

THE REASONABILITY OF CIVIL PROCEDURE TERMS CONTAINED IN THE LEGISLATION OF THE REPUBLIC OF MOLDOVA

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The legal reform is one of the most vehiculated and actual tendency of the governing of the Republic of Moldova, a perspective which is asked for alike the European forums and the civil society. The imperative of the implementation of such a reform is dictated of objective and subjective factors, and argued through the low efficiency of proper and equitable solutions of cases in the court, the level of corruption in the judicial system, the alarming quotation of cases lost at the European Court of Human Rights for The Republic of Moldova, because of the errors of the courts, in sense of applying the Convention etc. One of the ambitious projects of this reform is tied to the reducing of the terms of the examination of the cases in the court, project orientated to the annihilation of the factors which lead to the unfounded delay of the judicial procedures and the disciplinisation of judges in the sense of harmonisation with the reasonable terms of examination civil, criminal and contraventional cases. Even if the reform is aimed at all the categories of the legal procedure, this research is referred only on the civil procedure and on the terms of the civil procedure.

First of all it is necessary to clear up some aspects bound to the encroachment of the reasonability used in this study, which won't be confused with one of the reasonable term, but will be understood equal, in its typical sense, with the rationality, legality, equilibrated character etc. When we will refer to the reasonability of terms, we will refer also to the fixed terms, established by law. Where for, is tried on the appreciation of the context in which is or not welcome the rigour and exigence with which the legislator treats the arrangement in time of the activity of the court in the process of examination of different categories of civil cases.

For the coherence and explicitly of the study, we will separate the approaches bounded to the terms established by the civil procedure legislation from those regarding the reasonable term (appreciated depending on several criterions established by the legislation into force).

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The discretion of the court regarding the establishment of the term of judging a concrete civil case is the primary point of view, but also the reference point. In dependence of the nature of the civil case, the term will be appreciated in a different mode and it's evaluation doesn't impose the judge to indicate a concrete date, at which he will be forced to give solutions on the case, but, in light of some considerations more or less objective, he should formulate an attitude regarding the examination and solving the case, in a decision not just equitable and according to the law, but useful in the context of defense the rights of the human being, fact which lies indissolubly this solution on the moment of its occurrence.

Through the legislative occurrence which appeared in last years, the terms of the civil procedure came to the fore of the procedures. We refer in this case to the terms established for the receiving of the demand in court (art. 168 Civil procedure code of the Republic of Moldova¹ – 5 days), the restitution of the demand (art. 170 Civil procedure Code of the Republic of Moldova – 5 days), the disposal of not accepting the demands (art. 171 Civil procedure of the Republic of Moldova – 5 days), the preparation of the case for the judicial debates (art. 184, Civil procedure code of the Republic of Moldova), the term of the redaction of the motivation of the decision [art. 236 paragr. (6) Civil procedure code of the Republic of Moldova – 15 days] etc.

It is totally incorrect to appear the problem of too short terms, till it is natural for the person who addresses in the court to have a level of knowledge and certainty referring on the fact of receiving the demand, the actions taken by the court and the going of the procedure in general. On the other hand, we are in the situation in which, through a generalization, the court is imposed to the same terms for all the categories of civil cases (except those for which are specified more shorter terms), without carrying out the standards of appreciation the reasonable character of this terms. If to think logically, this terms appear to be adequate, but against with a concrete case, this terms are usually irrational and inefficient.

Concerning the term of 15 days, established for the redaction of the motivation of the decisions, this is a novation of the Civil procedure code of the Republic of Moldova, which was introduced through the Law nr. 155 from 5 iulie 2012, which entered in force at 1 december 2012, and had the purpose of the efficiency and optimisation of the activities of the courts in the civil procedure. This term is twice shorter than the term accorded by the Romanian legislation, for example, the art. 426 paragr. (5) of the Civil procedure code of Romania² (in force from 15 february 2013) establishes that the decision will be written and signed in 30 days from the day of the pronouncement. Our legislator argues the specification of the term of 15 days through the fact that writing the motivated decision is necessary just in three situations, expressly established by the civil procedure legislation, which are: the parties expressly demand it, the parties appeal or if the decision will be recognised and executed in another country, like it's expressed in the article 236 paragr. (5) Civil procedure code of The Republic of Moldova, in this mode, the activity of the courts is reduced and the sufficiency of the introductive part and of the disposal of the

¹ Civil procedure code of the Republic of Moldova, nr. 225 from 30.05.2003, Official Monitor nr. 111-115 from 12.06.2003.

² Civil procedure code of Romania from 01.07.2010, Official Monitor nr. 485 from 15.07.2010.

decision for the cases in which the motivation is not necessary, makes economy of time for the judge, who has more time to motivate the decisions in which the motivation is necessary.

The marking out of the benefits and disadvantages of the motivation of the decisions don't have such a big importance, but the fact that our legislator can be induced in error concerning the sufficiency of the term in which the decision should be redacted, in the cases in which this term is not interpreted regarding other civil cases, but regarding the period needed in order to motivate a decision completely and based on the law. The problem appears in complicated cases, which have as an object civil actions with a lot of parties or with a lot of demands. Such cases require a bigger time for the motivation and the practice already demonstrated the fact that this term doesn't cover, in all cases, the real of judges. It is ungrateful to consider that two weeks are enough for the redaction of a decision, no matter what is the object and the level of complexity, from the moment in which the judge's activity doesn't simply refer to isolated cases, but represents the judge's implication in a lot of procedures, the coordination of activities and procedural acts, organisation and management of the sessions etc. This is why, we think that the term of 15 days for the redaction of the motivated decision is way too little burdensome for the judge, and this fact could lead to faults, superficiality, formality and a not qualitative practice.

Beyond all, from the judicial system is required justice, but justice can't be offered without equity, truth, balance and quality. All this requires a lot of thinking and a profound analysis of all the factors and circumstances which lead to a legal solution, valid and argued on the case. In the situation in which the judge is constrained to realize a procedural act in a period fixed of time, a part of his attention is focused on the framing in that time and this can endanger the quality and wholeness of the decision or of the act elaborated/ executed.

It should appeal to a high level of culture and juridical conscience from the judge, in order that the problem of reasonable term of the examination of a civil case not to homogenize the solution for all the categories of civil cases, but to derive from an efficient, qualitative, conscientious activity, based on the judge's responsibility, to be folded on the specific and complexity of the case, to respond to legal interests of the person who addressed in the court, and, finally, to comply with the reasonable term.

Even if there are some reasonable facts for the specification of lower terms in the cases for which the term of examination is specified, not always is possible to respect this terms, because of some objective reasons and which don't depend on the behaviour of the judges. For example, in the cases examined in a special procedure, for which the law expressly establishes the term in which the judge is engaged to pronounce on the requirements of the petitioner. In the cases of the examination the problems on the forced hospitalization, established by article 310 Civil procedure code of The Republic of Moldova, the term is of three days from the day of the deposit of the demand, but in the cases of the deposit of the demands of internment in the psychiatric station, without the person's agreement (demand which must be deposited in 72 hours from the moment of the internment in the station), the court must pronounce in the period of 5 days from the moment of beginning the process, adopting a decision on this case, according to the

norms established at art. 314 paragr. (1) and art. 315 paragr. (1) and (3) Civil procedure code of The Republic of Moldova. The reduced terms absolutely argued from the moment in wich the judge adopts a decision regarding the restriction of one of the fundamental rights, the right of individual liberty and the safety af the person, established by aticle 25 of the Constitution of The Republic of Moldova³. The limitation of this right can be done just in accordance to the law and the Constitution, wich specifies the fact that a person can't be detained more than for 72 hours, and the internation in a psychiatric institution, without the agreement of the person, is equal with the perioud of detencion. The forced hospitalization in other medical institutions affects the right of individual freedom of a person and the judge's decision, wich has the force to assure the right of personal safety, according to the law, must interfere in the shortest time posible, in order that the state of uncertainty in wich the person is, to be unable to limit the rights without a legal basis.

A lot of problems and dissatisfaction brought The Chapter XXX¹ of The Civil procedure code of The Republic of Moldova, introduced throu The Law nr. 167⁴, referring to the applying of the means of protection in the cases of domestic violence. One of the problems is the term in wich the court should pronounce in a conclusion of admitting or denying the demand of applying the means of protection, this term is just of 24 hours from the moment of receiving the demand. Even if this chapter is placed among the special procedures, wich a not based on a problem between parties, the fact that the parties invoke the application of some violence acts and both the parties have a procesual quality (aggressor and victim), leads to the idea of a problem, in wich each part has the right to bring evidence from there own point of view and position and this creates contradictions. Besides the facts presented by the victim and aggressor, the court (how results from the art. 318³ paragr. 1 și 2) will administrate evidence, will inform the police and will ask for the imformations regarding the case, also the court can ask the police or the social assistance to present a report, in order to characterize the family and the aggressor. From this results that the term of 24 hours becomes too shrinked and it's imposible for the court to manage to get all the information needed and also study the case in it's complexity, taking the account of the fact that the means of protection wich will be applied in the cases in wich the court will accept the demand of the victim, will affect some esential rights of the aggressor (an absolutely unadequated term for giving a civil processual quality from the moment wich leads, volens nolens, to the presumption of an act of aggression as ascertain from the moment of the demand), for exemple the right of property and other rights on the objects, especially the right to live in his own house and the right to communicate with the relatives (children) etc. Each mistake or superficial approach from the court can lead not just to legal problems, but serious repercussions to the members of the family and the relations between them.

We think that the implementation of a resonable term for examination of cases of domestical violence in the family, for wich is demanded the applying of some means of protection is opportune and this will reduce the number of unequitable decisions. Can be excluded the situation in wich the victim demand for the help of the court, but doesn't

³ Constitution of The Republic of Moldova 29.07.1994, Official Monitor nr. 1 from 12.08.1994.

⁴ Law nr. 167 from 9 julie 2010.

have some evidence in order for the court to have a motivation in the situation of applying of some means of protection, situation which can lead to the denial of the demand, because the laying out the examination is impossible in the situation of such reduced terms. This period was introduced, probably, because of the immediate intervention of the court in the cases of domestic violence and counteract the abusive behaviour of the aggressor, but the insufficiency of evidence can affect, in the circumstances regarding the time, the right of access to justice, because the civil procedural legislation, in the chapter regarding the means of protection in the cases of domestic violence, doesn't establish any exceptions from the rule that a person can't address repeatedly to the court with the same demand, the same pretensions against the same person for a case which was resolved by the court. This means that the victim would have the possibility to address repeatedly only after the happening of another fact, which will modify the object of applying the means of protection.

Another category of civil cases, for which the law prescribes reduced terms and is examined in a special procedure, is that regarding the temporary ceasing or withdrawal of the license/authorisation which characterizes the entrepreneur activity. According to the article 343/4 Civil procedure code of The Republic of Moldova, the court will examine the demand of the competent authority (the authority of the public administration and the abilitated institution, established by law, with prerogatives of regulation and control), in the term of 5 working days from the deposit and adopts a decision of granting or denying the demand. The problem consists in the fact that these categories of cases, although they are examined in a special procedure, are based on a problem and misunderstandings between the competent public authority and the person which deploys an entrepreneur activity. The contradictory element is disclosed through the material interest of the petitioner (to suspend or withdrawal of the licence/authorisation of an enterprise), but also the holder's of the licence or authorised person's material interest, who have the quality of interested persons in the court. The contradictorial character leads to the increase of the term to present evidence, some procedural acts and term necessary for the adverse participant to defend himself, to present evidence for the court etc.

Those two cases lost by The Republic of Moldova at the European Court of Human Rights (Case Bimer S.A. vs. R. Moldova from 2007 and Case Megadat.com S.R.L. vs R. Moldova from 2008) established the fact that The Republic of Moldova broke the stipulation of art.1 of The First Protocol of The Convention, through denying to prolong the licence for the activity of entrepreneur, this puts into evidence the fact that the acts referring to the prolonging, ceasing, withdrawal of the licence of entrepreneur affects the right of property of a person and this leads to the necessity of defence of the person endorsed in a procedure based on the contradictorial principle, that means that the examination of these cases should be done in common procedure and in reasonable term, depending on the situation and the complexity of the case.

The simplified procedure should be named an urgent procedure, if to take into account the term established for the examination of the demands received in this procedure. Art. 350 paragr. (2) Civil procedure code of The Republic of Moldova establishes that the judicial decree is relieved by a judge in a period of 5 days from the day of the demand. The debtor has a period of 10 days for to tender his motivated objections which were granted through the judicial decree, fact established by art. 352 paragr.

(2) and in the term of 5 days from the objections the court must decide to allow or to deny the objections, according to art. 353 paragr. (1). This term established for the examination of this kind of demands is satisfactory, because the procedure is simplified, the presence of the parties is not necessary, the judicial debates are not included, and this means that there can't be some delays because of the lack of presentation of some evidence. The judge will pronounce on the demand just in accordance with the presented evidence, which is justified or not. Another plus is that the judicial decree mustn't be motivated, according to article 351 Civil procedure code of The Republic of Moldova, this is why it's possible for the judge to manage in the period of time mentioned.

Another term fixed by the law is the term needed for the preparation of the case for judicial debates in appeal, this term is of 30 days from the day of receiving the file. It is necessary to put into evidence the fact that this term is different from the term accorded by law for the preparation of the judicial debates in the court, which is set for 5 days from the date of the acceptance of the demands. The term of 30 days, set in art. 370 paragr. (1) Civil procedure code of The Republic of Moldova involves also the whole procedure of taking some actions of preparation the case for the debates. This term is sufficient enough for taking the needed means in order to make possible the pass on the judicial debates in appeal, on the date set. The difference between the term accorded to the court and to the appeal is welcomed, because the preparation of the case for the judicial debates in the court can't be limited on a period of time, because of a large variety of civil cases and the behaviour of the parties and other participants in a trial. A good preparation of the case for the debates leads to a good result and this has a big resonance for the court and discipline in a civil procedure, especially when the civil procedure legislation forces all the participants to present all evidence in a fixed term, according to art. 122 paragr. (4) Civil procedure code of The Republic of Moldova, with the exceptions established by article 204, this means that is more favourable the situation in which the preparation of the case for the judicial debates runs as much time as needed for a proper examination, than the situation in which the judicial debates will start without a preparation of the case, in this situation the participants will be forced to foot the bill for a lot of times, because of the delays.

In appeal, the actions of preparing the case for judicial debates are based on a file already examined by a court, fact which imposes a smaller volume of work, even in the situations in which, according to art. 122 paragr. (4) and art. 372 paragr. (1) Civil procedure code of The Republic of Moldova, in this step of the judicial branch is possible the presentation of some new evidence and some new claims. This argues the argumentation of fixing a time limit in which the case should be prepared for the judicial debates and the clarifying of questions regarding the determination of the time limits of appeal.

The term established for the redaction of the decision in appeal is the same as the term of the redaction of a decision in the court and regarding the reasonability of this term, we made before the conclusions.

The term of examination of a recourse is not fixed, except the recourse against a judicial closure, which can't, according to art. 426 paragr. (3) Civil procedure code of The Republic of Moldova, overdraw the period of 3 months. It is not a term which will put into difficulty The Court of Recourse, because the judicial closures are acts which don't express the judges' decision on the case, and in the situation in which this acts are

impugned separately from the solution of the case, in most of the times the solution on the case can't forego the solution of the recourse declared against a judicial closure, this is why a too bigger term will affect the term of the examination of the case and will serve as a cause of delaying the process.

The exposed ideas creates the impresion of trammeling the court into examination of civil cases, even if all the terms mentioned represent some exceptions from the rule of resonable term. The idea of a resonable term is established by article 192 Civil procedure code of The Republic of Moldova, wich doesn't define this term, but establishes the criterionsof appreciation of this term, wich are: the complexity of the case, the behavior of the participants and of the court and the importance of the process for the person interested. This criterions must be analyzed every time when appears the problem of overdrawing the reasonable term by the court for cases which concerned some procedural actions or some procedures for which is not specified a fixed term.

The Law number 87⁵, wich establishes the reparation by the state of the prejudice caused throu the breaching of the person's rights of a resonable term or of the right of execution in a resonable term of the judges decision, offers the posibility of the persons, who were affected by the passing of the resonable term, including in the cases examined in the court in a civil procedure, and expresses the procedure in wich this pretentions will be examined. The Law specifies, in art. 2 paragr. (3) that the prejudice caused throu the breaking of the right of judging in a resonable term of a case will be repaired even if the court is not guilty, and this fact should impose the judges to respect the tetms established by the law and be aware of the fact that when the terms are involved, the adjourning of the examination of the case, the breakes and other aspects will can couse the delay of the procedures. Very often happens that the court, becouse of an excessive tolerance, ofers them an extra time for presenting the evidence, adjourns the examination becouse one of the parties, being legally informed, didn't came etc. All this fact, toghever with the irresponsable behaviour of the judges, make a bad image for the justice in general, harm the budget of the state, becouse the state is forced to repair the damage. Sometimes, the long perioud of time needed for the examination of the cases is becouse of the overcrowding of the courts, wich can't face the number of demands and procedures, and becouse of the terms fixed, place there stake on the cases in wich the law doesn't establish fix terms. That's why, metaphorical speaking, all the eggs breake by the head of the judicial system, wich is uncompetent, uncapable to adopt a solution in a civil case and the intentional delay of the procedures. In this cases, it's not taked into account the objective factors, wich are the general specialization for all judges, the number of cases in the court, the physiological and intelectual fatigue of the judge etc.

We recollection about the newness brought by The Law number 88 from 2011⁶, wich entered in force with The Law 87, and wich introduced the fact regarding the posibility of acceleration of the procedure, if the participand adresses a demand, established by art. 192 paragr. 1¹⁻¹², solution wich was welcome and according to wich the court is informed about the ibterest of the parties to examine the civil case in more redused terms. But there are some risks to be puted into evidence the relations between judges, becouse

⁵ Law number 87 from 21 april 2011, in force from 1 julie 2011, wich establishes the reparation by the state of the prejudice caused throu the breaching of the person's rights of a resonable term or of the right of execution in a resonable term of the judges decision, Official Monitor nr. 106-109 from 01.07.2011.

⁶ Law number 88 from 21 of april 2011 for the modification and completion of legislative acts, Official Monitor nr. 106-109 from 01.07.2011.

the examination of the demand to examine the case in reduced terms is made by another judge or a full court, from the same court. This risks can be brushed aside by some informal pointers, which will be enough to adopt a proper solution.