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Ferruccio Auletta

Nullities and the effects of defective procedural acts in European law*

Sommario: 1. The modern pattern of procedural acts. – 2. The French Code. – 3. The *CPR* (in England and Wales). – 4. The *ZPO* (in Germany). – 5. From the legitimacy of the proceedings to the fair process. – 6. The key-role of the (new) principles: a comparison between the brazilian *código* and the italian *codice*. – 7. A new but continously changeable order.

The paper examines the path along which the european systems have developed their own voidness regime of procedural acts: since the origin of the legislative primacy of nullity in France to the current features of the English or German system. The turning point seems to be the settling of principles that, nowadays more and more emerging on the law's surface (e.g. in the new Bazilian Code), provide the judge with the main tool in order to shape a fair process much more than ensure the legitimacy of a single act. These principles play the key-role in applying the procedural law to the given case, making the judge as the king of the trial but also putting at risk the forseeability of the procedural law, whose rank is eventually lowered.

1. The modern pattern of procedural acts.

My presentation must start by taking for granted the primacy of France on the fundamental choice that oriented the European continental systems and – clearly – the Brazilian system too (from the 1973 Code up to – albeit to a lesser degree – the new one) about form and regulation of the civil procedural acts (that is why Antonio Do Passo Cabral, in the *Comentários ao novo Código de processo civil*[1], defines the *novo Código* a lost opportu-

* Presentation given at the *Congresso Internacional* «O novo CPC em debate» hosted by the *Instituto Brasileiro de Direito Processual*, in Rio de Janeiro, October 2017, 2nd and 3rd.

[1] Do Passo Cabral, *Comentários ao novo Código de processo civi*co, edited with Ronaldo Cramer, Editora Forense, 2016, 433.

nity and complains about «*um sistema parcialmente ultrapassado e que perdura há séculos sem alteração*»)[2].

The modern pattern of procedural acts and the question whether they are void was conceived in very deep connection to the idea of supremacy and preeminence of the statutory law, *lex certa*, *lex praevia*, *lex stricta*, an idea that became prevalent at the time of the «*French revolution*», therefore «*it is up to the law, not to the judge, to set out that regulation*»[3].

Previously, in the «*system of* nullités comminatoires *[…], the judicial power rest(s)-(ed) on the the circumstance that nullity provided by law could be both declared or remedied, with no legal criteria to be complied with by the judge. In a lawfulness system, instead, the law sets forth the criteria the judge has to comply with*».

As a result, the form and nullity of the procedural acts are particularly enlightening prisms through which the relationship between legislative power and judiciary can be analyzed, their relationship might be synthesized; and, in other words, their fight for primacy can be considered.

2. The French Code.

In the French Code provisions of nullities can arisen in two ways: as defects of form and defects *au fond*.

The «*vices de forme*» provisions of nullity are strict, and all listed in a limited number of cases selected by the legislation (no nullity without law), unless the case relates to a «*formalité substantielle ou d'ordre public*». Indeed, these latter cases need no strict provision by law and, actually, we can observe here the first step back of the Legislator. Art. 114 of the Code in force sets out the exemption that the settled case law had affirmed prior to 1972 (when the law came into effect). This is the exemption from the principle *pas de nullité sans text* that finds its roots in a well known classification first proposed by Glasson in 1925. However, before art. 114 entered into force, the case law had debated «*formalité substantielle ou d'ordre public*» in order to exempt (not so much the judicial declaration from a legal text to be based on, as for to exempt) the affected party from the burden of proof of the damage suffered by the defective act.

Actually, (here is a second proviso on which nullity could be declared) no act could be annulled unless the affected party gave evidence of the damage suffered as a consequence of the defective act. In any event, the principle *pas de nullité sans grief* (in the New Brazilian Code, art. 282, § 1: *The act shall not be repeated nor its absence compensated when it does not harm the party*) is no longer debated because of its explicit extension to the «*formalité substantielle ou d'ordre public*».

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[2] Since now on I will particularly refer to artt. 276 > 283 of the *Novo Código de processo civil*, where *Das nulidades* are regulated, but I will also consider other significant ones, such as artt. 76, 218, § 4°, 938, § 1°, 1007, § 7°, 1024, § 5°, 1029, § 3°.

[3] Minoli, *L'acquiescenza nel processo civile*, Torino, 1942, 182.

Finally, and here is the third, now negative, proviso on which nullity could be declared: it is not to be declared when the defective act has otherwise been corrected or rectified.

It is worth noting that, in order to be declared, «*the nullity of the act must be invoked at party's first opportunity to file a statement into the record, under penalty of preclusion*» (as set out in art. 278 of the new Brazialian Code).

Art. 117, in addition, sets out «*irrégularités de fond*» (sometimes in the case law you find a different wording, «*vices de fond*»). These defects relate to lack of capacity to sue or to be sued and to lack of representation.

It is a peculiar regulation, different from that mentioned above: in particular, should the considered defect be one of those «*d'ordre public*» neither evidence of the harm need to be given by the party who invokes the nullity (art. 119), nor does any objection need to be raised at all (art. 120). In any case, should the objection be deemed essential to the annullment, no preclusion could ever affect the party who raised it late, but in the latter case the counterparty is entitled to request so called *dommages-intérêsts*. On this point the legislation was inspired by the trend first implemented in the Alsace and Moselle Department, where, in order to prevent dilatory defences, judges were allowed «*to condemn to the payment of so called* dommages-intérêsts *the party who had purposely omited at his/her first opportunity to invoke the nullity aiming at invoking it later on*».

The topic of «*irrégularités de fond*» appeared in the specialist literature during the XX century, having remained unknown in the XIX Century's Code (1806), but aftewards it lost its relevance as a result of the figure, first shaped by the the case law, of the so called «*formalité substantielle*», through which the aggrieved party was relieved from the burden of proof of the damage suffered by the defective act. However, as I said earlier, the 1972 Code even put in the new scope of the principle *pas de nullité sans grief* the «*formalité substantielle*». The difference therefore between the categories of defects, whether affecting form or not, has become more valuable.

Currently, in France even the most grievous formal defects are ranked by law further down the scale than non-formal defects, for which the Code does not preclude as a matter of principle the chance of correction, albeit there are no written criteria to comply with to achieve that purpose. This is the reason why the correct position of a defective act is still debated, whether among formal nullities or not. Some authors state that differences depend on the origin of the defect, whether related to the *instrumentum* or the *negotium*, and it remains clear how important is the infuence of the civil substantial law over the subject matter[4].

[4] The last regulation of the manner to handle the proceedings by IT tools, that will become the compelling form on september 1st, 2019, does not modify in essence the principles discussed until now.

3. The *CPR* (in England and Wales).

Very far from such a premise might be the English system, although some elements belonging to the categories found in the continental countries are not unknown within it. A mere chronology of some cases judged untill the *CPR* came into force in 1999 can be enlightening; better than using different methods, the state of the art ultimately demonstrates how the relationship between judges and legislation has finally become crucial even in England and Wales, instead of being the remote cause of the main issue at stake like happened in the continental countries.

The point is to draw the exact line between nullity and irregularity: since Fry v. Moore, Lindley L.J. said (1889) that if an order is irregular it can be waived by the defendant but if it is a nullity then it renders all that is done afterwards void. In general one can easily see on which side of the line the particular case falls.

In Craig v. Kanssen Lord Greene M.R. confirmed (1943) that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside; so far as procedure is concerned the Court in its '*inherent jurisdiction*' can set aside its own order and an appeal from the order is not necessary.

And in Wiseman v. Wiseman Lord Denning M.R. specified (1953) that a void act is void even if it affects the rights of an innocent third party.

Later (1961), Lord Denning M.R. confirmed (in MacFoy v. United Africa Co Ltd.) that a void order is automatically void without more ado; a void order does not have to be set aside by a Court to render it void although for convenience it may sometimes be necessary to have the Court set the void order aside; a void order is incurably void and all proceedings based on the void order/invalid claim are also void.

Upjohn L.J. reviewed the case law in 1963 (in Re Pritchard, deceased) and distinguished between defects in proceedings which could and should be rectified by the Court and those which were so fundamental that they made the whole proceedings a nullity. These included (i) proceedings which ought to have been served but which have never come to the notice of the defendant at all; (ii) proceedings which have never started at all due to some fundamental defect in issuing them; and (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement.

Lord Denning (dissenting) said: «The only true cases of nullity that I have found are when a sole plaintiff or a sole defendant is dead or non-existent and I would like to see the word '*nullity*' confined to those cases in the future». Then, in Firman v. Ellis, he confirmed (1978) that a void act is void *ab initio*, but one year later stated that «*although a void order has no legal effect from the outset it may sometimes be necessary to have it set aside because as Lord Radcliffe once said: "It bears no brand of invalidity on its forehead"*» (see *The Discipline of Law*, Butterworths, 1979, 77). In other words the order setting the nullity aside is declaratory in effect.

Now the case law rests on the *CPR*, which entered into force on April 26th, 1999 and its *Practice Directions* (the 92 Update to which entered into force on 1st October 2017). The rules and practice directions are available electronically for the convenience of users (*e.g.*,

see the PD51O offering the Electronic working scheme, that is to clarify when documents may be submitted by email as well as through the Electronic working system)[5].

CPR at their *incipit* prescribe the «overriding objective», with a drafting-technique close to that one used for some of the 12 *Normas fundamentais* of the *Novo Código de processo civil*: «*a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost*». «*Dealing with a case justly and at proportionate cost includes, so far as is practicable […] (d) ensuring that it is dealt with expeditiously and fairly*». «*The court must seek to give effect to the overriding objective*» and «*The parties are required to help the court to further the overriding objective*».

The Court's duty to manage cases implies a «*General power of the court to rectify matters where there has been an error of procedure*», so that (3.10) «*Where there has been an error of procedure such as a failure to comply with a rule or practice direction* – (a) *the error does not invalidate any step taken in the proceedings unless the court so orders; and* (b) *the court may make an order to remedy the error*».

As a consequence of the power to rectify any error of procedure the statutory form of acts might appear at risk, lowered to the point of an absolute insignificance. In essence, it might be thought that the power to cure errors of procedure might enable the court to cure a nullity arising from a statutory provision. That might be thought to be the concern emerging from Bellinger v Bellinger in 2003, where the House of Lords felt the need to confirm that «*a void act is void from the outset; and no Court – not even the House of Lords (now the Supreme Court) has jurisdiction to give legal effect to a void act no matter how unreasonable that may seem because doing so would mean reforming the laws which no Court has power to do because such power rests only with Parliament. The duty of the Court is to interpret and apply the law not reform it*».

Three problems, however, still remain: first, the power to cure procedural error in *CPR* r.3.10 cannot cure an error of procedure that amounts to a nullity; secondly, the power cannot be used to cure all procedure irregularities (see Vinos v Marks & Spencer [2001] 3 ALL ER 784, where May L.J. stated that *CPR* 3.10 could not be extended to enable a court to do what another rule expressly forbade, like happened with a claim served too long after the date of issue, beyond the period within which had to be served pursuant *CPR* 7.5); and thirdly, procedural powers cannot cure errors of substantive, statutory law as the House of Lords in *Bellinger* made clear.

4. The *ZPO* (in Germany).

Unlike the latter, the German system does not tend towards general provisions in the subject matter of defective procedural acts, nevertheless from many sections of the *ZPO*

[5] See http://www.justice.gov.uk/courts/procedure-rules/civil/rules. More broadly, anyway, it appears in England and Wales that the use of listing online forms which can be downloaded and filled when the specific case occurs is widely available.

the inspiring principles can be clearly presumed. It is worth noting, e.g., the broad scope of § 56 (whose heading is *Review ex officio*), which is as follows:

(1) The court is to take account *ex officio* of any lack in terms of the capacity to be a party to court proceedings, of the capacity to sue and be sued, of the legitimisation of a legal representative, and of the required authorisation to pursue legal proceedings.

(2) If any delay would entail imminent danger for a party, that party or its legal representative may be admitted to pursue legal proceedings, with the provison that the lack identified must be remedied. The final judgment may be delivered only after the period determined for the remediation of the lack has expired.

Other significant clues derive from Section 130 (*Content of the written pleadings*), Section 189 (*Remediation of defects in the service of records or documents*), Section 230 (*General consequence of failing to take action*), Section 313 (*Form and content of the judgment*).

The *ZPO* does not include any general regulation on the nullity of acts; therefore interpreters should be banned from defining as null any defective act (*Mangel*) on the base of the applicable law, which -as to procedural acts- never makes mention of nullity (*Nichtigkeit*). There is, however, an unwritten general concept of defective acts established by procedural doctrine and recognized by the courts. The concept has been worked out with particular regard to court decisions (i.e. judgments, orders, and rulings; cf. Section 160 (3) n. 6) but does, in principle, also apply to procedural acts of the parties. The basic idea is that there are three different categories of unlawfulness: in consequence, the affected decision can be "*null and void*" (*Nicht- oder Scheinurteil*, e.g., when the judgment has not been properly announced in accordance with Section 311 (1)), or it can exist, but remain "*without effects*" (*wirkungsloses Urteil*; e.g., when the judgment was given against a party which is immune under the rules of public International law), or – in all other cases – it can be regarded as "*simply wrongful*" (*fehlerhaftes Urteil*, in which case the judgment must be appealed against, since it otherwise will become final).

Another aspect to be considered is connected with the way of redeeming the defective or void proceedings. The relevant section is 295, whose heading is «*Right of objection*» (*Verfahrensrügen*):

(1) The infringement of a rule to which the proceedings are subject, and in particular of a rule governing the form of a procedural action, no longer may be objected to if the party has waived the rule's being applied, or if the party has failed to object to the irregularity at the next hearing taking place as a result of the corresponding proceedings or at the hearing in which reference was made to the rule, in spite of the fact that the party appeared at the hearing and that it was aware, or must have been aware, of the irregularity.

(2) The above provision shall not be applied if any rules have been infringed, the compliance with which no party may effectively waive.

The provision, actually, deals with the manner of recovering (*Heilung*), if any, the defective procedural acts (*Prozesshandlungen*), in particular when a formal defect occurs.

The section 295 is located among the provisions specifically related to the first instance proceedings (for parallel ways, relating to appeal and *Revision*, see sections 534 e 556):

1) the provision deals with procedural acts in general, using a drafting as broader as possible, meaning either parties' acts or judge's orders and judgements;

2) the legal reaction to the defective judge's acts (*Gerichtshandlungen*) depends on their type, whether decisions or not: the latter, *e.g.*: hearing evidence, *ex officio* service or summons, are simply ineffective (*unwirksam*); and any judicial act except the decision, if still defective, has to be amended and correctly done anew whilst judgements are normally – as already mentioned – effective but on a regular basis appealable (as long as they are not, in exceptional cases, regarded as either "null and void" or "without effects");

3) the purpose of the section 295 is ensuring speedy and reliable proceedings. Any unamended defect, *i.e.* that hasn't been rectified along the first instance proceedings, can be duly invoked as ground of appeal unless it is no longer objectable because of a waiver of the affected party, or of his/her failure to the opportunity of objecting the irregularity.

By comparing both subsections, 1.st and 2.nd, of section 295, a distinction among defects emerges: the distinction between waivable (*verzichtbar*) and non waivable defects (*nicht verzichtbar*). The provisions about waiver of the affected party, or his/her failure to the opportunity of objecting the irregularity pursuant section 295, subsection 1.st. are applicable to the former ones: in other words the proceedings, though no correction has taken place, shall be deemed to be valid as a result of the loss of party's right to object to the irregularity (*Rügerecht*, that litterally stands for right of complaining).

It's worth noting that among the ways of redeeming the proceedings from its defective path the section 295 doesn't set out the fulfillment of the purpose (the purpose the act had to pursue), that is recognized as a reason for recovery (*Heilung*) only by some doctrine.

The waivable defects, or – as a consequence – correctable or suitable for being overcome (*heilbar*), are defects a party is allowed to invoke at his/her convenience since they are connected to the infringment of provisions whose compliance with is at disposal of the party, due to the circumstance that the protected interest is not general.

As a result of the loss of the right to complaint (*Rügerecht*) – where a waivable defect has to be dealt with – the proceedings is redeemed (*Heilung des Mangels*) and the defective procedural act shall be considered as valid and effective from the beginning whilst, dealing with non waivable defects, as a consequence of the infringment of provisions not at one's disposal, the proceedings is suitable for appeal or *Revision* on that ground (unless the wrongful act has been replaced *ex tunc* by a lawful one).

5. From the legitimacy of the proceedings to the fair process.

Ultimately, it might be said that from such divergent starting points the above mentioned systems have taken a converging path both in the historic and juridicial senses: once in the written law systems, under the primacy of the Legislator, judicial discretion tended to seek cases to be taken out of statutory provisions on nullity (let us think of categories

as *non-existence* or *absolute nullity* of the procedural acts, now everywhere under way of disappearance, Brazil included). Today, on the contrary, Codes, even those, like in England and Wales and Brazil, with an opening list of principles, tend to emphasize the instrumentality of the procedural statutes and lower the intimate value of procedural rules, particularly when it is matter of form, yet more downgraded to the level of non binding instructions, always suitable for being recasted in alternative patterns, which are feasible as long as deemed rationally interchangeble.

In summary: we have moved from the legitimacy of the proceedings to the *fair process*.

Then, as Teresa Arruda says, «*na medida do possível, o processo deve ser "salvo"*»[6]: of such a trend the new art. 277 – compared with the previous art. 244 – of the *Novo Código* is the case in point: «*When the law sets forth a determinate manner, a judge shall consider the act to be valid if, while performed differently, it achieves its purpose*». There is an unambiguous choice in favor of preserving the proceedings from all kind of nullities, without no more distinction between *nulidade cominadas* and *não cominadas*.

Obviously, achieving the goal of the «*previsibilidade*» for any orders or judgements becomes more difficult in the new context and it seems to be going back to that time of the *nullité comminatoires*, when the judge had at his own discretion the power to assess any procedural act not compliant with the statutory pattern. But this is the risk to be run since we are aware of leaving the time of the *nullités péremptoires*.

The process, according to Chiovenda, who was the most seminal supporter of the public essence of the procedural law and its location out of the field of the private law, is «*where the law solely finds its own enforcement*, i.e. *the law in an objective sense*»[7]. But the statement needs now to be amended, in the same sense Betti had suggested to his readers by adding an adjective in brackets to the phrase of Chiovenda, the adjective "*substantive*" next to the word "*law*"[8]: the due process only enforces the substantive law, and no longer the procedural law, yet downgraded to job-protocol, practical guide-lines, experienced common method, but protocol or guide-lines or method never more exclusively stated by the law and matching only by tendency with the statutory rules.

6. The key-role of the (new) principles: a comparison between the brazilian *código* and the italian *codice*.

I would test these critical aspects, *i.e.* the relationship between statutory rules and their judicial enforcement as the main variable to estimate the predictability of decisions, and

[6] *Nulidades do processo e da sentença*, 7.a ed., São Paulo, 2014, 493.
[7] *Principii di diritto processuale civile*, 1923, Napoli, rist. 1965, 65.
[8] See *Diritto sostanziale e processo*, Milano, a cura di N. Irti, rist. 2006, 42.

how much the mentioned relationship depends on the (new) principles which play the key-role between the rule and the case.

From my point of view, such a key-role of principles in procedural law can be mostly apreciated when to different rules nevertheless equal orders follow, that is much more symptomatic than the event of one rule followed by divergent implementations.

I will give some exemples comparing the Brazialian *Código* with the Italian *C.p.c.*

Art. 282, par. 2 of the *C*ódigo sets forth as follows: «*When a judge can decide on the merits in favour of the party who invoked the nullity, the former shall not declare nullity, order the act to be repeated or have its absence compensated*» (it's the *Lei da Vantagem* in soccer).

The *Codice* lacks such a rule, and yet Cass. 22nd jan. 2010, n. 272 stated that «should the appeal result *prima facie* to be dismissed, the court, even in the occurence of all required elements, shall not issue summons for a third party's sake, because by granting the term to the the latter party the reasonable lenght and the costs of the trial could be negatively affected».

In Brazil, «*não há nulidade sem prejuízo*» (according to art. 282, § 1). Although the Italian Legislator had quasi-proudly renounced such a principle, or the Italian Legislator having been aware of that lack (at least until a peculiar provision recently set out only for the Supreme Court: art. 360 bis, n. 2), the case law has nevertheless pointed out the so-called *principio di offensività*, *e.g.* to solve the problem of an omitted ground of appeal. The Supreme court ruled in the case in point (Cass. 1st feb. 2010, n. 2313) that the proceedings had not to revert to the lower instance, where the ground should have been properly examined, if the raised *quaestio juris* had *prima facie* to be dismissed and consequently no different judgment could be issued at the appeal stage.

From the point of view of an Italian observer, both cases show an unpredictable overruling of the statutory procedural law, that *ob Constitutionem* must back the system of the nullity of acts: a system conceived in order to restrain judicial discretion and therefore to be primarely governed by legislation which has recently become an other annexed field to the judge's *liberdade*, hopefully *razoável*.

7. A new but continously changeable order.

My last thought is that the original pattern of the procedural act and its voidness is suffering from an ultimate crisis, since it was strictly connected to the *lex certa*, *praevia*, *stricta*, with the subsequent need/requirement of one act being matched with its statutory scheme to measure *more geometrico* whether they overlap or not. Antonio Do Passo Cabral, *Nulidades no Processo Moderno*[9], on the contrary, has stated about the asimmetric values implied by this kind of test of validity: «*O princípio de validez apriorística dos atos*

[9] Do Passo Cabral, *Nulidades no Processo Moderno*, Rio de Janeiro, 2009, 283.

processuais [...] impõe um ônus ou peso argumentativo que a decisão para invalidar as condutas praticadas; exige una força maior para nulificar do que para manter sua validade prima facie». There from his doctrine of «*atipicidade relevante*» or *prima facie* validity.

Today, the judge has to acknowledge the inherent power of shaping the process in light of fairness, not only to ensure its legitimacy, but it seems to me as a new and continously changeable order, settled by different and equivalent items: «o intuito do texto legal e a conduta dos Tribunais»[10].

But too much discretion might put one's own freedom at risk, even in civil procedure.

[10] Arruda, *op. cit.*, 499