

# THE PRINCIPLE OF "NO REFORMATIO IN PEIUS" IN THE ROMANIAN LEGISLATION

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## Abstract:

*The principle no reformatio in peius (prohibition of reformation in peius means that a person should not be placed in a worse position as a result of filing an appeal) should be respected both in the trial of the remedy at law and the retrial of the case, after the invalidation or the repeal of the judgment, because the retrial is the consequence of the exercise of the challenge methods, and the party must have the certainty that its situation will not be deteriorated, not only in the filling of the appeal promoted but also in the pre-proceeding process subsequent to the admission of the appeal.*

*Thus the principle no reformatio in peius is adjusted under the article 481 from the Code of Civil Procedure, it can't create for the appellant a worse situation than the one before the judgment under appeal, besides if he expressly consents to this one or in the cases specifically provided by law.*

**Keywords:** *exercise of the challenge methods, appeal, recourse, deliberately, case law.*

**JEL Classification:** K10

The principle of *no reformatio in peius* (prohibition of reformation in peius means that a person should not be placed in a worse position as a result of filing an appeal) is a Latin phrase expressing the principle of procedure according to which using the remedy at law may not aggravate the situation of the one who exercises it. This rule is justified by the fact that carrying out the inspection of Justice judgments, set up as a guarantee of observance of the law, it would be restricted, if the parties would face a risk to create a situation more difficult as a result of the exercise of uni remedies. This is a principle of procedural law, according to which a decision of the court cannot create a situation more difficult for the party which has declared appeal or a second appeal against the court ruling.

The principle of no reformatio in peius must be followed both in the judgment of the attack path, as well as the retrial of the case, after the cancellation or annulment of judgment, because the retrial of the case is the consequence of exercising the recourse of the legal proceedings, and the party must have the certainty that its situation will not be deteriorated, not only in the way of attack on which promoted but also in subsequent stages of acceptance of this appeals.

Although in civil matters proceedings, unlike penal procedural law, this principle does not have a specific regulatory, until the adoption decree No 138/2000, it was recognized unanimously in doctrine, and in jurisprudence, the need for application of this principle, for reasons of equity and legal logic in this field.

To the application of the principle no reformatio in peius, according to the old procedural civil code, cannot be oppose no exceptions with character absolutely, the court being unable to plead of its own motion or to admit exceptions with character absolutely cited by appeal, if their admission would mean to worsen the situation of the party which has exercised the appeal. Only exceptions with absolute lack of competence, incompatibility or invalidity of the judgement which affects aspects related with the progress in terms of legality of the dispute could oppose the principle governed by the article 296 sentence of II-a of the Code of civil procedure " it cannot be created a worse situation for the appellant in his own appeal than that under the judgment".

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In accordance with this principle, there are two other fundamental principles of the process, namely: the principle of insurance for the party, of the right to defence and the principle concerning the judge role in finding out the objective truth which application ensures smooth operation of judicial process, ensuring preservation of rights and interests of the parties, the thorough and the legality of solution contained in civil judgment.

In the absence of this principle, the parties, knowing the possibility that their situation may get worsened, it could be determined to give up to the attacks against the judgement, in order to assume no risk, even if the judgment would be illegal and unfounded.

The role of this principle is not only to protect private interests of the one who declared the appeals, but also to ensure a fair share of ongoing civil process, meaning a legal and founded judgement.

This principle is currently devoted by express provisions, according to which the use of appeals cannot create, in the case in which the party has pursued a situation more difficult than that of judgment. The contested judgment shall, where appropriate, may be reformed only in favour (in melius) and not to the disadvantage (in peius) of that party. New Code of penal procedure, contains a different regulatory principle of no reformatio in pejus (unworsen the party situation in his own way of appeal).

The principle no reformatio in pejus is covered in this way, in accordance with Article 481 of the Code of civil procedure, the appellant cannot create in his own way of attack a situation worse than that in the contested judgement shall, except in the case in which he consents expressly in this or in the cases specifically provided for by law.

No reformatio in principle pejus knows two limitations:

a) when the appellant agrees to make the situation worse in the exercise of the challenge methods who has used it. The consent may be expressed for the appellant by the means of the challenge methods or by special request sent to the court and deposit it at the end of the meeting. The judge must establish itself in report with the manifestation of will of the appellant in this respect, on the basis of Article 22 (2) of the Code of civil procedure, regarding the judge role in finding out the truth, since the law requires express consent of appellant and not to be inferred from acts and deeds which would imply that agreement.

b) In certain cases provided by law. Such a situation is the case law exception provided in Article 432 of the Code of civil procedure, and as a result of admission exceptions, it can be created for the party worse situation than that in judgment in his own appeal, without being necessary the express consent of appellant but this rule operates against his will. The case law exception is a fund exception, absolute, of public policy can be invoked by the court or by the parties in any status of the process, even before the Body of appeal. The court has an obligation to respect and to invoke the case law, regardless of conduct parties. Exception is intended to ensure the legal stability relations and effective judicial activity.

The effect of the exception admission is that for the party it can be created in his own appeal a situation worse than the one of judgment.

This effect is justified by the fact that the party intended to pass over the case law and initiated a new process on a accusations it has been settled definitively by a previous court.

The case law exception is one of public order and requires compliance with a judgement of court and keeping public order. The code of civil procedure provided in Article 431, paragraph 1, no one can be sued twice in the same quality, under same causes and for the same object.

Either party may object to previous work were put on trial in another dispute, if it's got something to do with the settlement of the latter.

The case law regarding the device, as well as the grounds on which it rests, including those by which it worked out a matter contentious (Article 430 (2) of the Code of civil procedure).

The case law exception can be invoked:

- In the motivated appeal, when the exception has not been settled by the first instance of the European Communities and can be invoked by both the appellee or of its own motion by the court, the appellant does not have interest to invoke so his situation not to worsen in their own exercise of the challenge methods.

In the event that the exception was debated by the court, the parties may invoke it in the appeal, but not as a reason for public order and no court may of its own motion, but it can be reconsidered within the limits of transmission of the appeal.

In accordance with Article 477 (1) of the Code of civil procedure, the Court of Appeal will proceed to retrial the fund within the limits laid down express or implied, by appellant, as well as of the solutions that are dependent on the part of the judgement under appeal.

High Court of Cassation and Justice decided that re-evaluation of findings and assessments made by the court on the background of the evidentiary material of the cause is allowed within the appeal settlement only in so far as, the accused, through the grounds for the appeal, has formulated criticism relating to these solutions given by the first instance. In addition, even if both sides have promoted appeal the solution adopted was not allowed within the settlement of the defendant's appeal whereas runs counter to the principle of no reformatio in peius (it will not be created, for the appellant, in its own appeal a situation more difficult than that of judgment). High Court further argued that the provisions C. proc. civ., allow the court to invoke of its own motion reasons of public order, but in this situation the Court of Appeal, in order to ensure compliance with the principle of contradiction and the right of the parties to the defence, had an obligation to put in the parties debate the reason restrained for adoption of solution, or, in question deducted judgment, the court has not exercised active role for the purposes referred to.

In the unmotivated appeal the court will decide, as a matter of fact, only on the basis of the arguments put forward in the first instance, in such a way that, the Court of Appeal will not invoke the exception for its own accord and will not reconsider the case law judgement debated by the Court of the First instance, but it will be issued only on the basis of those invoked in the first instance (Articles 476 (1) of the Code of civil procedure).

If the exception has not been invoked in the first instance, the Court of Appeal may invoke one for its own initiative, in accordance with Article 479 (1) of the Code of civil procedure, the reasons of public order may be invoked also by its own motion.

When a decision of the court accepts the appeal, by taking into account the character grounded on the case law exception, it will cancel the appealed judgement and will reject the application as inadmissible.

Thus, in accordance with the provisions of Article 502 of the Code of civil procedure, as well as the lawsuit after the cessation of the judgement by the Court of Appeal, the appellant cannot create in his own way of attack a situation worse than that in the contested judgment shall, except in the case in which he consents expressly mentioned in this or in the cases specifically provided for by law.

Breaking the case law represents an illegality for which can be promoted civil appeal according to Article 488, paragraph 1, point 7 of the reasons of disposal, of the Code of civil procedure.

High Court of Cassation and Justice decided that, in the case in which the application for winding up of the company has the legal basis the provisions of Article 237 of Law 31/1990, the law sets the exercise of the challenge methods for the second appeal, and in case are invoked cases of winding up provided for in Article 227 of Law 31/1990, special law does not provide for the appeals, so that common law applies in this matter, the exercise of the challenge methods being the appeal. In this case, by sue petition, the claimers invoked as grounds for the winding up of the company, the provisions of Article

227, as well as the provisions Article 237 of Law No 31/1990. High Court has stated that, because the appeals are unique, in the light of more favourable provisions of the common law, the application of these provisions is correct and in cases of dissolution rate provided for in Article 237 of Law 31/1990. The analysis on the texts shows that the appellant cannot be set up in its own way of attack a situation more difficult than that of judgment.

The party attacking a decision must be given guarantees that his approach will not result in worse of his situation not only in the trial but also in the respectively remedy at law, but also in subsequent stages of admission of the remedy at law, which is nothing more than the effect of initiative in the exercise of the challenge methods.

No reformatio in principle pejus is limited only in the path of the attack. In the event that, the same remedy at law is also used by another party, with provisions to the contrary, or by prosecutor in favour of another party, the sentence may be detrimental for the first party, by the admission of the appeal of his opponent. In the criminal law, the Court of Appeal, setting up the cause cannot create a situation more difficult for the one who state the appeal.

The principle of ameliorate the situation in his own appeal applies to both defence, as well as on the occasion of retrial in fact after the disposal. In addition, he shall also apply in the case of exercising his appeal by prosecutor in favour of a party. Therefore, the court assuming such an appeal will not be able to quash the judgement in the detriment of that part. This principle applies also in the case of the second appeal.

No reformatio in principle pejus is expressly covered in the Code of penal procedure, reason for which it has been examined in wide doctrine of penal procedural law.

Thus, according to Article 418 of the Code of penal procedure, the Court of Appeal, setting up the cause cannot create a situation more difficult for the one who state the appeal. Also, in the appeal filed by prosecutor in favour of a party, the Court of Appeal may not aggravate the situation.

The Court of common pleas examine the cause by extending and with regard to the parties that have not state appeal , or to which it is not referred, being able to decide in respect to them, without being able to create a situation more difficult.

In accordance with the provisions of Article 444 of the Code of penal procedure, the court, sentencing the cause cannot create a situation more difficult for the one who declared the second appeal in cassation.

In the second appeal of cassation declared by a prosecutor in favour of a party, the court of appeal in cassation may not aggravate the party situation.

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