Extinctive Prescription, a Means of Extinguishing the Substantive Right of Action and the Forfeiture of the Right to Invoke it

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Abstract: This article falls both within the provisions of the Civil Code relating to extinctive prescription, its notion and object, the effects of prescription, and, inseparably, within the provisions of the Code of Civil Procedure because this institution entails the forfeiture of the right to bring a civil action, which produces serious legal effects for the holder of the right of action because, once invoked and applied, it leads to the loss of the civil subjective right itself.

The purpose of the article is to present the general legal rule governing this institution and to highlight the procedural aspects that practitioners must take into account in the activity of legal representation.

Keywords: *extinctive prescription, civil action, subjective right, object of extinctive prescription, effects of extinctive prescription, rules applicable to extinctive prescription, forfeiture of the right to invoke prescription.*

How to cite: Macsim, C. (2021). Extinctive Prescription, a Means of Extinguishing the Substantive Right of Action and the Forfeiture of the Right to Invoke it. *Logos Universality Mentality Education Novelty: Law*, 9(1), 01-12.
<https://doi.org/10.18662/lumenlaw/9.1/51>

1. Introduction

The civil action is the most important legal means of defending rights that have been infringed or interests protected by law, through which the court's activity is initiated with regard to the examination and settlement of the dispute.

According to the provisions of the new Code of Civil Procedure, the civil action is the set of procedural means provided by law for the protection of a subjective right claimed by one of the parties or of another legal situation, as well as for the defence of the parties in the process. The subjective right can be defined as the possibility for the active subject, within the limits of the civil legal rules, to conduct himself in a certain way, to demand appropriate conduct from the passive subject and, if necessary, to request the assistance of the coercive force of the State

The civil action has been defined in the literature as the legal means by which a person asks the court either for the recognition of his right or for the realisation of this right, by the cessation of obstacles put in his way by another person or by a corresponding compensation or, in a synthetic expression, taken by the same authors from the Roman law, the right to pursue in justice what is due to him (Stoenescu et al., 1983).

The right of action is distinct from civil action. The right of action is a concept that encompasses all procedural rights pertaining to the exercise of civil action (the right to bring an action before a court, the right of defence, the right to apply for enforcement, the right of appeal). Some subjective rights are prescriptible, so they can only be exercised within the statutory limitation period.

The right of action belongs, essentially, to the holder of the subjective right but, in exceptional cases, the right of action may also be exerted by other individuals or legal persons.

The main means of defending subjective civil rights is legal action. However, the use of this action to defend a civil right is subordinate to certain conditions and may only be brought under certain conditions laid down by law.

In view of this aspect, it is appropriate to explain the phrase "defence of a civil right", an explanation which, in this material, will lead to the approach of the institution of extinctive prescription from a double perspective, of substantive law and procedural law, of the extinction of the substantive right to action and, correlatively, of the forfeiture of the right to invoke it.

The right to bring an action is defined as a right of action in the procedural sense and the possibility of defending an infringed civil right by means of action is called a right of action in the substantive sense (Răuschi et al., 1995).

Thus, the right of action in the procedural sense is the possibility for the holder of a subjective right to bring an action before the court, requesting it to rule on that claim and does not depend on the expiry of certain time limits, and the action may be brought at any time after the infringement of the non-applicable subjective right, whereas the right of action in the substantive sense may be exercised only within the limits laid down by law.

Therefore, the right of action in the procedural sense is not subject to the limitation period unless it is accompanied by a right of action in the substantive sense.

The application of the statute of limitations is justified in law by ensuring certain legal stability. Rights cannot remain indefinitely in uncertainty, i.e. under threat of litigation, and the factual situation must remain stable and cannot be changed after a certain time has elapsed. The application of the statute of limitations also takes account of the difficulties of proof that would be encountered by both parties after a long period of time has elapsed. Those difficulties would be such as to lead either to the rejection of well-founded claims which the plaintiff could not prove or, on the contrary, to the admission of unfounded claims where the defendant could not present satisfactory evidence in his defence.

The statute of limitations also fulfils an educational, mobilising function, in that it encourages right holders to enforce their rights within the time limits laid down by law (Räuschi et al., 1995).

The limitation period must represent both the expression of general interests, consisting in the need to clarify uncertain legal situations within a reasonable time and the expression of particular interests, consisting in the fact that the limitation period must be left to the parties concerned, who alone are in a position to decide whether or not they wish to avail themselves of its effects; in no case is the limitation period a source of unjust enrichment, so that invoking and applying it ex officio is contrary to its very basis and functions (ECtHR, 1979, 2008).

2. The subject matter of the limitation period and its effects

In accordance with the provisions of Article 2500 NCC, the substantive right of action, hereinafter referred to as the right of action, is extinguished by prescription if it has not been exercised within the period prescribed by law. The right of action means the right to compel a person, by public force, to perform a certain service, to comply with a certain legal situation or to bear any other civil penalty, as the case may be.

Prescription does not operate automatically, it must be invoked by the person for whose benefit it is running and the court must establish that the right of action has been extinguished by prescription. Per a contrario, limitation periods do not operate by operation of law (Romanian Civil Code, art. 2.506 The effects of prescription, para. (1) Prescription does not operate as of right), cannot be invoked ex officio (Romanian Civil Code, art. 2.512 , Invocation of prescription by the interested party, para. (2) The competent court may not apply the limitation period ex officio) and are not applicable even if the invocation of the limitation period would be in the interest of the State or its administrative-territorial units. (Romanian Civil Code, art. 2512, Invoking prescription by the interested party para. (3) The provisions of this Article are applicable even if the invocation of prescription would be in the interest of the State or its administrative-territorial units).

It follows, therefore, that in order to produce its specific effects, the statute of limitations must be invoked by the party concerned (Romanian Civil Code, art. 2.512. Invoking prescription by the interested party para. (1) Prescription may be invoked only by the person for whose benefit it is running, personally or through a representative, and without being required to produce any title to the contrary or to have acted in good faith), and the provisions of Article 22 NCPP relating to the principle of the active role of the judge, however broadly interpreted, are not applicable in this case.

Nor could there be any other interpretation in the light of the European Convention on Human Rights and its case law.

Thus, in application of the principle of access to a (civil) court, the ECtHR has ruled that, in civil proceedings, the litigant has every right to have his case decided by the judicial body, in other words, he must obtain a final judgment (as this notion appears in the meaning of the ECtHR), in which the issue at stake is effectively resolved.

Therefore, the possible right of the court to invoke the statute of limitations ex officio (without the party concerned having to invoke it) would restrict this main component of access to justice, namely the right to obtain an effective resolution of one's own case in civil actions subject to the statute of limitations (Radu, 2011).

However, with regard to the application of civil law over time, in relation to this principle, the High Court of Cassation and Justice, by Decision No 1 of 17 February 2014 (Published in the Official Journal No 283 of 17 April 2014) on the appeal in the interest of the law, ruled that, in interpreting and applying the provisions of Articles 5, 201 and 223 of Law No 71/2011 for the implementation

of Law No 287/2009 on the Civil Code and Article 6 para. (4), art. 2.512 and art. 2.513 of Law no. 287/2009 on the Civil Code, establishes that extinctive prescription commenced before 1 October 2011, fulfilled or not fulfilled on the same date, remain subject to the provisions of art. 18 of Decree no. 167/1958 on extinctive prescription, republished, so that both the courts, ex officio, and the interested parties may invoke the exception of extinctive prescription, regardless of the procedural stage, even in disputes commenced after 1 October 2011.

In other cases, the ECtHR has ruled and established that States have concrete positive obligations in achieving access to a court, such as, for our purposes here, providing a legal system which allows creditors to obtain in an adequate and reasonable manner the enforcement of their debtors, both by the courts, through court judgments, and by ensuring their effective enforcement (Romanian Constitutional Court, 2020).

The effect of the statute of limitations is governed by 2 principles (Boroi et al., 2019):

- once the right of action in respect of a principal subjective right is extinguished, the right of action in respect of accessory subjective rights (interest, real or personal guarantees) is also extinguished, which is an application of the rule *accessorium sequitur principale*; thus, the non-applicability of the statute of limitations to the principal subjective right has the effect of making the accessory subjective right non-applicable;

- where a debtor is obliged to pay successive instalments, the right of action in respect of each instalment is extinguished by a special limitation period; the principle of extinguishment by a separate limitation period of the right of action in respect of each instalment in the case of obligations with successive performance applies whenever the debtor is obliged to pay successive instalments (rents, lease payments, interest, annuities, etc.), irrespective of the source of the obligation

The limitation period extinguishes only the substantive right of action, not the subjective right. The subjective right continues to exist after the expiry of the limitation period without being sanctioned by the substantive right of action because the holder of the right of action can no longer ask the court to obtain a judgment which, in the event of a favourable decision, would entitle him to enforce it.

This principle is laid down in the provisions of Article 2506 NCPC, according to which the person who has voluntarily performed the obligation after the limitation period has expired is not entitled to demand the return of the performance, even if at the time of performance he did not know that the limitation

period had expired, which means that, although the holder of the subjective right loses by extinctive prescription the right to the substantive action, he is entitled to keep the performance made by the debtor after the limitation period has expired.

Therefore, the effects of the intervention of the extinctive prescription are applied either by way of legal action, when the subjective right may benefit from legal protection if the prescription is not invoked within the period prescribed by law (Romanian Civil Code, art. 2513 The moment up to which prescription can be invoked) by the person in whose favour the prescription has been invoked or by the persons established by the provisions of Article 2514 Civil Code (Co-debtors of a joint and several or indivisible obligation and guarantors may invoke prescription, even if one of the debtors has neglected to do so or has waived it. So may the creditors of the person concerned and any other interested person) or, by way of exception, when the subjective right may benefit from legal protection if the correlative obligation has been performed voluntarily after the prescription period has expired.

3. Time-barred or non-time-barred rights of action and the time limit for invoking the limitation period

According to Article 2501 of the New Civil Code, they are prescriptible:

- rights of action having a pecuniary object, unless the law provides otherwise;
- other rights of action, whatever their subject-matter, in the specific cases provided for by law.

According to the provisions of Article 2502 of the New Civil Code, the right of action is imprescriptible in the cases provided for by law, as well as whenever, by the nature or object of the subjective right protected, its exercise cannot be limited in time. Examples of such actions are: actions for claim, which are not time-barred unless otherwise provided by law (Article 563 of the new Civil Code); rights of way, which are extinguished when the dominant property acquires another access to the public highway (Article 617 (3)), etc.

Apart from these cases, rights relating to:

- an action for the defence of a non-patrimonial right, unless otherwise provided by law;
- an action for a declaration of the existence or non-existence of a right;
- an action for a declaration of the absolute nullity of a legal act;

- an action for a declaration that the certificate of inheritance is absolutely null and void, if the subject matter of the action is either the determination of the estate or the division of the estate, provided that the inheritance is accepted within the period prescribed by law;

They are also considered to be imprescriptible:

- partition action (art. 669 Civil Code.);
- action for a movable and immovable claim based on private property rights (Article 563(2) Civil Code.);
- action for a claim on movable and immovable property based on the right of public ownership (Article 865(3) with reference to Article 563(2) Civil Code)

Another important aspect is the right of action concerning ancillary rights, under the conditions of extinctive prescription. Only some rights in rem and rights of claim are accessory rights. Ancillary rights in rem are mortgages, pledges, liens and privileges. Ancillary rights of claim exist in respect of interest, penalty clauses, liens, sureties, etc.

Thus, Article 2503 Civil Code. provides that, once the right of action in respect of a principal right is time-barred, the right of action in respect of ancillary rights is also extinguished, unless the law provides otherwise. Such an exception is provided for in Article 2504 with regard to mortgage actions, the mortgage being of an accessory nature. The limitation of the right of action in respect of the principal claim does not entail the extinction of the right of action for a mortgage.

In the latter case, subject to the statute of limitations on the right to obtain enforcement, the mortgagee may at any time pursue the movable or immovable property mortgaged under the law, but only up to the value of such property.

As to the moment by which prescription may be invoked, Article 2513 of the Civil Code establishes that prescription may be opposed only in the first instance, by means of a statement of defence, or, in the absence of invocation, at the latest at the first court term at which the parties are legally summoned.

As regards the moment up to which prescription may be invoked, art. 2.513 Civil Code. requires that it be opposed "in limine litis", only at first instance, by way of a statement of defence or, failing such invocation, by the first trial date with the summons procedure duly completed. This provision has rightly been criticised in the literature on the grounds that the phrase "in default of appearance" will give rise to confusion, in that it is not clear whether the party may, at his option, plead the limitation period either by an application or at the latest at the first court hearing at

which the parties are legally summoned, despite the fact that the application was compulsory, or, conversely, in cases where the application is compulsory, if the party has not pleaded the limitation period by an application, he is deprived of that right (Hodis, 2014).

4. Waiver of prescription and its effects.

The Romanian legislator expressly provides for the possibility to waive the statute of limitations, regulating the conditions under which waiver is possible, the types, effects and extent of waiver, as well as the persons who are prohibited from waiving it.

The new Civil Code regulates the possibility to waive the acquired prescription, through the provisions of Article 2507, according to which the prescription cannot be waived while it has not started to run, but it is possible to waive the completed prescription, as well as the benefit of the elapsed time for the prescription started and not completed.

The text of the law regulates the possibility of waiving the limitation period which has not yet expired but which has begun to run, as well as the waiver of the benefit of the limitation period which has expired, but prohibits the waiver of the limitation period as long as it has not begun to run.

The renunciation must also be, as the doctrine has been stated, free and spontaneous, i.e. it must not have been made by mistake, violence or deceit, in other words, the will of the person from whom it emanates must not have been altered as a result of the incidence of any defect of consent (Matefi, 2019).

According to Article 2508 Civil Code., the waiver of prescription may be express or tacit.

With regard to tacit waiver, in order to be valid and legally effective, the text establishes that it must be unquestionable and result from unequivocal manifestations (such as, for example, the payment of the debt or interest on the time-barred claim made in full knowledge of the facts).

However, from a practical point of view, we consider that the waiver of the limitation period commenced is not a waiver of the limitation period but a waiver of the benefit of the limitation period which has elapsed from a limitation period commenced.

Therefore, in Art. 2510 in para. (2) provides that if the party entitled renounces the benefit of the period which has elapsed up to that date, the provisions on the interruption of the limitation period by recognition of the right shall apply. Waiver of the limitation period and interruption of the limitation period

by recognition of the right of action have identical effects only strictly in terms of the limitation period, since in both cases the period which has elapsed is extinguished and, as a result, the party entitled to invoke the limitation period can no longer rely on it.

Recognition of the right whose action is time-barred, unlike a simple waiver of the benefit of the limitation period which has elapsed, may however also have effects outside the limitation period, since it may, if appropriate, be regarded as a confession.

Therefore, we can say that the recognition of the right whose action is time-barred, by its interrupting effect, is always also a waiver of the benefit of the limitation period which has elapsed, whereas the mere waiver of the benefit of the limitation period which has elapsed is not also a recognition of the right (Reghini et al., 2013).

As regards the extent of the waiver of the limitation period, it is to have effect only on the person from whom it originates and also on his heirs and representatives. However, according to the provisions of Article 2511 NCC, it cannot be invoked against joint and several co-debtors or co-debtors of an indivisible obligation or against guarantors.

5. Rules applicable to limitation periods

In the system of the New Civil Code, the statute of limitations, although it remains an institution of general interest, by the reasons or functions it serves, is and remains an institution of private law, so that the benefit of the statute of limitations is reserved, in principle, only to those directly concerned, and the parties, in order to resolve more quickly or, as the case may be, under specific conditions, a possible dispute, can arrange, within certain limits, including the rules concerning the limitation of the right of action, arising from their civil relations. These predominantly private interests lead to a much more flexible, liberal regulation of the institution of prescription, based on two fundamental principles (Nicolae, 2010):

- the need to ensure certainty and stability in civil legal relations;
- respect for the principle of freedom of contract in matters of limitation, provided that this does not prejudice public policy (e.g. the principle of guaranteeing the right of free access to justice), mandatory rules and morality.

Accordingly, although it is accepted as a matter of principle that 'limitation periods shall be governed by law' (Article 2.515(1)), parties who have full capacity may validly conclude agreements on limitation (Article 2.514(3) and (4)). The new

Civil Code allows the possibility of concluding agreements on limitation, subject to certain conditions or limits.

6. Forfeiture of the right to invoke prescription by way of exception

With regard to prescription, limitation periods are governed by a set of legal rules established by the rules of the New Civil Code and the New Code of Civil Procedure. Thus, according to the provisions of Article 2.550 NCC, forfeiture may be opposed by the interested party under the terms of Article 2.513 (The limitation period may be invoked only at first instance, by a statement of defence or, failing that, at the latest at the first court hearing at which the parties are legally summoned).

The court or tribunal is obliged to invoke and apply the limitation period of its own motion, regardless of whether or not it is invoked by the party concerned, unless it concerns a right which is freely disposable by the parties.

According to the provisions of art. 185 C.proc. civ. when a procedural right must be exercised within a certain time limit, failure to do so entails forfeiture of the right, unless the law provides otherwise. A procedural act done after the time limit is void.

Thus, forfeiture produces serious legal effects for the holder of the right of action because, once invoked and applied, it leads to the very loss of the subjective civil right, since it no longer exists in the property of its holder and, consequently, cannot be protected by means of legal action or, where appropriate, substantive defence.

With regard to the determination of the legal nature of a term as being of extinctive prescription or of substantive forfeiture, the Civil Code regulates this through the provisions of Article 2547, according to which if it is not clear from the law or from the agreement that a certain term is of forfeiture, the rules of extinctive prescription are applicable.

The law does not provide for a special form for raising the defence of revocation as a substantive defence, which may be raised in the text of the statement of defence or in the notes of the hearing, and there is also the possibility of expressing it orally in court, these defences being recorded and noted by the court clerk in the closing of the hearing.

According to Article 124 para. (1) of the Civil Procedure Code, the court having jurisdiction to hear the main claim shall also rule on defences and objections, with the exception of those which are prejudicial matters and which, according to the law, fall within the exclusive jurisdiction of another court.

From a procedural point of view, if the court finds that the plea of revocation is well founded, it will dismiss the claim of the person who has lost the subjective right as time-barred. If the court raises the issue of forfeiture of its own motion, it will necessarily put it to the parties, in order to respect the principle of adversarial proceedings governing civil proceedings.

According to the minutes of the meeting of the representatives of the Superior Council of the Magistracy with the presidents of the civil divisions of the High Court of Cassation and Justice and of the courts of appeal, the text of Article 2.513 of the Civil Code provides for two limits for invoking the exception of prescription, without, however, indicating the situation in which each limit is applicable, the choice thus being left to the judgment of the defendant; in this way of drafting the text, in fact, the only limit imposed by law is the first trial date at which the parties are legally summoned.

Thus, it should be emphasised that what is of interest in the context of the issue under consideration is not the legal regime of limitation, but that of the defendant's forfeiture of the right to invoke it.

Next, we point out that the defendant's forfeiture of the right to invoke the exception of prescription is one of procedural law, which falls within the scope of Art. 185, Art. 186 Civil Procedure Code, Art. 245 - 248 Civil Procedure Code. and not one of substantive law, the legal regime of which is laid down in Art. 2545 et seq. of the Civil Code, since its effects extend to one of the ways in which the defendant may bring a civil action.

We consider that the objection of belatedness is an absolute one, in view of the public policy nature of Article 2513 of the Civil Code, which establishes the time limit for invoking the exception of prescription.

In conclusion, the opinion is that the court has the possibility to raise, of its own motion, the plea of belatedness and to order the defendant to forfeit the right to raise the plea of extinctive prescription of the substantive right of action, a substantive procedural plea raised in breach of the legal time limit.

References

- Boroi, G., Anghelescu, C. A., Nazat, B., & Nicolae, I. (2019). *Fişe de drept Civil* [Civil Law Fact Sheets] (4th edition, revised and added). Hamangiu Publishing House.
- ECtHR. (1979). *Airey v Ireland*, no. 6289/73, judgment of 9 October 1979 [*Negulescu v Romania*], no. 25111/02. <http://echr.coe.int>.
- ECtHR. (2008) judgment of 1 July 2008; [*Apostol v Georgia*], no. 40765/02, judgment of 28 November 2006 <http://echr.coe.int>.

- High Court of Cassation and Justice. (2014). Decizia nr. 1, 283, 2014, Aprilie, 17. [Decision no. 1, 283, April 17, 2014]. *Monitorul Oficial* nr. 283. <https://legislatie.just.ro/Public/DetaliiDocumentAfis/157510>
- Hodiș, A. M. (2014, February 28). *Despre reglementarea prescripției extinctive în Noul Cod Civil* [On the regulation of extinctive prescription in the New Civil Code]. Budusan si Asociatii. <https://www.budusan.com/articole/despre-reglementarea-prescriptiei-extinctive-in-noul-cod-civil>
- Matefi, R., (2019). Renunțarea la termenul de prescripție și particularitățile acestuia - o vedere comparativă din perspectiva reglementărilor altor state [The waiver of the statute of limitations and its particularities - a comparative view from the perspective of other states' regulations]. *Universul Juridic Magazine*, 2, 45-50. http://revista.universuljuridic.ro/wp-content/uploads/2019/04/04_Revista_Universul_Juridic_nr_2-2019_PAGINAT_BT_R_Matefi.pdf
- Nicolae, M. (2010). *Tratat de prescripție extinctivă* [Treaty of extinctive prescription]. Universul Juridic Publishing House
- Radu, F. (2011, July 27). *Excepția prescripției extinctive este o veritabilă excepție de ordine publică?* [Is the exception of extinctive prescription a genuine public policy exception?]. Juridice.ro. <https://www.juridice.ro/157841/exceptia-prescriptiei-extinctive-este-o-veritabila-exceptie-de-ordine-publica.html>
- Răuschi, S., & Ungureanu, T. (1995). *Drept civil. Partea generală. Persoanele* [Civil Law, general part, natural person, legal person]. Fundatia Chemarea Iasi.
- Reghini, I., Diaconescu, S., & Vasilescu, P. (2013). *Introducere in Legea Civila* [Introduction to Civil Law]. Hamangiu Publishing House
- Romanian Civil Code*. <https://www.codulcivil.ro/>
- Romanian Constitutional Court. (2020). Decizia Nr. 264/04.06.2020 referitoare la excepția de neconstituționalitate a dispozițiilor art. 707 alin. (1) din Codul de procedură civilă [Decision No. 264/04.06.2020 regarding the exception of unconstitutionality of the provisions of art. 707 para. (1) of the Code of Civil Procedure.]. *Monitorul Oficial al României*, 807. <http://legislatie.just.ro/Public/DetaliiDocument/229704>
- Romanian Parliament. (2009/2011). Lege nr. 287 din 17 iulie 2009 (**republicată**) privind Codul civil [Law 287 of 17 July 2009, republished, on the Civil Code]. *Monitorul Oficial*, 505. <http://legislatie.just.ro/Public/DetaliiDocument/109883>
- Stoenescu, I., & Zilberstein, S., (1983). *Drept procesual civil teoria generală* [Civil procedural law general theory]. Editura Didactică și Pedagogică.
- Superior Council of Magistracy. (2019, November). *Minuta Întâlnirii reprezentanților Consiliului Superior al Magistraturii cu președinții secțiilor civile ale Înaltei Curți de Casație și Justiție și curților de apel* [Minutes of the meeting of the representatives of the Superior Council of Magistracy with the presidents of the civil divisions of the High Court of Cassation and Justice and the courts of appeal] . Pitesti. <http://inm-lex.ro/wp-content/uploads/2019/11/minuta-intalnire-civil-Pitesti-14-15-noiembrie-2019.pdf>