justice; thus, the prosecutor is called to use the domestic remedies whereby to complain against judicial decisions tainted by faults.

There was also a proposal supported by some authors (professors Ion Les and Emil Poenaru) in terms of limiting the prosecutor's right to exercise remedies only to those circumstances where there is a disregard of rules of public policy, but as far as we are concerned we have acceded to this proposal as we consider that the prosecutors' general right to use the remedies is also a guarantee in order to ensure the legal status. We believe that the rule of not aggravating the situation of the party in his own appeal applies also to the prosecutor, because otherwise it would lead to an unfair situation.

We have noted that in the new procedural regulations is missing the review reason provided in the actual article 322, the one referring to the appliance regarding some unfavorable decisions impossible to be brought to achievement and so causing the missing of efficiency in the decision.

We took into consideration the prosecutors' situation during execution of judgments, according to art. 90 of the New Code of Civil Procedure, the prosecutor may request enforcement of any rights of execution issued in favor of minors,

individuals under interdiction or missing people. But he can also use the appeal on execution or even under the form of appealing the title in the same individuals' interest, as well as he may arouse, just in case, the "return of foreclosure procedure".

We have developed the conclusion that the prosecutor may attend and may express his own conclusions during any stage of the civil lawsuit without censoring his determination in court, the appreciation of the prosecutor being supreme. Using this occasion we have reminded that the void utterance of article 90, paragraph (2) from the New Code of civil procedure in the extent that *"the prosecutor sets conclusions"* does not cover the entire wide activity of the prosecutor as side part but we have observed that this way of expressing has reached a great ineptitude. Ultimately, the prosecutor, even compulsory takes part at some trials, and we referred to the texts from the law which gives him this obligation, and his absence determines the poor structure of the instance.

Inside Chapter VI we have treated the subject of ceasing to be a party in the civil lawsuit, showing that this can occur either naturally or as a result of developments in civil relations' material or procedural plan, either voluntarily or involuntarily.

We have considered it necessary to mention that the death of the party may cause the closure of the case such as in purely personal actions. We have mentioned that loosing the status of a party can be withdraw by the loss of one of the qualities that conditions it such as loss of procedural capacity by placing it under prohibition that ex party and when that party cannot act on its own process, but only through a representative.

We have developed the issue that loosing the quality of part can occur as a result of acts of will of the parties, expressed by waiving or acknowledgment transactions. Writing about the withdrawal, we have reported that the two abandon ways (at trial and at the claimed right) are treated together, first in the first paragraph and the second in the second paragraph of Article 246 of the Civil Procedure Code in force, and also in Article 400 and 402 of the New Code of Civil Procedure. Joining them by the legislator may mean that they have the same legal judicial nature and some common elements as ways of expressing the right of disposal of the parties. As regards the effect of losing the procedural quality, in the first case - of giving up justice – when the court concludes without right of appeal an issue finding that the applicant has waived the court or, rather, has withdrawn its action, the plaintiff loses the trials' legitimation and therefore the status of a party in a lawsuit and the defendant has gained legitimation as passive as a result of proceedings initiated by the claimant, he also loses his status of a party in a lawsuit. In giving up those rights, we have noted that, after the parties have entered into the background debate, this is done only with the agreement of the other parties; this does not mean a change of the structure though becoming conventional, but that this agreement acts as a suspensive clause precedent to the fulfillment of which, The Court may decide to dismiss the applicant

About the transaction, as a way of voluntarily loosing the quality of a party, we have noticed that both definition from art. 1704 of the old Civil Code and article 2267 of the New Civil Code fail to point out an essential element of this judicial contract, namely, that between parties should be held mutual concessions, in order to prevent settlement or closing of the trial because otherwise it would have been an acknowledgment of the claims of the other parties. In relation to the fact that in the legal literature appeared the question whether the transaction takes effect by agreement of parts, or only by consenting this agreement by the expedient, we appreciated that the aim of the transaction, respectively, the settlement of the trial, is accomplished only through the expedient's decision, which lead to the loss of the status of parties in the trial which happens not only to achieve the transaction.

In our thesis we have referred to the ways of loosing the status of a party of legal entity and, in this context, we have considered, first, the abolition of the legal entity followed by its liquidation, leading to the loss of procedural capacity and therefore the loss of being party of the lawsuit. We have pointed out that not always the legal entity looses its status of a party, seen the case of total dissolution and not the case of a partial division or consolidation.

When developing the subject we are referring at, we have shown that the status of a party may be lost as a result of the incidence of obsolete sanction. Developing this hypothesis, we showed that this civil penalty, regulated by article 248 paragraph (1) of the Code of Civil Procedure and nearly identical to its counterpart - art. 410 - the new Code of Civil Procedure, which strikes the indifference of the authors' request or appeal and any reform or withdrawal requests, which he leaves aside for a period of 6 months determines the lack of efficiency of all the pleadings made by that instance, meaning that, in practice, the process goes in the state of being surprised by the obsolete decision. Related to these issues we pointed out that the sanction of deprivation strikes by lack of efficiency the procedural pleadings and does not refer to the law matters of material right. We have also noticed a certain lack of consistency of the legislator in the extent that evidences in the application can be used in a new trial started for the same cause. We allowed seeing a feature of obsolete in that it is "repeatable", since it allows formulating a new request. We have also remarked that by lack of effects in the formulated application process which, in turn, may be outdated. We pointed out that by depriving the effects of acts done in court where the obsolete was declared, parts are put at the same place they were before the opening of the process. We pointed out that, while demand lapse summons cannot be raised for the first time on appeal, the appeal hearing may expire.

Among the explanations offered by the juridical literature regarding the possibility of using evidences already administrated in a new open process in question, we have attached to those who explained the possibility of instituting a new actions by the fact that effect of "out-of-date" did not lead to the totally conclusion of the case, remaining still "standing" the right of action that one part could use to start a new action which I called "spare action".

In our last chapter dedicated for conclusions, we have included a synthesis of theoretical and jurisprudential approaches of the developed subject as well as of the personal contribution that, we hope, gives personality/ distinction to the present thesis and legitimates the effort.

As a general conclusion, our scientific approach aimed to gather all relevant information in order to analyze these procedural institutions, sought to interpret, where there was no interpretation, and our personal inclination to find out the practical usefulness of this information led us sometimes to try to provide concrete solutions to the problems we have identified.